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Martin Report 1991: Relevant Committee Recommendations and Associated Supporting Statements

18. the Commonwealth Government consult with industry and consumer groups in the development of a list of required features for industry-based dispute resolution procedures and establish a process through which the Government, the industry and consumer representatives can look at options for rationalising the various schemes and proposed schemes.

11.85 The resolution of disputes is a matter which is considered in Chapter 20 of this Report. Many of the points made there concerning banks also apply more broadly to financial conglomerates and other financial intermediaries. (pg 177)

11.86 The Committee has noted the development of a number of industry-based dispute resolution procedures in the consumer financial services area.38 Whilst these developments should be strongly encouraged, there may be a need for rationalisation. This is especially so in the light of the announcement by the Treasurer in his August 1991 Budget Speech that the Government is examining the development of a superannuation dispute resolution scheme. (pg 178)

38. a Council of Financial Supervisors be established to facilitate closer co-ordination between the supervisors of the Australian financial system. The Council should include the Reserve Bank, AFIC, the ISC and the ASC

14.40 Given the involvement of banks and other intermediaries in the funds management area, there is a clear case for close liaison between the groups of regulators. Until recently, it seems, the Reserve Bank and the ISC have not had frequent contact. However, senior Reserve Bank staff now meet with senior ISC staff every six months and formal arrangements to exchange information are now in place. There is now considerable informal contact between the staff of the two bodies and the Bank is in the process of establishing similar links with the Australian Securities Commission.[22] (pg 233)

14.41 Some overseas countries have formal co-ordination arrangements in place. In the United States the Federal Reserve Board, the Office of the Comptroller of the Currency,

the Federal Deposit Insurance Corporation, Office of Thrift Supervision and the National Credit Union Administration are members of the Federal Financial Institutions Examination Council. In Canada a Financial Institutions Supervisory Group is being established including the Bank of Canada, OSFI and the Canadian Deposit Insurance Corporation. (pg 233)

14.42 The continuing trend within the financial system for the creation of financial conglomerates creates a need for closer co-ordination between the various supervisory organisations. This could be achieved by the creation of a formal council bringing together very senior representatives of the various supervisors for regular meetings. The secretariat for such a council could either reside within the Reserve Bank (as with the Australian Payment System Council) or in a government department. (pg 233)

39. the Council of Financial Supervisors designates one supervisor as the lead regulator1 with overall responsibility for each financial conglomerate but that supervision of the individual arms of the conglomerate remain with the individual supervisors, (paragraph 14.49)

14.44 An alternative approach to the supervision of financial conglomerates is to designate one supervisor, the 'lead regulator1, with overall responsibility for each conglomerate but leave the various arms under the supervision of the appropriate supervisor. For bank-owned conglomerates the lead regulator would be the Reserve Bank. (pg 234)

14.46 The Reserve Bank was asked its view on the system. It replied: The indications are yes, it is a workable system and in the circumstances may well be the best system ... But I think it is just a bit early to give it a total tick yet.[24] (pg 235)

14.47 The ABA also favoured the idea: there is a lot of merit in the idea of lead regulator ... Of all the alternatives, that is the one which seems to give the most consistency and rules for a particular industry, yet allows for the advantages for the community of having institutions like the banks come in with stronger prudential standards and better delivery systems.[25] (pg 235)

49. the Australian Law Reform Commission examine the powers of the courts to deal with abuse of their processes and consider whether there is a need for legislation in this area to assist the courts to deal with abuse of process; and

15.83 Concern was expressed by a number of small business people about the adequacy of means of redress available to them in cases of dispute with bank. (pg 264)

15.84 The chief means of redress available to small business is through the court system. The cost of litigation and the powerful position of the banks in the litigation process were emphasised by small business as difficulties in enabling them to have disputes resolved satisfactorily. Small businesses advised that some of the difficulties they had in legal proceedings with banks included that banks unnecessarily protracted proceedings to ruin small businesses so they could no longer continue legal action and failed to ensure adequate discovery, or had belated discovery. The Committee views these allegations seriously. (pg 264)

15.85 The Committee notes that the recent decision to extend to small business the coverage of section 52A of the Trade Practices Act concerned with unconscionable conduct will redress some of the disparity that exists between small business and banks in disputes. (pg 265)

15.88 The Committee is aware of the difficulties of small businesses in obtaining inexpensive and satisfactory resolution of disputes with banks. However, it can not support the extension of the Banking Ombudsman to cover small business generally. The size and complexity of many small business operations would swamp the Ombudsman's Office at the expense of small consumers. In Chapter 20 where the Ombudsman scheme is discussed, the Committee will suggest the monetary limit. This will to small business access to dispute resolution by the Ombudsman. (pg 265)

15.89 However, many small businesses will be required to use the court system to obtain redress. In this context, the Committee views the allegations of abuse of process by means of delaying tactics and poor discovery as serious. The courts have powers to ensure that their processes are not abused by any party. The issue of the cost of pursuing litigation is a further issue of concern. The Committee considers there should be an investigation by the Australian Law Reform Commission of the powers of the courts to

deal with abuse of their processes and whether there is a need for legislation in this area. The Committee notes that the Senate Committee is undertaking an inquiry into the cost of justice and the Committee will refer the issue of the cost of justice in cases between banks and customers to that committee for inclusion in its consideration. (pg 265)

15.90 In terms of redress available through the courts, the Committee notes the extension of the unconscionability provisions of the Trade Practice Act to cover small business. This will assist in reducing some of the disparity in the relationship between banks and small business. (pg 266)

50. the Senate Committee on Legal and Constitutional Affairs, as part of its inquiry into the cost of justice investigate the issue of the cost of justice in cases between banks and customers. The Committee will refer the information it has taken on this issue to the Senate Committee, (paragraph 15.91)

15.84 The chief means of redress available to small business is through the court system. The cost of litigation and the powerful position of the banks in the litigation process were emphasised by small business as difficulties in enabling them to have disputes resolved satisfactorily. Small businesses advised that some of the difficulties they had in legal proceedings with banks included that banks unnecessarily protracted proceedings to ruin small businesses so they could no longer continue legal action and failed to ensure adequate discovery, or had belated discovery. The Committee views these allegations seriously. (pg 264)

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54. the existing draft Code of Practice on the Bank-Farmer relationship be re-examined in consultation with the ABA, NFF, State farming associations, DPIE, rural counsellors and the Trade Practices Commission. The final code should be authorised by the TPC;

16.64 The proposal for a code of practice has been an issue between the NSW Farmers' Association, the NFF and the ABA since the mid 1980's when concerns about the calculation and quotation of effective interest rates were raised with the ABA. It was proposed that this code would not involve regulation but would require a uniform method of disclosing interest. Ideally, it should provide for a standard calculation of a comparison rate for all contracts and include the disclosure of that rate and all bank charges on statements thus increasing the transparency of bank decision making. (pg 284)

16.65 The Committee notes the timeliness of the announcement of the ABA's Draft Code of Practice made while the Committee was taking evidence in Dubbo. The Code relates to farm finance, including leases and commercial bills. A particular feature of the Code is the inclusion of the 'effective interest rate' for comparison purposes. It provides for the reopening of agreements which are unjust, enforcement of loans and security for loans (including repossession and sale) and dispute resolution. The ABA also indicated that it would release educational material to enable farmers to calculate their own effective rates

and, if desired, to include fees and charges in the calculations using their own assumptions. (pg 284)

16.66 Written advice was received from both the NSW Farmers' Association and the NFF regarding a number of deficiencies they perceived with the Code. Some of the problems identified that:

- the Code includes the disclosure of three different interest rates which will create problems for clients when endeavouring to compare products;
- the definition of effective interest rates does not incorporate other charges imposed by the bank in addition to interest rate charges. Distinction is also not made between the interest rate component and fees component of the loan;
- the Code does not include the requirement that farmers be notified of changes to their margins and/or additional fees that may be introduced;
- the loan offer does not include the circumstances under which a bank would alter interest rates, margins and fees;
- there is no requirement to regularly print interest rates on bank statements;
- an undertaking by banks not to introduce any new fees that have not been detailed is excluded;
- the requirement that the disclosure of interest rates and other charges be in writing is excluded;
- the legal right to have an unjust contract reopened already exists and is unnecessarily included in the Code;
- detail as to how the Dispute Resolution mechanism is to work in practice is excluded;
- guidelines for the managed exiting from farm properties acceptable to both the banking industry and the farming community is not included; and
- the Code excludes provisions relating to its enforcement. (pg 284)

16.67 The Committee considers that a code of practice governing the bank-farmer relationship is a worthwhile concept. Properly developed, it has the potential to alleviate many of the difficulties experienced in farming communities. In particular, it provides the opportunity for farmers to obtain a better understanding of what banks are offering when providing a lending facility. (pg 285)

16.68 However, the existing draft Code of Practice is deficient in many respects. In particular, it lacks detail about disclosure, dispute resolution and guidelines for borrowers exiting properties. In addition the pastoral companies are not included in the existing draft Code. These deficiencies need to be rectified. (pg 285)

16.69 The need for wider consultation in developing the draft Code is required. Such consultation should occur between representatives of the banking industry and the rural sector. As with other codes, the Trade Practices Commission should be involved in the consultative process and provide final authorisation. Once implemented the Code should be reviewed on a regular basis. (pg 285)

55. bi-annual reviews of the Code of Practice governing bank-farmer relationships be undertaken to ensure the Code is achieving its original purpose; and

16.69 The need for wider consultation in developing the draft Code is required. Such consultation should occur between representatives of the banking industry and the rural sector. As with other codes, the Trade Practices Commission should be involved in the consultative process and provide final authorisation. Once implemented the Code should be reviewed on a regular basis. (pg 285)

56. the Draft Code of Practice relating to bank-farmer relationship be amended to include pastoral companies and government business enterprises conducting similar business. (paragraph 16.70)

16.60 The Draft Code of Practice relating to the bank-farmer relationship should be applied, with appropriate amendments, to the relationship between pastoral companies and rural borrowers. (pg 282)

16.63 While these suggestions have been raised as possible solutions to the difficulties in the bank-farmer relationship, it was considered that they do not go to the heart of the

problem. Difficulties in the bank-farmer relationship include problems of communication, negotiation and the provision of information. It is for these reasons that the Committee has welcomed the Draft Code of Practice on the bank-farmer relationship. (pg 283)

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60. an independent mediator (or mediators), funded by the banks, but acceptable to both banks and foreign currency borrowers be appointed to mediate in foreign currency loan cases that remain in dispute. Mediation is not compulsory, banks will pay for their own mediators or for a general mediator based on usage. The determinants of the mediator will not be binding on either party. Banks should endevour to the extent possible, to advise all foreign currency loan borrowers of the mediatory mechanism. The mediator should operate under the following conditions:

- Mediation would not be possible where cases have already proceeded through all stages of appeal so that the court processes are recognized.

- mediation would also not be possible where out of court settlements have been reached

-mediation can be sought where cases are still in court without final decision, or pending, and

- any determinations of the mediator will be non-binding on both parties so that both have the appropriate option of pursuing court action

17.171 Dissatisfaction was expressed by borrowers about the settlement process. They were concerned about the confidential nature of the agreements and that many settlements occurred 'on the steps of the court' when the borrower has expended significant funds. (pg

17.173 Last minute settlements also were defended by the banks. The Commonwealth Bank acknowledged that it settled the majority of cases 'either during the course of the hearing or just before the hearing starts at the door of the Court'.110 The Bank said that this timing was not 'sinister' but for the reason that:

> ... only during the hearing (or at least after all the interlocutory steps of discovery and subpoena have been completed) is the true extent of the particular borrower's knowledge of the risk of the foreign currency borrowing at the time he entered into the loan, the circumstances surrounding his entering into the facility, and the extent of his reliance (if any) upon the Bank for information and advise exposed.111 (pg 330)

17.174 Borrowers were most critical of the process of litigation which they said was expensive and abused by the banks to the disadvantage of borrowers. (pg 330)

17.175 All parties agreed that litigation was expensive. (pg 330)

17.176 Francis Galbally, who has acted for borrowers in a number of cases, stated that foreign currency litigation was expensive for borrowers with costs of $50,000 - $60,000 to bring a case to trial and then $10,000 per day per participant as the cost of the trial itself.112 (pg 330)

17.177 The banks acknowledged the high cost of litigation. As a result, they stated that they had no interest in unnecessarily pursuing litigation. Westpac said that the cost and commitment of scarce management time made it 'a last resort1. However, where the bank considered that the borrower did not have a valid claim it would defend the position.113 (pg 330)

17.178 Borrowers also made a number of allegations about the banks' abuse of the legal processes in foreign currency cases. These included that the banks have: unnecessarily protracted proceedings to ruin borrowers so that they can no longer continue legal action; and failed to ensure adequate discovery, or had belated discovery. (pg 330)

17.179 For the same reasons that the banks have denied unnecessarily undertaking litigation in foreign currency loan cases, they also stated that they have no interest in prolonging litigation. (pg 330)

17.182 In view of the costs, delays and alleged 'abuse' they identified in litigation as a means of resolving foreign currency loan cases, borrowers and their advisers argued for the need for alternative mechanisms to resolve cases. Various mechanisms were suggested including a form of banking tribunal and an expanded and statutory independent Banking Ombudsman Scheme. The latter proposal by Mr Francis Galbally was a general one for the resolution of disputes between banks and customers, of which foreign currency borrowers would be one set of customers.115 The general proposal for an expanded and statutory independent Banking Ombudsman is considered in Chapter 20. The specific question of the consideration of foreign currency loan cases by the Banking Ombudsman or other mediatory mechanism is considered here. (pg 331)

17.183 The Commonwealth Bank noted some problems with mediatory mechanisms in relation to foreign currency loan cases. In mediation, the full knowledge of the strengths and weaknesses of both sides of a case is difficult to discover without the rigorous exploration of respective claims made possible by court processes of discovery and cross-examination. The cost of commercial arbitration can be higher than litigation through the courts and can involve the courts in dealing with procedural matters prior to arbitration. As well, not all mediation will be successful and there will have to be resort to the courts.116 (pg 331)

17.186 In Chapter 15 the Committee expressed concern about allegations made by small business of abuse of court processes by banks by means of delaying tactics and poor discovery. The issue of the cost of pursuing litigation is a further issue of concern. The Committee recommended there should be an investigation by the Australian Law Reform Commission of the powers of the courts to deal with abuse of their processes and whether there is a need for legislation in this area. The foreign currency loan cases could provide useful case studies for such an investigation. The Committee also noted that the Senate Committee is undertaking an inquiry into the cost of justice and the Committee will refer the issue of the cost of justice in cases between banks and customers to that committee for inclusion in its consideration. (pg 332)

17.187 However, the Committee considers that the approach adopted by some banks to settle foreign currency loan cases before court proceedings demonstrates the advantages

for all of conciliation wherever possible. The court process is expensive for all parties, and can be traumatic for borrowers. The Committee favours a mediatory system being available prior to, or as an alternative to, litigation in foreign currency loan cases from the 1980s. In Chapter 20 the Committee examines broader issues of dispute resolution. (pg 332) 17.188 While favouring a mediatory approach the Committee expresses concern about settlements made between banks and foreign currency loan customers being confidential. The Committee considers this protects the banks, but does not allow adequate scrutiny of the settlements that are reached. (pg 333)

17.189 In regard to the unresolved problems of foreign currency loans of the 1980s, the Committee can not agree to the proposal to refer the foreign currency loan cases to the Banking Ombudsman. The Committee considers that the foreign currency loan cases have such complexity that the Ombudsman's office would become clogged with these cases at the expense of the general case work. (pg 333)

17.190 An alternative would be the appointment of an independent mediator to act as an intermediary between the bank and customer and, where necessary, make a non-binding determination of a settlement. The mediator would be an independent person of stature acceptable to both the borrowers and the banks. (pg 333)

17.191 Given that the banks have taken varying approaches to the resolution of foreign currency loan cases, it could be expected that some banks would have more matters that could be mediated than others. Therefore, like the current Banking Ombudsman scheme, it is suggested that the banks pay proportionally for their usage of the mediator. Alternatively, each bank could appoint a mediator, acceptable to borrowers, in relation to its loans. (pg 333)

17.192 In view of the thorough investigation undertaken by the Committee and the conclusions reached, the Committee sees no need for a royal commission into foreign currency loans. Any royal commission would be expensive and arrive at conclusions similar to those reached by the Committee. The priority now should be to resolve the outstanding disputes and the mediatory mechanism recommended by the Committee and the court processes, if necessary, allow the opportunity for this to occur. (pg 333)

71. speed up their implementation of effective complaint handling schemes and make known the existence of their complaint departments to their customers through brochures available in all bank branches;

19.109 Banks have indicated they are endeavouring to substantially improve customer service through means such as:

- appointment of senior service quality managers with area responsibilities;
- improving customer complaints procedures; and
- clearly defining service standards and assessment of staff against these standards.32 (pg 374)

19.110 The major banks have, or are in the process of setting up, internal dispute resolution systems to deal with consumer complaints. The Commonwealth Bank has a fully functional system which it believes is the most advanced and longest established system, and one system that other banks may chose to emulate. (pg 375)

19.112 The Chairman of the ABA indicated complaints about bank service are part of general anti-bank sentiment. Grumbling about queues, mistakes and staff training is fairly common and he questioned whether these criticisms were fair prejudices.34 (pg 375)

19.114 There are several reasons for complaints about service. First, the public had very high expectations in relation to bank services and were quite impatient with any failure to meet those expectations. Second, banks failed to adequately inform customers of their actions. Third, until the evolution of dispute resolution procedures and the establishment of the Australian Banking Industry Ombudsman scheme, customers were limited in their ability to quickly and cheaply resolve their complaints. Naturally, they became very frustrated. (pg 375)

75. the Australian Law Reform Commission be requested to conduct a review of the law of banker and customer, involving consultation with industry, regulatory authorities and consumer groups. In cases where statutory change is required the ALRC should draft recommendations for appropriate legislation; and

20.13 In a detailed analysis of banking law and practice, consumer organisations recommended that the Australian Law Reform Commission should be given a reference to investigate whether codification of banking law would assist in achieving fairness and equity in the relationship between banker and customer. It was recommended that the ALRC be requested to set minimum terms and conditions of the banker-customer relationship, with terms of reference specifying the need:

- to distribute rights, responsibilities and the risk of loss in the banking relationship with fairness and equity;
- to take into account the need for a workable and efficient payments system;
- to encourage product development;
- to encourage fair market competition;
- to ensure bank customers are aware of their rights and
- responsibilities; and to ensure that banking contracts are not one-sided.3 (pg 383-384)

20.14 It is noted that many of the areas covered in the consumer organisations' recommendation may appropriately be part of a code of banking practice. (pg 384)

20.47 Accordingly, the Committee proposes that, in a joint project, the Trade Practices Commission supervise the development of a code of banking practice and the Australian Law Reform Commission examine banking law. The ALRC should develop appropriate legislative proposals to deal with those areas of banking law which cannot be dealt with by a code but which require clarification or change and make recommendations as to other changes to the law necessary to facilitate the development of the voluntary code. (pg 390)

20.48 The Committee considers the Australian Law Reform Commission is a suitable body to undertake the task. The ALRC should examine and report on those matters which involve clarifications of, or modifications to, existing law. These include the right of appropriation between accounts and disclosure to guarantors. The ALRC should exclude from its consideration those aspects of the banker-customer relationship that would more

appropriately be included in a code of banking practice. The ALRC should consult widely with industry bodies, regulatory authorities and consumer groups in developing legislation. (pg 390)

20.49 The Committee is of the view that a joint project would be the most appropriate way to proceed. Both the ALRC, with its experience in analysing the law, developing proposals for reform and modernisation and drafting legislation, and the TPC, with its history of developing and administering codes, have expertise which would be of immediate relevance to the task at hand. (pg 390)

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 between the banking industry, consumer organisations, Commonwealth regulatory agencies and relevant State government authorities. The consultative process should take place under the auspices of the Trade Practices Commission. Monitoring should have regard to the degree of compliance with the code and to the ongoing appropriateness of the provisions of the code in the light of changing circumstances, (paragraph 20.51)

20.5 few customers will consider issues such as which bank's contract most fairly distributes loss in the event of fraud by a third party where neither bank nor customer has been negligent. … It is in relation to those aspects of the banker-customer relationship to which competition does not extend that the Committee sees a need to ensure fair minimum standards are set. (pg 382)

20.6 The Committee examined two issues concerning the codification of the relationship between banks and customers. The first was the question of whether there should be a codification of the common law covering the banker-customer relationship. The second was the development of a code of banking practice to govern the day to day relationship between bank and customer. (pg 382)

20.7 A number of submissions addressed banking law and practice. In addition there was much discussion of the possibility of industry codes, codes of conduct or codification of the law. (pg 382)

20.8 Whilst based on the law of contract, the banker-customer contract has been of a very unusual nature in that the majority of the terms have been implied ones developed by the common law. The courts have been reluctant to see those terms overturned by specific contractual agreements. (pg 382)

20.9 There were both advantages and disadvantages to customers in most terms being implied. The main advantage was that the courts retained power to monitor implied contractual terms. In so doing they sought to preserve a fair and balanced relationship and thus protect customers from the consequences of their relatively inferior bargaining position. For the courts, the contractual terms of the banking relationship raise issues of public policy not effectively dealt with by negotiation between substantially unequal parties. This attitude has been maintained by the courts. A recent House of Lords decision let the risks of third party fraud inherent in the system fall on the bank rather than the customer. Lord Scarman declared in justification: 'The business of banking is the business not of the customer, but of the bank.'2 (pg 382-383)

20.10 The disadvantage to the customer was that as the contractual terms were unexpressed they remained largely unknown. Thus there was an overriding ambiguity and lack of transparency. Law shaded into established practice and there was a grey area in between where established procedure gradually became the law, either because customers did not realise they might contest it or through principles of custom and usage. This is one of the reasons why 'the bank's usual terms and conditions' is one of the most common expressions seen in bank documents. (pg 383)

20.11 Most of the common law remains in place today, but it has been overlain by sometimes conflicting modern developments, particularly with the wider focus of banking activities and by the increasing tendency to supplement and vary the common law with written terms and conditions. Many contracts are long, complex and extremely detailed. Terms and conditions are invariably drafted by the bank, having regard to its own interests and the benefit of its past experience. The bank can take advantage of its stronger bargaining position to ensure that the terms reflect its interests. They often exclude protection traditionally implied by the courts into the banker-customer relationship. Despite the apparent certainty of written terms, however, the traditional

ambiguity remains as there is still extensive reliance on 'custom and usage' and use of clauses which are expressed to incorporate the bank's 'usual terms and conditions'. For similar reasons, the fact that the terms are written down does not mean that the transaction has become 'transparent'. (pg 383)

20.12 Despite these shortcomings, banking law continues to play an effective role in mediating the relationship between banker and customer. Along with associated common law and statutory provisions governing such matters as agency, cheques, consumer credit and privacy, it fulfills an important function. But the ambiguity and lack of transparency of traditional banking law, the need for an effective mechanism to replace the court's role in ensuring standards of fairness in newer products and particular areas of uncertainty are problems which the Committee has sought to address. (pg 383)

20.15 The ABA considered it a may be timely to codify important aspects of banking law and practice. If the law were to be codified in the sense of introducing legislation, the ABA expresses the view that Commonwealth legislation administered by a Commonwealth agency would be most appropriate.4 (pg 384)

20.16 As noted above, the ABA advised that it supported the codification of important aspects both of banking law and practice. It stated the banking industry had developed a disclosure standard in 1988 and significant progress had been made in its implementation. During the period of the inquiry the ABA also released aseparate disclosure standard for lending to the rural sector. (pg 384)

20.17 National Australia Bank said banking practice should be codified on a national basis, that it should be a self-regulatory code and the Ombudsman 'is probably the one that first comes to mind as a possibility for ensuring adherence to a voluntary code of practice'.5 (pg 384)

20.18 Westpac said that there were some aspects of the banking system which required some form of codification. It submitted its own draft of such a document.6 (pg 384)

20.19 Metway Bank also made submissions in favour of a uniform code of conduct for banks and their staff, not only to protect customers, but also to ensure that banks were prevented from acting in a manner unfairly prejudicial to each other.7 (pg 385)

20.20 The Banking Ombudsman favoured the development of a code. He considered a draft code should be developed by the industry, circulated for public discussion and a negotiation process set up. He saw a threshold question in whether the code should merely reflect existing practice or set desirable standards.8 The Banking Ombudsman noted that 50% of the complaints he sent back to the relevant bank for reconsideration were resolved by the bank providing an explanation to the customer. He considered this was indicative that people want to know how the system operates. 9 (pg 385)

20.21 Finally, regulatory authorities appeared to favour some form of codification of banking practice. Attorney-General's Department noted a good case could be made for a code but said 'they can take a long time to develop and they need to be very vigorously administered'. 10 (pg 385)

20.22 The then Chairman of the Trade Practices Commission stressed that the Commission had a major involvement in getting the code of conduct on EFT into an effective state and would see itself as having close involvement in any banking code of practice. 11 (pg 385)

20.33 Whilst the result is impressive, the process of development of the code was resource intensive. This is indicated by the number of reports issued and the number of regulatory agencies involved. It is hoped in the development of a code of good banking practice the lessons from the EFT experience can be relied upon without the need to repeat the entire process. (pg 387)

20.34 The following lessons can be drawn from the experience of developing the EFT Code:

- codes should be developed by a consultative process involving industry, government and consumers;
- codes should be reviewed regularly, perhaps every two years;

- codes should be monitored by a particular agency charged with that responsibility; and
- the terms and conditions of codes should be enforceable as a matter of contract law.
- Codification Overseas (pg 387)

20.36 In England, the Committee appointed jointly by the government and the Bank of England to review banking services law and practice (the 'Jack Committee') made two recommendations on banking law and practice. The first was the enactment of a Banking Services Act to implement 18 proposed changes or clarifications to banking law. The second was that the industry be given a limited period to develop a 'code of best banking practice' to be used by the proposed Ombudsman in determining disputes. The Committee proposed that the Government issue a formal code with statutory backing if the industry code was not satisfactory in its term, or not fully implemented or observed. The Committee made 26 specific recommendations about improved standards of bank practice that should be dealt with in the code and appended to their report a draft code.12 However, following the subsequent UK White Paper, these recommendations were reduced to a proposal for a code of banking practice developed by the industry.13 The draft code developed as a result has been severely criticised. 3 (pg 387)

20.37 Similarly, many in New Zealand consider that the draft code prepared by the New Zealand Bankers Association is not adequate. National Australia Bank representatives commented that the New Zealand code did not go far enough but might provide a starting point. 14 (pg 388)

20.38 An alternate approach to achieving some of the objects of codes of conduct - clear and fair contract terms - has been developed in Israel and now adopted elsewhere. The approach is based on legislation which allows unfair contract terms to be dealt with in the abstract rather than in specific disputes between bank and customer. All European Community member countries now have such legislation in force or under consideration. The basic feature of such legislation is a two tiered mechanism whereby provision is made for consumer interests to be represented by a public or private body in negotiations with suppliers or their organisations to achieve agreed fair standard contractual terms. In

some countries public resources are committed to providing a secretariat function in the negotiations. At the second level is a court or court-like agency with power to order a supplier to cease using particular contract terms. The existence of the second level is considered essential for the effective conduct of negotiations at the first level. (pg 388)

20.39 In the United States, the concept of 'truth-in-lendmg' underpins consumer credit legislation. The intent of the legislation is to achieve a fairer marketplace through full disclosure, so that lending transactions are carried out on a basis of'truth.' The principle is now being extended in the US to cover borrowing. (pg 388)

20.40 The Committee accepts the view advanced in the preponderance of submissions that codification of banking law and practice is desirable. (pg 388)

20.41 In forming its view on these issues, the Committee has examined the need for codes in the light of the perceived deficiencies in the present position. In recommending codification the Committee's goal is to have banking services provided on terms which are fair to both parties, which are accessible and known to them, and which provide a clear basis for resolving disputes which arise. (pg 388)

20.42 In addition, both the contents of the EFT Code and the experience in its development have provided some indications of the essential elements for the development of an adequate system. Market forces are not of themselves sufficient to ensure that bank services are delivered on fair and equitable terms. It is not appropriate for banks to have exclusive responsibility for setting standards of banking practice. The thinking of the Committee echoes that of the Jack Committee review:

> Historically the developing of standards of best banking practice has been the sole prerogative of banks. It has been argued in this Report that approach is no longer entirely appropriate: competition, while increasing, cannot be relied upon to secure, by itself, the improved standards for which we see a need. While banks must continue to have a major say in the development of standards of best practice, there is also a legitimate public interest in those standards, which should be reflected in some objective assessment of their adequacy.15 (pg 389)

20.43 The Committee has determined that the consumer groups' recommendation that all of banking law be codified in statute is not appropriate. Whilst clarification of the law is desirable, the size of that task would greatly delay the necessary reforms and may result in the law becoming overly rigid at a time when the pace of technological and market change necessitates adaptability. (pg 389)

20.44 The Committee has determined that a better overall approach would be to proceed by way of a voluntary code incorporating the lessons set out in paragraph 21.36 of this Report. The Committee considers that codification of banking practice will provide certainty in many areas of current ambiguity. It can foster transparency in two ways: the existence of a code will provide a single source of information for a customer or his or her adviser to refer to; more significantly any code will include provisions designed to ensure that customers are adequately informed of the full details of the products they are about to use. The process of negotiating a code between the banking industry, government and consumer organisations will provide an opportunity to ensure that all its provisions are fair. (pg 389)

20.45 In a number of areas the Committee believes desirable industry standards should be set, rather than existing standards re-stated. Whilst standards developed in the marketplace should be given great weight in this process, one of the virtues of a code is that it can address matters not sufficiently subject to competition. (pg 389)

20.46 However, the Committee acknowledges that, in respect of a number of distinct issues, a voluntary code may not be sufficient to overcome impediments to change in the existing common law or statute law. (pg 389)

20.50 The code should be developed through a process of negotiation between industry, consumer groups and regulatory authorities, the implementation of which is then monitored by an appropriate Commonwealth regulatory authority. That agency should preferably be the TPC. It would be renegotiated periodically to take into account technological or other changes which render it inappropriate in some way. (pg 390)

20.52 No single Commonwealth regulatory agency has the full expertise in, and responsibility for, consumer banking issues. Such a role would involve:

- complaints monitoring;
- participation in code development and implementation;
- consumer policy;
- research;
- data collection and analysis; and
- public information.

Aspects of these roles are undertaken by differing regulatory authorities, with the TPC having the primary responsibility. (pg 391)

77. The Trade Practices Commission be given formal responsibility for overseeing consumer banking issues at the Commonwealth level including the monitoring of the recommended code of banking practice, (paragraph 20,62)

20.22 The then Chairman of the Trade Practices Commission stressed that the Commission had a major involvement in getting the code of conduct on EFT into an effective state and would see itself as having close involvement in any banking code of practice. 11 (pg 385)

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20.53 Consumer groups considered, given the desire and resources, the Reserve Bank could develop sufficient expertise to deal with consumer issues. The Reserve Bank through the Australian Payments System Council now has a role in the monitoring of the EFT Code. (pg 391)

20.54 As a result of discussions in the USA, the Committee is aware of the US Federal Reserve's involvement in consumer issues. The US Federal Reserve fulfils its responsibilities in the regulation and monitoring of consumer financial services through its division of Consumer and Community Affairs, which is advised by a Consumer Advisory Council. It ensures that all state chartered member banks of the Federal Reserve System comply with the Consumer Credit Protection Act and associated legislation such as the Equal Credit Opportunity Act, the Consumer Leasing Act, the Electronic Funds Transfer Act and the Fair Credit Reporting Act. It also collects and makes public, on a six-monthly basis, information from a range of financial institutions. The Consumer Advisory Council advises the board on the exercise of its statutory authority, on the need for and development of consumer related regulations and on issues arising related to deregulation. The Council meets three times per year. (pg 391)

20.55 However, the Reserve Bank of Australia expressed the view that it did not wish to adopt a role similar to that of its US counterpart. It considered the extensive consumer role of the US Federal Reserve as a product of circumstances which did not prevail in Australia. These circumstances included the difficulty of achieving reasonable consistency across a large number of States and the very large number of financial institutions in the US. The Reserve Bank also argued that the addition of formal responsibility in consumer matters to its already extensive areas of activity may detract from its overall efficiency and increase the potential for conflicts to develop amongst its objectives. Further, it would result in bank transactions being regulated separately from other consumer transactions, whereas a specialist consumer affairs agency could deal

with them equally. Finally, it considered its present reservoir of skill and experience would not be adequate for the task.16 (pg 392)

20.56 A general difficulty in allocating responsibility to a Commonwealth agency is that none of the existing agencies has an extensive complaints handling facility. Historically, complaints have been dealt with by state bureaux of Consumer Affairs. A database of consumer complaints (The National Consumer Complaints Statistical System, NCCSS) is maintained by the state bureaux.17 Officers of the Attorney-General's Department advised that having accurately collected, maintained and analysed complaints data is of fundamental importance.18 (pg 392)

20.57 The Trade Practices Commission is in the process of resurrecting the national complaints system. The existence of the database and access to the Ombudsman's analysis of complaints made to him may overcome the lack of a separate intake point for complaints at the Commonwealth level The Ombudsman's Office, whilst having a major complaint handling role, does not have extensive policy functions and the Ombudsman stated he did not consider it appropriate for him to have a central role in the generation of a code of practice. (pg 392)

20.58 The Trade Practices Commission expressed an interest in being involved in consumer issues. The TPC already has a significant role in banking consumer affairs, for example in the EFT code, guarantors, and consumer credit insurance in addition to its central role in consumer protection and the regulation of competitive activity at the Commonwealth level. (pg 392)

20.59 As well as the Trade Practices Commission, the Federal Bureau of Consumer Affairs in Attorney-General's Department has policy responsibility for the consumer protection and related provisions of the Trade Practices Act, and for consumer interests generally and has had considerable involvement in recent years in issues relating to financial services. (pg 393)

20.60 The Committee recognises the value in having one agency at the Commonwealth level with the primary responsibility in relation to consumer banking issues. (pg 393)

20.61 The Committee considers the Trade Practices Commission is best placed to take responsibility for consumer banking issues including the ongoing monitoring of a code of banking practice. Whilst the TPC does not have existing channels of communication with the banks to the same degree as the Reserve Bank, it has dealt with them, is experienced in code development and monitoring, has contact with the consumer movement and has relevant powers and responsibilities under the Trade Practices Act. (pg 393)

81. the development of comprehensive procedures for resolving complaints and disputes be considered in the development of the code of banking practice. Banks should ensure that all staff are familiar with the bank's policies and procedures relating to all aspects of dispute resolution. In doing this, banks should ensure that these policies and procedures are clearly set out in staff manuals and are incorporated into both initial training programs and refresher programs. The issues identified in paragraph 20.123 above should be included in the development of internal dispute resolution procedures, (paragraph 20.124)

20.63 The area of dispute resolution is one on which many submissions placed special focus. There have been recent positive industry initiatives including the development of the Banking Ombudsman and increased focus by banks on effective complaint handling. However, many submissions expressed the difficulties customers, particularly consumers and small businesses, experience in seeking to contest, a bank's action, decision or calculation. (pg 393)

20.64 Consumer groups submissions emphasised the significant power imbalances which exist between banks and many of their customers. These power imbalances are particularly important when a dispute arises between a customer and a bank. Some of the manifestations of these imbalances for consumers seeking redress include that:

- the banks control nearly all relevant information and documentation;
- banks have access to specialist advice and legal assistance and resources to pursue disputes to the end, whereas customers, particularly poorer customers, do not;
- banks tend to have inherent faith in their internal operating systems and bankers may be reluctant to admit failures in those systems;

- in many cases the bank's interest in resisting any claim outweighs that of an individual customer in pressing it, in that the bank is protecting its system whereas the customer is seeking redress on a one-off basis;
- because banks know they can outlast most customers, both in terms of will and resources, there is often little incentive for banks to settle a dispute, even if the bank would be likely to lose any eventual case; and
- in matters which are litigated the bank, as a repeat player, is in a position to select a particular matter to run to a hearing in order to obtain a favourable precedent.19 (pg 393-394)

20.65 Until recently, the only recourse for aggrieved customers was the courts. In practice, however, seeking relief through the courts is not a feasible option for most consumers. Often the amount in contention will be significantly less than the likely legal costs, even where the consumer could afford to take such action. In most Stages and Territories, access to legal aid is tightly restricted and is not generally available for disputes involving amounts less than $1,000. Thus legal fees ensure that, for the vast majority of consumers, legal action is beyond their resources. As Sir Ninian Stephen put it: 'The Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court1.20 (pg 394)

20.66 In addition, because of time delays involved in court proceedings, even if customers could afford legal action, they might have to wait a number of years before their matter would be heard. For those few consumers who do in fact take the banks to court, the superior resources of a bank can be used to delay the case for years and/or to place further financial strain on the consumer litigant by appealing unfavourable decisions. (pg 394)

20.67 There is a need for cheap, speedy, fair and accessible alternatives to the traditional court system if customers are to receive justice in their dealings with the banks. As the Australian Law Reform Commission has stated in another context:

> It is a fundamental principle of access and equity that all individuals should be equally able to exercise their rights under the law. Cost or other barriers which

unfairly disadvantage a person or group in gaining access to a particular kind of remedy should be overcome so far as is practicable.21 (pg 395)

20.68 Many disputes can be avoided by reform of procedures and practices which give rise to them. The Banking Ombudsman noted 'the biggest problem facing the banks is their relationship with their customers in terms of communication breakdown'.22 The Committee agrees with the Ombudsman's prescription that improving communications between banks and their customers will help to avoid potential disputes. (pg 395)

20.69 Many disputes arise because customers are unaware of their rights and obligations under banking contracts. This is inevitable given the opaque language used in many official banking documents, their length and the tendency to rely upon unspecified 'usual banking practice'. The Committee elsewhere recommends that all banks make a concerted effort to progressively convert all of their banking contracts into ‘plain English’. (pg 395)

20.75 The Australian Banking Industry Ombudsman Scheme was an initiative of the banking industry, undertaken in consultation with government and consumer organisations. Its establishment in May 1989 was a recognition by major banks of the need to improve their service and public image. The Scheme was created to provide individual customers of member banks with access to an independent avenue of redress when they had a complaint about one of those banks. (pg 396)

20.76 The reasons for developing the Scheme were the high cost of litigation, the inability of the average customer to contest matters in courts against a bank and the inadequate in-house dispute resolution mechanisms of banks. (pg 396)

20.79 The introduction of the Scheme represented more than just a free service offered by the banks. The basis on which disputes were to be resolved has been expanded. Importantly, the resolution of disputes is reached not only by reference to the law, but also to good banking practice and fairness in all the circumstances. (pg 396)

20.80 The inclusion of reference to good banking practice and fairness are significant steps in recognising the quality of service to bank users. As part of a more complete dispute resolution process banks have also moved towards establishing their own internal complaint handling divisions, the commencement of the collection of detailed data

arising from consumer complaints and the feeding of that data into their long term planning. (pg 396)

20.119 This is recognised in the procedures adopted by the Ombudsman Scheme, which require that a customer must first have taken up his or her complaint with the relevant Bank before the Banking Ombudsman will consider it. Clearly, internal dispute resolution procedures are not working properly because evidence of the Banking Ombudsman indicates most complainants come directly to 403 him and have not previously been dealt with internally. It would appear that internal systems are inadequate and/or there is a lack of confidence in them or knowledge about them. (pg 403-404)

20.120 The Committee has not surveyed the internal dispute resolution schemes employed by the banks. Evidence suggests, however, that while the major banks have all put an increased emphasis on internal dispute resolution procedures in recent times, standards vary considerably both between banks and between branches. (pg 404)

20.122 To date, it has been a matter for each bank to develop its own internal dispute resolution mechanism and undoubtedly there are commercial advantages to be gained by the bank which best satisfies this important area of customer service. (pg 404)

20.123 However, the Committee believes that there are certain minimum standards which all bank internal dispute resolution schemes should satisfy. The matters that need attention are:

- the need for all complaints (other than those dealt with instantly over the counter at the time they arose and to the customer's satisfaction) to be recorded;
- a clear point of entry for a complainant seeking to have a dispute considered;
- clear steps which are readily accessible;
- clearly defined lines of responsibility, with each level of staff knowing the bounds of their discretion in resolving disputes;
- speedy timeliness for resolving disputes;
- the need for the customer to be given reasons for the Bank's decision;
- the need for customers to have access to all relevant documentation; and

- the need for information about the Bank's internal dispute resolution procedures, the steps involved and how to access them to be readily available in brochure form and appropriately displayed at all branches of the Bank. In areas with high migrant populations, such brochures should be available in the dominant community languages. The brochure might also include information on external avenues of review, including the Australian Banking Industry Ombudsman Scheme.33 (pg 405)

90. the details of the relationship between a bank and a guarantor be clearly laid down in a code of banking practice and include the specific undertakings that were part of the TPC's agreement with the National Australia Bank. In addition, banks should be obliged to inform guarantors as to the reasons for requiring a guarantee, (paragraph 20.179)

20.172 The kind of conduct found to be unacceptable by the TPC was:

- undue influence exercised by the borrower over the guarantor;
- the guarantor having a 'special disability';
- the guarantor having a poor general understanding of the concept of a guarantee;
- the guarantor becoming involved in the transaction at a late stage;
- and the complex nature of guarantee documents. (pg 415)

20.178 The principles laid down in the undertakings from the NAB to the TPC should be included in a code of banking practice as it relates to guarantees. This would ensure that guarantors are aware of the nature of the transaction and their potential liability. (pg 417)

94. the principle of disclosure be incorporated into a code of banking practice, (paragraph 21.34)

21.27 The fundamental legal relationship between banks and their customers is an implied contract, the terms of which are seldom set out. Bankers are well aware of the terms but most of their customers remain ignorant of them although they involve important rights and obligations. This sometimes continues even after bank documents are signed. (pg 426)

21.28 Although the terms of the banker-customer contract remain unspecified, there is little possibility that competition in the market place will improve the situation. Customers will continue in ignorance of their position or be able to assert or enforce their rights. To all intents and purposes bank practice and tradition are the law. (pg 426)

21.29 Consumer organisations stated that the terms and conditions which currently form part of the banker-customer relationship should be codified in a code of banking law. They believe that a formal reference should be given to the Australian Law Reform Commission (ALRC) to incorporate disclosure principles relating to the banker-customer relationship.7 (pg 426)

21.30 The major banks were questioned about the concept of a code of banking practice which included industry disclosure principles. The banks were not opposed to such a code but preferred that it be self-regulatory.

21.31 Westpac has released a code of banking practice which includes disclosure principles. The code is in-house, self-regulatory rather than enforceableby consumers.8 It is a good first step and other banks should follow. (pg 426)

21.32 Given the legal nature of the basic banker-customer relationship there is good argument for this code. There is also good argument for general disclosure requirements to be incorporated into a code of banking conduct. (pg 426)

21.33 The Committee concludes there should be adequate disclosure by banks. The principle of disclosure should be written into an industry code (pg 427)

95. a requirement for plain English documents to be incorporated in the code of banking practice. Plain English documents should be produced urgently by the Australian Law reform Commission working whenever possible in conjunction with State Law reform commissions and in consultation with the banking industry, consumers, and users. Priority should be given to producing important consumer documents such as the mortgage and guarantee documents (paragraph 21.51)

21.36 Despite continuous adverse comment from the courts, customers and consumer groups, many bank contractual documents remain lengthy and incomprehensible to all

but trained experts. For example, the first sentence in the current Westpac Home Mortgage document is more than 1000 words in length. (pg 427)

21.37 While it is generally accepted as desirable to have documents in plain English, it should be acknowledged that existing case law may provide some legal impediments. Further, it is argued that complexity in documentation has resulted from the process of accretion as terms are added which seek to avoid the effect of court decisions protecting customers.10 21.38 The Law Reform Commission of Victoria has been working with the major banks to produce mortgage and guarantee documents in plain English.11 Initially all four major banks were supportive of the process but recently support for the process has waned. It would appear that the reason for this is that some banks are concerned that changes to the language of documents could affect the substance of the documents. (pg 427)

21.39 If the legal complexities justify the involvement of the Law Reform Commission of Victoria in order to clarify the law - something the banks have sought - it should not be left to the banks individually to develop the documents, but to be given help in drafting and clarifying documents. (pg 428)

21.40 The ABA and the Commonwealth Bank have argued against having legal documents written in plain English.12 They considered that plain English documents could be misleading because changes in the wording of documents could create conflict over legal interpretation. However, in recent times similar documents have been successfully put into plain English - documents such as insurance contracts, the EFT code and credit Acts. If documents are in plain English it does away with the need to have them interpreted by the court. They mean what they say. (pg 428)

21.41 The Commonwealth Bank's opposition to the introduction of plain English documents is inconsistent with its support for the concept in its code of conduct. (pg 428)

21.42 Professor David Kelly of the Victorian Law Reform Commission said of the concept of plain English documents being misleading: The suggestion that plain English is misleading is based on the understanding of what is meant by 'plain English' in this context. If 'plain English' means simplified or 'popularised' English the suggestion would

of course be correct. It is obviously not possible to substitute commonly used word for technical legal words without changing the effect of the language used.13 (pg 428)

21.43 In this context, 'plain English' simply means English that is properly structured and is free of the repetition and circumlocution that abound in legal documents. All technical legal words are retained. Only the overlay of obscure language and incoherent structure is removed. The document's meaning is unchanged. (pg 428)

21.47 Consumer organisations suggested that a regulatory agency be resourced to develop a model plain English home mortgage. This document would be produced as a result of negotiation between consumer representative groups and industry groups.15 (pg 429)

21.48 In a recent out of court settlement against the National Australia Bank, the bank agreed to several undertakings one of which was to describe in bold print on the document the significance of what the guarantor was signing.16 21.49 The ANZ Bank in its evidence said of guarantors that the bank would like to see the guarantee documentation made clear, plain, absolutely unambiguous, and that the bank was working on redrafting the guarantee agreement.17 (pg 429)

21.50 The Committee concludes that there is a need for banks' documents to be produced in plain English. Such documents could be produced either by the banks themselves or an appropriate external legal organisation. The Committee supports the latter approach because uniformity of language and clarity of meaning would be introduced throughout the industry. (pg 429)

96. banks should disclose all fees and charges and interest rates relating to all products. Disclosure should be done in such a way that all fees, charges and interest rates are clearly drawn to the attention of consumers, (paragraph 21.67)

21.57 Evidence from the major banks on the issue of disclosure of interest rates showed that there were significant differences in the ways in which they represented interest rates. However, there was general agreement among them that interest rates should be disclosed clearly. (pg 431)

21.58 The National Australia Bank said that the interest rate shown on its statements to customers was not the base rate but the rate actually charged to them. The Bank's base rate was published in newspapers and customers could calculate their margin above the base rate from this. Changes to base rates are published weekly. Fees are disclosed separately.18 (pg 431)

21.59 The ANZ Bank said that from 1 July 1991 all statements of its loan accounts will have the applicable interest rate shown on them, including the dates of any changes. The interest rate shown on the statement will be the nominal interest rate, that is the interest rate that is needed to check the bank's interest calculation. ANZ Bank had an open mind on the issue of whether effective interest rates also ought to be provided. It had not done so because it was not compelled and because it considered that disclosure of two rates may be a ‘culture shock’ to customers. ANZ Bank was in favour of a code of banking conduct and a uniform measure of disclosure of interest rates, fees and charges.19 (pg 431)

21.60 Westpac was in favour of a uniform measure of disclosure on fees and charges and interest rates and an industry code of conduct.20 The Commonwealth Bank favoured the principle of disclosure. The Bank felt that disclosure was becoming more important and that it should get on with implementing the principle. (pg 431)

100. personal information be provided as a "right1 to individuals. This "right' should be written into a code of banking practice. (paragraph 21.116)

21.108 Banks often use this principle selectively, disclosing when it suits and denying access when it does not. An example that came to the Committee's attention was in regard to the rural sector. When the Committee was in Dubbo in NSW one bank was asked questions about a particular customer's dealings with that bank. That customer had spoken publicly about her own matters in Dubbo on the same day. The bank refused to discuss the case because of customer confidentiality. The next day a letter from the bank was published in a rural newspaper in the town in which the customer lived disclosing details of that customers dealings with the Bank. This appeared to demonstrate a double standard about the bank's approach to customer confidentiality. The issue of privacy was discussed further in Chapter 20. 21.109 Banks hold documents about their customer's

financial affairs. From time to time customers will be in dispute with their bank and may need access to documents that are held by the bank. It seems fair that banks should make personal information available to customers. (pg 441)

21.110 This principle of access to information exists in the *Commonwealth Freedom of Information Act 1982.* The object of the Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth. This includes access to personal information as a right. (pg 441)

21.111 The banks have resisted this notion. They have provided information and documents when they considered it appropriate. However, they have not done so in all cases. Not only have banks provided information to third parties in the past, but they have conferred power on the Banking Industry Ombudsman, with the customer's consent to obtain files on request. There is a power under the Ombudsman's terms of reference to ask for a bank file, but there is no power for the Ombudsman to pass the file to the customer. (pg 441)

21.113 The ANZ Bank's view on providing customers with documents was that it was not a lack of willingness or a company policy against giving customers their own documents. The way in which their systems were designed meant that a customer's information would not be on a single file; there would be several, as a customer would have a separate file for each product. This will not be so in future as it will change in the next two years. The Bank is moving to a customer information file, which will mean that there will one source of information for each customer. 41 (pg 441-442)

21.114 The Committee notes the UK has a Draft Code of Banking Conduct which provides, through the *UK Data Protection Act 1984,* for personal information to be made available. (pg 442)

21.115 The Committee concludes that customers are entitled to have documents relating to their personal affairs. The definition of personal or own affairs contained in the Freedom of Information Act should be considered by the banks as the basis on which such information is provided. (pg 442)

102. a structure for an on-going dialogue between the Reserve Bank, the Trade Practices Commission and consumer representatives be established, with a view to ensuring that the Bank and the Commission are and continue to be more fully aware of the experience of consumers of retail banking services and products. (paragraph 22.53)

22.19 The consumer representatives argued that banks are parties to a social contract. Since banks are the creation of governments (being required to be licensed, even in a deregulated market), it could be said they have entered into a contract with society to perform certain services. The price which society should ask the banks to pay in return for their privileges should not, consumer representatives argued, take the form of, say, a licence fee. Rather, it should be a payment 'in kind' - the provision of community access to banking, on fair and equitable terms.9 (pg 446)

22.20 The ABA has argued against this interpretation, questioning whether banking products and services should be viewed as any different to other goods or services.10 In its view, suggestions that banks should be obliged to provide certain community services on any basis other than explicit pricing are misguided:

> ... the strong suggestion is that banks should provide free or substantially subsidised services to particular groups in society and that the rest of the banking customer base should be forced to pay for this. They are, in effect, arguing for a return to regulation. The ABA cannot accept such a proposition and believes that subsidies to particular groups (if warranted by the community) should be provided explicitly through the budget, not through the banks. It would be inappropriate and inequitable for banks to provide certain services without proper regard to the costs of their provision, as such costs would invariably have to be met by other users.11 (pg 446)

103. the House of Representatives amend the resolution of appointment of the House Standing Committee on Finance and Public Administration to include a responsibility for reviewing the banking industry. The name of the Committee should be amended to House Standing Committee on Banking, Finance and Public Administration, (paragraph 23.28)

23.24 As well as the need for appropriate government intervention, the Committee envisages a need for continuing parliamentary oversight of the banking and financial services industries. The inquiry has given the Parliament a valuable insight into their operation and interrelationship. It has provided a forum for those with concerns about the industry to air their problems and for the banks to correct misunderstandings and to respond. There is value in this being a continuing process. (pg 459)

23.26 The Committee considers that the Commonwealth Parliament should have a committee whose responsibility is the continuing oversight and review of the banking industry. The Committee could:

- consider legislation (for example, there may well be legislation resulting from the recommendations made in this report);
- conduct inquiries into specific areas of concern; and
- undertake general review work. (pg 459)