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Bank Secrecy and Confidentiality Law in Practice in Australia and Their Impact on the Control of Economic Crime*

Paul Latimer*

I. Introduction

At common law, a bank is under a strict duty to maintain secrecy and confidentiality about its customer's account.¹ This confidentiality belongs to the customer, not the bank. The basis for the bank's duty of confidence is contractual, but the duty is not absolute and is qualified by statute and case law, including the *Tournier* case, in all common law jurisdictions.²

II. Bank Secrecy and Australian Law

In most jurisdictions, including Australia, both the customer and its bank can be compelled by law to disclose information.³ Indeed, so many Australian statutes require disclosure of information that the bank's duty of confidentiality has now been seriously

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1. See PAUL LATIMER, AUSTRALIAN BUSINESS LAW § 16-080, at 937 (15th ed. 1995).

2. *Tournier v. National Provincial and Union Bank of England*, 1 K.B. 461, 471-473 (1924) (holding that bank secrecy is qualified in four situations — disclosure under compulsion of law; duty to the public to disclose; disclosure in the interests of the bank; disclosure by the express or implied consent of the customer). See, e.g., W.S. WEERASOORIA, BANKING LAW AND THE FINANCIAL SYSTEM IN AUSTRALIA, ch.23 (Butterworths ed., 3rd ed. 1993).

3. Other justifications for disclosure include the bank's duty to the public, the interests of the bank, and the express or implied consent of the customer. The public duty, higher duty or iniquity rule authorizing disclosure is not a breach of the duty of confidentiality. It is not a positive duty, and it is hard to define the dividing line between "public duty" and a "private duty." E.g., Financial Transaction Reports Act, AUSTL. C. ACTS (1988); Proceeds of Crime Act, AUSTL. C. ACTS (1987).

eroded. These statutes, such as the Evidence Act,⁴ include disclosure to the government, government agencies, and the courts. Access to personal information by government authorities in Australia is authorized in numerous statutory provisions,⁵ including tax and corporation law, and Australia's "anti-trust" law contained in the Trade Practices Act 1974 (Cth.).⁶

III. Regulation of Corporations and Securities Markets

Regulation of corporations and securities markets is in the hands of the Australian Securities Commission, a federal government agency with national operation and offices in all State capitals.⁷ The Commission has wide powers affecting bank secrecy under the Australian Securities Commission Act 1989 (Cth.) (the Act), especially under Part 3—investigations and information-gathering, Division 3—inspection of books.⁸ In particular, the Commission may inspect books without charge;⁹ give written notice to produce books about the affairs of a corporation;¹⁰ serve written notice requiring the production of specified books;¹¹ serve written notice to produce books about futures contracts;¹² give written notice to produce documents in a person's possession;¹³ apply for warrants to seize books not produced and take possession of those books;¹⁴ and require explanations of any matter in the books.¹⁵

Non-compliance with sections 29, 30, 31, 32 and 33 of the Act is an offense under section 63 subject to a fine and/or imprisonment.¹⁶ Additionally, under section 70, the Commission may apply to the court for an order to comply with Part 3.¹⁷ For

4. See, e.g., Evidence Act, §§ 58A - 58J, (1958) (Vict.); Evidence (Banker's Books) Act (1969) (Vict.).

5. See, e.g., AUSTRALIAN LAW REFORM COMMISSION, PRIVACY, Rep. No. 22, (Canberra, Australian Government Publishing Service, 1983).

6. Trade Practices Act, § 155, AUSTL. C. ACTS (1974). See also *Melbourne Home of Ford Pty. Ltd. v. Trade Practices Commission* (No. 1) (1979) 36 F.L.R. 450 (indicating that § 155 has been given a wide interpretation). *Id.*

7. Australian Securities Commission Act, AUSTL. C. ACTS (1989).

8. See *id.* §§ 28-39.

9. *Id.* § 29.

10. *Id.* § 30.

11. *Id.* § 31.

12. *Id.* § 32.

13. *Id.* § 33.

14. *Id.* §§ 35, 36.

15. *Id.* § 37(a).

16. *Id.* § 63.

17. *Id.* § 70.

example, in *Australian Securities Commission v. Zarro*,¹⁸ the Federal Court of Australia held that the bank's obligation of confidentiality was no reasonable excuse for noncompliance with a section 33 notice to produce documents in its possession, and that the statute must take precedence, "[a]s corporate citizens, information must be provided in response to authorized requests and information concerning possible violation of statutes or regulations reported. At the same time it is imperative that customer confidentiality is strictly maintained."¹⁹

A. *The Privacy Act*

Australian authority recognizes a trade-off between bank confidentiality, statutory inroads, and privacy: "[t]he balancing of competing interests is required . . . including the intrinsic values of privacy and of confidentiality and the demands of the revenue."²⁰ Australia's Privacy Act 1988 (Cth.), with its privacy principles, confirms disclosure in Principle 11 if "required by or under law."²¹

B. *The Financial Transaction Report Act*

To these many disclosure requirements can be added two laws targeting money laundering — the washing of dirty money into clean money — namely, the Financial Transaction Reports Act 1988 (Cth.)²² and the Proceeds of Crime Act 1987 (Cth.).²³

The Financial Transaction Reports Act 1988 (Cth.) targets the cash economy by setting up reporting requirements designed to identify the money trail of the proceeds of criminal activities and tax evasion.²⁴ It requires a "cash dealer" to report a "significant cash transaction" to a federal government agency, the Australian Transaction Reports and Analysis Centre (AUSTRAC), within the "reporting period" of 15 days if Australian currency is transacted and the end of the next day if the transaction involves foreign currency.²⁵ "Cash dealers" include banks, building societies, credit unions, and stockbrokers.²⁶ A "significant cash transaction" is a

18. *Australian Securities Commission v. Zarro*, 32 F.C.R. 546 (1992).

19. S. E. Jones, *Right to Financial Privacy: Emerging Standards of Bank Compliance*, 105 BANKING L.J. 37, 51 (1988).

20. *Citibank v. Federal Commissioner of Taxation*, 88 A.T.C. 4714 (1988).

21. Privacy Act, Principle 11, AUSTL. C. ACTS (1988).

22. Financial Transaction Reports Act, *supra* note 3.

23. Proceeds of Crime Act, *supra* note 3.

24. Financial Transaction Reports Act, *supra* note 3.

25. *Id.* § 3.

26. *Id.*

transaction of not less than AUD10,000.²⁷ Information supplied to AUSTRAC is made available by controlled computer access to federal and state law enforcement agencies such as the National Crime Authority, Customs, the Australian Taxation Office, and the Australian Securities Commission.²⁸

C. *The Proceeds of Crime Act*

The Proceeds of Crime Act 1987 (Cth.),²⁹ also aimed at organized crime, seeks to deprive those involved of the profits of their crime by providing tracing, freezing, and confiscating of criminal profits.³⁰ For example, banks and other financial institutions must retain records, such as those relating to the opening of accounts, for seven years.³¹ Checks of over AUD200 must also be retained for seven years. If a bank or other financial institution has information which it believes may assist in the investigation of an offense under the Act, it may give the information to the National Crime Authority. This disclosure will not result in a cause of action against the financial institution.³²

D. *The Australian Securities Commission Act*

The Act³³ overrides bank confidentiality at common law. Similarly, taxation legislation authorizes the Australian Taxation Office to search bank records.³⁴ In the words of one commentator, "the taking of voluntary steps to assist the Australian Taxation Office in relation to investigations involving the client will *prima facie* leave the 'professional person' exposed to a legal action by the client."³⁵ Section 92 of the Australian Securities Commission Act provides that a person, such as a bank, complying with the Act "is neither liable to a proceeding, nor subject to a liability, merely because the person has complied . . . with a requirement made."³⁶ Taxation officers could disclose information to the Director of

27. *Id.* §§ 3, 15. Approximately \$7,500 in U.S. currency or AUD5,000 if the transaction involves an international transfer of currency into or out of Australia.

28. *Id.* § 27.

29. *See supra* note 3.

30. *Id.*

31. *Id.* § 77.

32. *Id.* §§ 79-80.

33. *See supra* notes 7-17.

34. Income Tax Assessment Act, §§ 263-264, AUSTL. C. ACTS (1936).

35. D. Williams, *The Citibank Raid*, § 263 and *Balancing the Right to Privacy*, 45 Butterworths Weekly Tax Bulletin 690, 695 (1988).

36. Australian Securities Commission Act, *supra* note 7, § 92.

Public Prosecutions.³⁷ The Commissioner of Taxation has authority to hand over confidential information to law enforcement authorities.³⁸

IV. Conclusion

For many years Australian corporation law, as upheld by case law, has recognized the duty of banks to disclose otherwise confidential information:

The section (giving the power to examine) is intended to impose a statutory obligation to render assistance and that obligation will override any express or implied contractual obligation that might otherwise have required the assistance to be withheld. . . . In my view the section imposes upon a banker a duty to do that which its implied contractual obligations would otherwise preclude it from doing. If the assistance sought from the banker can reasonably be given by it, no implied obligation of secrecy will prevail to fetter the bank in any way in giving that assistance; nor will the bank be in any way exposed to liability at the suit of the company or any other party in complying with the requirement made of it.³⁹

This statutory requirement was one of the early versions of today's many statutory requirements on the part of banks to disclose confidential information to the appropriate authorities.

Modern business regulation requires these disclosures to provide information in the interests of better regulation for the benefit of all interests in the economy. As remarked in 1914, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."⁴⁰ Bank secrecy, recognized for so many centuries, is no longer a barrier to the control of economic crime in Australia.

37. *Saunders v. Federal Commissioner of Taxation*, 88 A.T.C. 4349 (1988).

38. *Taxation Administration Act*, AUSTL. C. ACTS (1953).

39. *Australia and New Zealand Bank Ltd. v. Ryan*, 88 W.N. (N.S.W.) Part 1 368, 373 (1968) (referring to § 173 of the now repealed *Companies Act* (1961) (N.S.W. Stat.), which became § 295 of the now repealed *Companies Act*, AUSTL. C. ACTS (1981) and equivalent State Codes; it was carried forward as §§ 19, 21 and 85 of the current *Australian Securities Commission Act*, AUSTL. C. ACTS (1989)).

40. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT* 92 (Augustus Kelley ed., 1986) (1914).