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INTRODUCTION

WHAT IS A BANK?

- “Bank” not a defined term, although referred to in various legislation → **ADI with authority to undertake a “banking business”**
- **“Banking business”** (statute + common law) defined in Banking Act, and also defined by function at common law
 - **Statute** → Banking Act
 - S5 → “banking business” means: (accepting Isaacs J Test)
 - (a) A business that consists of banking within the meaning of paragraph 51(xiii) of the Constitution; or
 - (b) A business that is carried on by a corporation to which paragraph 51(xx) of the Constitution applies and that consists, to any extent, of:
 - (i) Both **taking money on deposit** (otherwise than as part-payment for identified goods or services) and **making advances of money**; or
 - (ii) Other financial activities prescribed by the regulations for the purposes of this definition.
 - Need permission from APRA to call yourself a bank – restricted under s66 and s66A of the BA
 - **Common Law**
 - **Reservoir test** – Commissioners of the State Savings Bank of Victoria v Permewan Wright and Co Ltd (1914) Isaacs J at 470-471 (**see pg 77-78 of materials**) (same as statute definition b(i) above basically)
 - Streams of money going in and out → the margin gained is then used to lend again
 - **Economic utility test** – United Dominions Trust v Kirkwood (1966) Lord Denning at 447 (pg 80 of materials)
 - Time takes us past the 1914 definition
 - Accept money from, collect cheques for, and honour cheques of customers
 - They also keep a current account with debits and credits
 - **Not simply a licence or authority test** – Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) Mason J at 422 (pg 81 of MT)
 - An **entity can still be a bank without a licence** – it is the activities of the company that make it a bank (there will still be penalties from APRA for not being licenced)
 - Talks about the purpose of the Act
 - **Summarising, “banking business” has three key elements:**
 - Accept money by receiving deposits
 - Repay money on agreed terms
 - Utilise money collected by deposits and repayments by lending the money again
 - Woods v Martens Bank
 - March of time will alter what it means to be a bank

WHAT IS A CUSTOMER?

- Not a defined term – mixture of fact and law
- **Duration and regularity are not determinants** (COT v English, Scottish and Australian Bank – duration is not of the essence)
 - Used to be, but not anymore
- **Created by accepting instructions and intending to create a relationship**
 - Immediate – only have to make a single deposit (Woods v Martins Bank)
- Usual way is to open an account
- Different from performing a casual service (e.g. people walking into a branch)
 - Issue with one-off transactions such as international money transfers

AUSTRALIA'S BANKING SYSTEM

- **Branch banking system**
 - Few banking corporations with a lot of branches
 - Based on the English banking system
 - Very different from the US → state banking system (was historically difficult to cash cheques across state borders)
 - Competitive but concentrated
- All banks are regulated under s9 of the banking act
- **Universal banking model**
 - All divisions of the bank operate under one entity
 - Activities of one part of the bank can be cross-subsidised by other operations
- Mutual bank → profit goes back into the bank; no shareholders; each account holder gets a vote
- Foreign banks are limited to providing wholesale banking services
- GFC (07/08) led to increased international cooperation and regulation, with a general view that there was a need for more consistency in banking internationally
 - G20: the Group of Twenty (G20) is the premier forum for its members' international economic cooperation and decision-making. Its membership comprises 19 countries plus the European Union.
 - Basel Committee: is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Its mandate is to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability.
 - IOSCO International Organisation of Securities Commissions: The International Organization of Securities Commissions (IOSCO) is the international body that brings together the world's securities regulators and is recognized as the global standard setter for the securities sector. IOSCO develops, implements and promotes adherence to internationally recognized standards for securities regulation. It works intensively with the G20 and the Financial Stability Board (FSB) on the global regulatory reform agenda.
 - IMF: The IMF's primary purpose is to ensure the stability of the international monetary system—the system of exchange rates and international payments that enables countries (and their citizens) to transact with each other. The Fund's mandate was updated in 2012 to include all macroeconomic and financial sector issues that bear on global stability.
 - FATF Financial Action Task Force: objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a “policy-making body” which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.
- Too big to fail
 - Would adversely impact the market if it failed
 - In the US the Dodd-Frank Act states that entities can merge if they would create such a situation
 - Systematically Important Financial Institutions
- Living Will
 - Recovery and resolution plan for when there is a financial destabilisation
 - Resolution plan is the cost effective wind-up plan
- Ring fencing and electrification
 - Retail banking separated from wholesale banking
 - US Glass-Steagall Act opposing our universal banking model

CHANGES TO BANKING REGULATION

- **Campbell Report** (1981) recommends deregulation of banking
- [Vic] **Martin Committee** (1984) recommends entry of new banks
 - Agreed with Campbell's ideas but added the idea of new banks
 - In 1985 16 new banking licences were approved → improving competition
- **House of Reps Standing Committee on Finance and Public Administration** (chaired by Stephen Martin) (1991) recommends code of banking practice

- Banking regulation moving from businessman in the first two reports to a politician in this one
- Following deregulation and outburst of competition, regard of banks in society went downhill
- Atmosphere of bank bashing
- This committee attempted to deal with the customer dissatisfaction
- **Wallis Report** (96/97) recommends significant change to regulatory framework to keep pace with a range of forces (e.g. customer needs, technology, globalisation)
 - Gained bipartisan support – nearly all recommendations enacted
 - Financial System Inquiry chaired by Stan Wallis
 - Established June 1996, final report March 1997
 - Recommends regulation by activity not entity
 - E.g. set up of bank, building society or credit union didn't matter → if they all do the same thing, should be regulated in the same way
 - Recommended "twin peaks" regulatory framework
 - Regulating by activity results in two main areas:
 - Conduct: how customers are treated → ASIC
 - Prudential regulation: how financial institutions are run (capital requirements etc.) → APRA
 - There is actually the RBA as a third
 - Alternative approach: Himalayas (US approach)
 - Basically a lot of regulatory agencies
 - Resulted in communication difficulties (e.g. Lehman Brothers collapse)
 - Another alternative: super-regulator (old UK approach) – now moved towards a twin peaks kind of model
 - Recommended a single licensing regime for financial sales, advice and dealing and for licencing of deposit-taking institutions (regulating by function, as specified above)
- Removal of 6-pillars policy, but 4 pillars policy retained
 - 6 pillar policy wasn't law – four major banks and two major life insurance companies prohibited from merging
 - Wallis wanted to abolish but PC implemented 4 pillar policy instead
 - Possible 5th pillar → allowing mutual societies to become banks
- **Financial System Inquiry** chaired by David Murray handed down interim report in July 2014, final report in December 2014
 - Idea that things are working, but certain things could be tweaked
 - Resilience
 - Super
 - Innovation
 - Consumer outcomes
 - The regulatory system: who regulates the regulators?

APRA

- Responsible for prudential regulation, banking supervision and authorisation of deposit-taking institutions
 - Role was transferred from the RBA
 - Regulated banks, but now that regulation is by function, banks and non-banks alike are regulated by APRA
 - Authorising occurs through the provision of a 'banking authority'
 - Supervises private health insurance companies
 - Collates reports
- APRC in Wallis Report (recommendation 31)
- APRA Act 1998 (Cth): role and structure
- Banking Act 1959 (Cth): interaction with banks (i.e. how it actually runs)
 - S9 sets out the banking authority
 - Can be subject to conditions (e.g. foreign banks >\$250K deposits, can only fund incorporated entities or non-residents)
 - Can be revoked
 - S11AF: APRA can make prudential regulations that have power of law
 - S66 and 66A: restricts the use of phrases like 'bank', 'ADI' and 'credit union' etc.
- Originally had a non-executive board, but after the HIH collapse and the royal commission, APRA now operates with a three member executive group
 - Royal commission found internal mismanagement and fraud
 - Found that APRA's supervision and intervention fell short of what the public were entitled to
- Conducts regular reviews and visits
 - Very structured: i.e. not one to jump in and do things ad hoc
 - They have a particular focus of each review year
- Responsible for the financial claims scheme: banks contribute money to a fund that is the first source when a bank has liquidity problems (i.e. the industry helps itself)
- Problem with the \$250K guarantee → single customer view
 - Difficult to calculate each individual's entitlement when there are trusts, joint accounts involved
- 250K per banking entity: so \$125K with CommBank and Bankwest gets to total
- APRA's interest for some time has been maintaining Basel standards
 - Very prudent in this respect → wants them to do it faster than the rest of the world
- Ratings: developed internally to classify entities they regulate once reviewed
 - PAIRS rating
 - Probability and impact ratings system
 - SOARS rating
 - Supervisory oversight and response system

ASIC

- Responsible for consumer protection in the provision of financial services, market integrity, licencing of deposit (AFSL) and lending (ACL) financial service providers, administration of companies and securities law
 - These licences are different from APRA's banking authority
- Corporations and Financial Services Commission in Wallis Report (recommendation 1)
- ASIC Act 2001 (Cth): role and structure
- Corporations Act 2001 (Cth): licencing for deposit investment and advice
 - S131 → carve-out for financial services consumer protection (ASIC has this role)
 - Cth doesn't have the power to make consumer protection laws generally
 - The referral power had to be used for the rest, but the financial stuff was already there
- National Consumer Protection Act 2009 (Cth): licencing for consumer lending

- **Conducts reviews, investigations and raids**
 - ASIC is more ad hoc – more likely to just barge in and conduct a regulatory raid
 - Police force of the financial world
- Regulatory guides persuasive but not legally binding
- **Wingacaribee Case**
 - Looked at whether there had been misleading and deceptive conduct in regards to a number of acts
 - Very difficult for the judge to determine which regulations to apply
 - Used to just be s56 of the TPA
 - (He's basically just having a whinge) → Rares J's comments "**legislative porridge**")
- Issues consultation papers and information sheets (e.g. FAQs on matters like applying for a credit licence)
- Can issue class orders (i.e. saying that they won't pursue an action for the moment to give you a chance to comply)
- They also issue notices → s30 and 34 say that they can be provided with information of the company (i.e. books)
- They can issue a media release as a kind of penalty → not saying much but making it public that there had been a problem
- Also responsible for financial literacy (ASIC Act)

RBA

- Responsible for financial system stability, monetary policy, note issue, and operates as the central bank
- Not as much in the front line as it was pre-Wallis
- Includes Payments System Board responsible for payments system policy in Wallis Report (rec 61)
 - Important change after Walls
 - Therefore, RBA has two boards as apart of its regulatory framework
- RBA Act 1959 (Cth)
 - 9 member board, Glen Stephens is Chairman
 - s10C: RBA policy will prevail over PSB policy
 - s34: note issue (not coins – currency act: mint)
- Payment Systems (Regulation) Act 1998 (Cth)
 - The way money gets out of one account and into another
 - 8 member board, Glen Stephens is again the Chairman
 - Policy making entity
- Payment Systems and Netting Act 1998 (Cth)
 - Offsetting money owed and money owing to a company into one sum
- **Designated payments systems** are regulated by the RBA
 - Designation occurs when the policy board recommends and the RBA goes out and implements a payment system
 - That means the RBA can make the rules of how it operates
 - E.g. ATMs, EFTPOS, VISA (MasterCard abided by regulations voluntarily)
- Advices are highly persuasive but not legally binding
- Responsible for issue of bank notes and is banker to the government

COUNCIL OF FINANCIAL REGULATORS

- All three limbs meet up in a forum
- A Treasury rep was added after HIH

OTHERS

- **AUSTRAC**
 - Australian Transaction Reports and Analysis Centre
 - Dual roles:
 - **Regulation of money laundering and counter-terrorism financing**

- **Financial intelligence agency**
 - Works with the Federal Police, ASIC, overseas bodies etc.
- Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
 - Suspicious matter reporting (s41)
 - Significant cash transactions of \$10000 or more (s43)
 - International funds transfers by designated service providers (which includes banks) (s45)
 - Service providers have to lodge compliance report (s47)
 - Provision against tipping off (telling the dodgy person that you're reporting them)
- **ACCC**
 - **Regulates anti-competitive behaviour but not for financial services** (s131A)
 - E.g. s12DA of **ASIC** Act re misleading or deceptive conduct (note: Rares J's comments "legislative porridge") Wingacarribee Case
 - Competition and Consumer Act 2010 (Cth)
 - Authorises restrictive trade practices (s88)
- **OAIC**
 - Office of the Australian Information Commissioner
 - Includes Office of the Privacy Commissioner
 - Regulates privacy of personal information of individuals
 - Freedom of information, health information and privacy
 - Privacy Act 1988 (Cth) amended by 2014 legislation
 - **13 Australian Privacy Principles** (APPs), credit reporting includes negative, positive and comprehensive (Part 111A)
- **Office of Deregulation 2013**
 - Govt announced a regulatory audit framework (regulating the regulators)
 - Impact of productivity on the people the regulators regulate (i.e. the impact of red tape)
- Misc terms
 - **ADI**: Authorised Depositary Institution (authorised by APRA)
 - **NOHC**: Non-Operating Holding Company (not itself a bank but has a bank with authority as its subsidiary; s11AA; e.g. Macquarie Group)
 - **DSIFI**: Domestic Systematically Important Financial Institution

THE BANKER – CUSTOMER RELATIONSHIP

- **Contractual relationship** that can be varied by agreement
 - If there's no intention to contract, then there's no mandate
- Based on **debtor-creditor relationship** (Foley v Hill 1848 on pg 85 of MT)
 - Not principal of agent, not trustee; it is debtor-creditor relationship based on contract
- **Single continuing contract** rather than a series of contracts made on each deposit (e.g. Joachimson v Swiss Bank Corp (1921))
 - In the absence of a new agreement, a second deposit is made on the same terms as the first deposit (Hart (Inspector of Taxes) v Sangster (1957))
- Commences when instructions are accepted (Woods v Martins Bank Ltd 1959)
 - Don't need a bank account (duration point)
- Includes the **practice of bankers** which may vary over time (Hare v Henty 1861)
 - Normal/generic banking practice – varies in the circumstances – question of fact
- Also includes elements of common law, legislation and codes of practice
- **Distinguishing factors:**
 - No duty on the banker to seek out the customer and ask if they want to withdraw the money
 - Pay only balance, not more than what you have in your account (unless you have an overdraft facility (Bank of NSW v Laing)
 - Also, bank doesn't have to pay \$50 if you have \$30 in one account and \$20 in another (netting)

DUTY OF THE BANKER

(five MAIN duties of a banker (possible SAQ))

- (1) Receive money (deposits) and collect bills (withdrawals) for the customer's account (Joachimson v Swiss Bank Corporation 1921)
- (2) Repay money on the unambiguous written order of the customer at the branch during opening hours (Joachimson's Case)
- (3) Not cease to do business without reasonable notice (Joachimson's Case)
 - Prosperity Ltd v Lloyds Bank Ltd (1923) McCordie J – elaborated on the **meaning of reasonable notice**
 - Depends on the facts of the case
 - Minimal notice required when: small account drawn upon only by cheques cashed by the customer for his own purposes
 - More notice required when: customer sending his cheques to various parts of the country
 - More notice again required when: sending cheques to different parts of the continent; where there is a more widespread course of dealings: bills of exchange, credits, title deeds etc.
 - Practical example → Business customers will need greater notice due to the fact that their cheques bouncing due to an account closure isn't a good look for the company's reputation
- (4) Observe secrecy in relation to information about the account, subject to 4 exceptions (Tournier v National Provincial and Union Bank of England 1924) = banker's duty of confidentiality
 - Four exceptions to secrecy (week 4 class)
- (5) Duty of care is that of a reasonable person (Hedley Byrne and Co Ltd v Heller and Partners Ltd 1964) → **see pg 95 of materials**
 - Reasonable man would have three course of action open to him when asked for advice:
 - Stay silent
 - Give advice with a disclaimer that he has accepted no responsibility
 - Give advice with no such disclaimer → it is in this situation that the reasonable person would accept some responsibility
 - Any additional special duty is a question of fact (San Sebastian Pty Ltd v The Minister 1986 HC; the FX examples)
 - "The special complications which arise in connection with the imposition of a duty of care on the author of a statement can only be unravelled in a variety of factual situations"