*no distinction between individual and corporate securities.* The proposed law covers all securities over personal property, whether credited by individuals, partnership or corporations. This may reduce the practice of financial institutions requiring borrowers to incorporate before finance is provided.

*remedies.* The Commission did not reach agreement upon whether remedies based on the North American rules should be incorporated in the legislation. It did agree that provisions giving special protection to consumers should be contained in separate consumer protection legislation.

*harmonisation.* In Australia, security arrangements under consumer credit contracts are governed by the credit legislation. This is currently being revised by the VLRC for the Standing Committee of Consumer Affairs Ministers. It is the subject of a recent comprehensive book, by A Duggan, S Begg and E Lanyon, *Regulated Credit: The Credit and Security Aspects* published by the Law Book Co. Many of the problems encountered in New Zealand also occur in Australia. The proposals of the NZLC may stimulate interest in reform of Australian law with a view to possible harmonisation.

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## extensive review of banking law and practice in the UK

> Bankers are just like anybody else, except richer.
>
> Ogden Nash, verse title, 1938

*the Jack committee.* In 1987 the United Kingdom Treasury and the Bank of England established a three-person Committee to review the law and practice relating to banking services, chaired by Professor RB Jack. This Committee reported in February 1989 (Cm 622, HMSO). Its terms of reference were wide-ranging, extending to statute and common law affecting all aspects of services provided by banks. The only excluded areas were matters of company law, laws relating to 'prudential supervision' of banks, company laws and matters related to the market, such as competitive pricing and the cost of credit. The Committee was required to examine developments in banking law and practice throughout the world. It was also required to consult widely with banks and other interested organisations.

*the changing role of banks and banking law.* The legal rules relating to the provision of banking services are a mixture of common and statute law. The common law, which is the prime source of rules relating to the relationship of banker and customer, took most of its present form in the last century. Statutes provide the framework of rules relating to negotiable instruments, such as cheques, promisory notes and bills of exchange, but, as the Committee noted, 'the nature of banking has changed beyond recognition since the main statutes were drafted'. The law of banker and customer is based mostly on terms implied into an unwritten contract by the operation of common law principles, though the introduction of plastic payment and credit cards has led to greater reliance on express contracts to govern certain aspects of the relationship of banker and customer. Among the ways in which banking practice has changed have been the 'accelerating growth in electronic banking' such as Electronic Funds Transfer at Point of Sale ('EFTPOS') and Automatic Teller Machines ('ATM'). (See *Reform*, April 1989, p 73) The Committee also found that

> banks have inevitably become more commercial in their outlook towards customers.

> The bank manager has perforce moved away from his role as the trusted financial adviser, the 'man of business', to that of the salesman of a whole range of products and services. Automation has further depersonalised the relationship, putting it on a more formal basis of contract.

Recent articles in the Australian media, reporting a combination of high interest rates for bank loans and record profits earned by banks indicate that the changing role of banks is not confined to the United Kingdom. There appears to be some dissatisfaction with aspects of current banking practice in Australia.

*the committee's approach.* The Committee was given the power to recommend new legislation if it considered this necessary. It did not assume that its mandate was to rewrite the law of banking completely. It recognised that recent UK statutes relating to Data Protection (1984) and Financial Services (1986) had already subjected banks to considerable regulation and it did not want to introduce new regulations unless this was clearly needed. Having determined that its objectives were to develop and foster

- fairness and transparency in the banker-customer relationship
- confidence in the security of the banking system
- efficiency, and
- confidentiality in the relationship of banker and customer,

it decided that these objectives could be best achieved by a balance of competing interests represented by a mixture of new statutes and non-statutory regulation (which, it points out, is not equivalent to self-regulation). Its recommendations include the enactment of new legislation — a Banking Services Act, a Cheques and Payment Orders Act (similar to the Australian legislation passed in 1986, but possibly extending further), and a Negotiable Instruments Act to replace the Bills of Exchange Act 1882, as well as amendments to other acts concerning evidence of banking transactions — and the establishment of a number of codes of good practice by the banks themselves. In the United Kingdom, the government may exercise powers under the Fair Trading Act 1973 Vic) to give statutory effect to such codes in certain cases where voluntary compliance is difficult to obtain. The Committee felt that this mixture of statute and non-statutory regulation would provide the necessary mix of certainty and flexibility needed to cope with the needs of a rapidly developing area of nationally significant economic activity without inhibiting innovation.

*cheques and other negotiable instruments.* Although cheques are a special kind of bill of exchange, their function has become different from that of other commercial paper. They now provide a very significant means of effecting payment, though in this role electronic transfers of funds are increasingly important. The number of cheques in circulation and the need for an efficient system of clearing cheques means that the provisions of the Bills of Exchange Act are no longer appropriate for this function. The Jack Committee has recommended a new Act to deal with cheques and payment orders. A separate Act would deal with other bills of exchange and promissory notes, which have also acquired new functions. Instead of being a means of payment, they have developed into a means of providing commercial finance, and the new law, while retaining many features of the century-old Bills of Exchange Act, should also provide for the new function of bills.

Among the changes which the new laws would embody are

- removal of the requirement for consideration for bills of exchange and negotiable instruments

- removal of the requirement that every negotiable instrument should be for a 'sum certain in money', in order to accommodate modern commercial arrangements for discounting and the payment of interest
- provisions facilitating the choice of law governing various aspects of international negotiable instruments
- special provisions relating to the effect of forged and unauthorised signatures on bills, to bring British law into harmony with that of its European partners
- abolition of some of the current formalities for 'noting' and 'protest' of dishonoured bills.

Many of these changes are in line with recommendations of UNCITRAL (the United Nations Commission on International Trade Law) and the OECD (Organisation for Economic Co-Operation and Development).

*new rules for new technology.* The introduction of new banking services which rely on new technology, and also new statutory obligations on banks, especially the Supply of Goods and Services Act 1982 (UK), the Unfair Contract Terms Act 1977 (UK) and the Data Protection Act 1984 (UK), have affected the relation between bankers and customers. The Data Protection Act forbids banks from disclosing some information relating to their customers. Other laws dealing with drug trafficking and prevention of terrorism require banks to disclose information about their customers. The Jack Committee has recommended that several aspects of the common law rules relating to the relation of banker and customer, especially those affecting to confidentiality of information about customers, should be replaced by statutory provisions contained in a Banking Services Act. The common law restrictions on the rights of banks to disclose information about their customers would be tightened. Banks would only be able to disclose information about customers on grounds of public interest if this were expressly required by statute. It would no longer be possible for courts to find that customers has impliedly consented to banks giving information about them to third parties. Banks' rights to do so would be limited to cases where the customer had consented expressly in writing and in advance. The Committee noted the problems that arise where a customer enters into a financial transaction with a company which is related to, but a separate legal entity from the bank — for example, a finance company controlled by the bank. This situation raises particular problems of company law, but the Committee did not recommend legislation to deal with it.

The Committee recognised that there was a need for special protection of customers who use electronic banking services, especially in relation to the authentication of instructions given by a customer to a bank (for example, the use of transaction cards and personal identity numbers ('PIN'), the operational security of electronic banking transactions, and the question of liability in cases of fraudulent use or technical failure of electronic banking equipment. It noted that laws relating to different types of plastic cards were not consistent. Some types of cards which can be used with ATM and EFTPOS systems are regulated by consumer credit legislation, which may not be compatible with the technical requirements of provision of banking services.

Among the specific questions considered by the Jack Committee in relation to the use of ATM and EFTPOS systems are a number which were referred to in a recent Australian study by the Trade Practices Commission (see *Reform* April 1989, p 73). These include

- the limitation of the customer's liability to the bank in the case of stolen or mislaid cards
- the place of the onus of proof that the use of an ATM or EFTPOS system is unauthorised
- the resolution of disputes between banker and customer over use of electronic banking services.

In the United States such matters are covered by the federal Electronic Funds Transfer Act 1978, which is expressly a consumer protection statute. Both the European Communities and the OECD are developing standard rules to deal with problems affecting consumers of electronic banking services. The Committee considered that legislation is required to deal with questions such as the onus of proof in cases of the unauthorised use of lost of stolen cards and the registration of notification agencies (who advise banks when customers' cards are lost or stolen), but, because of technical complexity and the rapid development of technology, suggest that other protection for customers be provided through codes of good practice at this stage. However, the Committee concedes the possibility that these codes might have to be given statutory force at some future time.

*other aspects of the banker-customer relationship.* The Committee was attracted in some ways to the idea of a 'model contract' which would provide standard basic terms for the banker/customer relationship, though it was aware that such a measure might be anti-competitive. Rather than have such standard terms enacted by legislation, it was content for the time being to leave this to a code of good practice, which would cover matters such as the terms and conditions attaching to various aspects of the relationship and the circumstances in which the bank could vary those terms and conditions without the agreement of the customer.

One aspect of the common law did call for immediate statutory change. At common law the relationship of banker and customer is based on an implied contract, which gives use to both the relationship of debtor and creditor and of principal and agent. In England at least, it also obliges each party to act with due care for the interests of the other. Contributory negligence is not a defence in actions for breach of contract, and if one party acts negligently, the amount recoverable cannot be apportioned to take account of the negligence by the other. The Committee recommends that a provision in the Banking Services Act remedy this position, so that where the bank's negligent action is partly due to the customer's neglect, for examply, in failing to supervise the activities of clerks and bookkeepers who have control of cheque forms, the customer's negligence would be taken into account in calculating the amount of damages recoverable.

The Committee also recommended that statutes could enable banks to require proof of identity of persons seeking to open accounts. This has recently been dealt with in Australia by the 'Tax File Numbers' legislation.

*dispute resolution.* At present, most commercial banks in the UK are parties to an agreement which sets up a banking Ombudsman, who has the function of enquiring into and resolving complaints about the use of banking services, particularly those involving electronic banking. The Committee recommends that the Banking Ombudsman should have a statutory foundation.

*evidence about banking transactions.* The Committee has recommended that some existing statutory rules relating to evidence about banking transactions should be replaced by new legislation

because they have not kept pace with the introduction of the new technology used in modern banking.

*constructive trusts.* The courts have developed the law of constructive trusts in ways which cause problems for banks. The Committee acknowledges the existence of these problems, but because they are complex and not confined to banking recommended that the law of constructive trusts be referred to the Law Commission for review.

*implications for Australia.* Much of the law and practice of British banking applies in Australia. Apart from the Cheques and Payments Orders Act 1986 (Cth), the Bills of Exchange Act 1909 (Cth) reproduces most of the English 1882 Act. The common law applies equally to banking in Australia. In Australia, recent legislation relating to tax file numbers, disclosure of material relating to drug trafficking and other crimes, and possibly the Privacy Act 1988 relate directly to banking. Section 52A of the Trade Practices Act 1974 (Cth), which allows courts to give relief to victims of 'unconscionable' contracts, may affect banking contracts. The Commonwealth Minister for Consumer Affairs, Senator Nick Bolkus, has recently announced planned legislation relating to the activities of credit reference agencies — a matter which the Jack Committee considered very carefully. Banks in Australia have recently established a scheme for a banking Ombudsman. Many of the recommendations of the Jack Committee may be as relevant in Australia as they are in the UK.

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## another way

> Positive, adj. Mistaken at the top of one's voice.
>
> Ambrose Bierce, *The Devil's Dictionary*

On 3 June 1989 the Australian Institute of Judicial Administration held a Seminar on Aspects of Alternative Dispute Resolution in conjunction with the Australian Commercial Disputes Centre Ltd. The meeting was well attended by the judiciary and the profession, and by academic, administration and government lawyers. The Attorney-General Lionel Bowen was present.

The stated purpose of the day was to explore how much common ground there might be between the traditional court system of settling disputes and 'alternative' approaches, which emphasise consensual or informal dispute resolution, and how much can be learned from one by the other and used for the general benefit of the community.

The AIJA also hoped to define some useful areas for possible future research.

*adr in hawaii.* In the first session Dr Peter Adler, Director of the Program on Alternative Dispute Resolution for the Supreme court of Hawaii spoke on 'Alternative Dispute Resolution in American Courts: Recent Developments'. In the United States 60,000 lawsuits are filed each day; less than 10% go into Court, less than 5% to a jury. There are 900,000 lawyers and they are paid $(US)35 billion per annum, representing 1.5% of the GNP.

There is, in the US, dissatisfaction with civil justice because of its high cost and a demand for new and more satisfying ways of resolving disputes. This