Liability for Misleading or Deceptive Conduct in the Banking Industry

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Abstract


Introduction

Bankers owe a contractual duty of confidentiality to their customers in matters concerning their customers’ accounts. However, bankers are also subject to statutory prohibitions on misleading or deceptive conduct. It is now an established principle of law that silence may amount to misleading or deceptive conduct. The conflicting demands of secrecy on the one hand, and disclosure on the other, require bankers to find the right balance on a case-by-case basis. This article briefly introduces the duty of secrecy. The article then outlines the law of misleading and deceptive conduct generally, followed by a specific examination of its application to banks and providers of financial services. The article concludes with recommendations to bankers on how to reduce possible legal liability.

The legal framework

The relationship between banker and customer is traditionally based on contract. Bankers owe their customers an implied contractual duty to maintain confidentiality, at least in respect of their customers’ account transactions and related guarantees and securities. The common law duty of confidentiality is also reflected in the National Privacy Principles contained in the Privacy Act 1988 (Cth), thus adding statutory force to the banker’s duty to keep account matters secret. Furthermore, the duty of secrecy and the exceptions to this duty are also set out in clause 22 of the Code of Banking Practice.

On the other hand, both state and federal parliaments have enacted legislation that prohibits misleading or deceptive conduct. Conduct, in this context, may...

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1 See, for example, Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 79 ALR 83; Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31.


3 Privacy Act 1988 (Cth) sch 3.

4 Code of Banking Practice <http://www.bankers.asn.au> at 24 August 2009. This Code was first published by the Australian Bankers’ Association in August 2003. The Code is voluntary, but once adopted by a bank it has contractual effect between the bank and its customers.
include silence. It follows that a banker’s failure to disclose a matter of relevance may amount to a breach of a statutory duty. The earliest legislative intervention is s 52 of the Trade Practices Act 1974 (Cth) (‘TPA’) that prohibits corporations from engaging in misleading or deceptive conduct. The various state Fair Trading Acts (‘FTAs’) contain similar prohibitions and these apply, more broadly worded, to a ‘person’. More recently, the Australian Securities and Investments Commission Act 2001 (Cth) (‘ASIC Act’) was enacted. Section 12DA of this Act prohibits misleading or deceptive conduct by a person ‘in relation to financial services’. Whilst recognising other sources of law or obligation, this article only focuses on the banker’s common law duty of secrecy and s 52 of the TPA.

The common law duty of secrecy
The duty to keep certain information confidential arises from the circumstances in which the information was imparted or received. The English case of Coco v AN Clark (Engineers) Ltd is the authority for the elements a plaintiff needs to establish to succeed in an action for breach of confidence. Megarry J stated:

First, the information itself, in the words of Lord Greene MR in the Saltman case, must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

The leading case in which a court was asked to examine the existence and scope of the banker’s duty of secrecy is Tournier v National Provincial & Union Bank of England. Tournier had an overdrawn bank account with the defendant bank. When he failed to make the repayments as agreed the bank manager sought to obtain his contact details from Tournier’s employer. During this conversation the bank manager let it slip that Tournier had failed to repay the bank as promised, and had instead endorsed cheques in favour of a bookmaker. Tournier’s contract of employment was subsequently not renewed, and he sued the bank for breach of confidentiality. The court found in favour of the bank at first instance, but Tournier was successful on appeal. The main principle of law established by the English Court of Appeal in this case was that banks owe a strict duty of confidentiality in all matters concerning their customers’ accounts transactions and information, including securities and guarantees. However, the appeal judges’ opinions as to the exact scope of that duty differed. Lord Atkin took a broader approach than the other members of the court. He stated:

I further think that the obligation extends to information obtained from sources other than the customer’s actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers for example, with a view to assisting the bank in conducting the customer’s business, or in coming to decisions as to its treatment of its customers.

Despite finding existence of a legal duty of secrecy, the appeal judges also agreed that the duty was qualified, not absolute. Bankes LJ formulated four categories of exceptions to this duty. He stated that the duty of secrecy did not apply in circumstances where (1)

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5 Fair Trading Act 1992 (ACT) s 12; NSW Fair Trading Act 1987 (NSW) s 42; Fair Trading Act 1989 (Qld) ss 38; Fair Trading Act 1987 (SA) s 56; Fair Trading Act 1990 (Tas) s 14; Fair Trading Act 1999 (Vic) ss 9-11; Fair Trading Act 1987 (WA) s 10; Consumer Affairs and Fair Trading Act 1990 (NT) s 42.
6 Peter E Nygh and Peter Butt (eds), Butterworths Australian Legal Dictionary (1997) 397.
7 Coco v AN Clark (Engineers) Ltd [1961] RPC 41.
8 Ibid 47.
10 Ibid 485.
disclosure was under compulsion of law; (2) disclosure was pursuant to a duty to the public; (3) disclosure was required in the interests of the bank; (4) disclosure was made with the customer’s express or implied consent. A more recent formulation of the duty of confidentiality was given in *Royal Bank of Canada v IRC*12 where the court held that the duty was owed in respect of any banking transaction undertaken for the customer, both ordinary and extraordinary.13

While recognition of the bank’s duty of secrecy is a necessary safeguard to protect the privacy of the bank’s customers, it does little or nothing to protect the interests of, for example, providers of securities or guarantees. At common law, such persons are subject to the principle of *caveat emptor* (let the buyer beware) unless they are able to invoke one of the four exceptions listed above.14 Parliament has since intervened and modified the common law.

The statutory regime

Part V of the TPA is the first comprehensive set of provisions aimed at providing consumer protection.15 Section 52 of the TPA provides: ‘A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’.16 Section 12DA of the ASIC Act mirrors s 52 of the TPA in relation to financial services. It provides ‘A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive’. ‘Financial services’, as defined by the ASIC Act, include the provision of financial product advice, dealings in financial products and operations in a financial market, to name a few.17 A ‘financial product’, in turn is defined as a facility through which a person ‘makes financial investments, manages financial risk, [or] makes non-cash payments’.18 While the TPA still applies to traditional banker/customer relations, the ASIC Act now applies in relation to any ‘financial services’.19 To avoid duplicity of discussion, any reference in this article to s 52 of the TPA shall also be seen as a reference to s 12DA of the ASIC Act.

Section 52 of the Trade Practices Act 1974 (Cth)

To establish a breach of s 52 of the TPA the plaintiff must prove each of the following elements:20

- that the defendant (bank) is a corporation;
- that the defendant engaged in conduct;
- that the conduct was in trade or in commerce; and
- that the conduct was misleading or deceptive, or likely to mislead or deceive.

Each of these elements is discussed in outline below.

The defendant is a corporation

Due to constitutional constraints on parliament’s powers to legislate, the Commonwealth has largely relied on its corporations power when passing the TPA.21 However, the Commonwealth may also rely on other heads of constitutional power and thus extend the application of

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11 Ibid 473.
13 Ibid 680.
14 These exceptions are also listed in clause 22 of the Code of Banking Practice, above n 4.
15 Section 2 of the *Trade Practices Act 1974* (Cth) reads: ‘The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and the provision for consumer protection’.
16 This provision is duplicated in state fair trading legislation enacted in each Australian state and territory between 1985 and 1992.
17 *Australian Securities and Investments Commission Act 2001* (‘ASIC Act’) s 12BAB(1).
18 *Australian Securities and Investments Commission Act 2001* s 12BAA(1).
19 *Trade Practices Act 1974* (Cth) s 51AF(1). This section was inserted into the TPA on 1 July 1998. In consequence financial services are now regulated by the Australian Securities and Investments Commission, not by the Australian Competition and Consumer Commission.
21 The *Australian Constitution* s 51(xx) empowers parliament to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.
this Act to entities other than corporations. The ASIC Act and state fair trading legislation, in contrast, apply to ‘persons’.

The conduct was ‘in trade or commerce’
The TPA does not define the meaning of the words ‘in trade or commerce’. It is therefore the role of the courts to interpret their meaning. The leading authority is the High Court’s interpretation given in Concrete Constructions (NSW) Pty Ltd v Nelson. The court said that:

[I]t is plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. … the reference to ‘in trade or commerce’ … can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their very nature, bear a trading or commercial character.

To invoke s 52, it is therefore essential that the conduct complained of be ‘in’ trade or commerce, as distinct from ‘in respect of’ trade or commerce.

Conduct
The meaning of ‘conduct’ is defined by the TPA to include ‘engaging in conduct’, ‘refusing to do an act’ and ‘offering to do an act’. Refusing to do an act in turn includes refraining from doing an act or making it known that a certain act will not be done. The terms ‘refuse’ and ‘refrain’ pertain to a deliberate, rather than inadvertent, failure to act. Silence falls within the definition of ‘engaging in conduct’.

Misleading or deceptive
For conduct to be misleading or deceptive it must contain or impart some misrepresentation. The Oxford English Dictionary meaning defines ‘deceive’ as ‘to cause to believe what is false, to mislead as to a matter of fact, to lead into error, to impose upon, delude, take in’. To ‘mislead’ means ‘to lead astray in action or conduct, to lead into error or to cause to err’.

In Taco Co of Australia Inc v Taco Bell Pty Ltd the court developed a four step test to determine the effect of the misrepresentation (conduct) on the target. The courts have consistently applied this test to determine whether conduct is misleading or deceptive (or likely to be so). In brief, the four steps are as follows:

- Firstly, to identify the target section of the public to whom the conduct is directed. This may be a single person, a group or the world at large.
- Secondly, the conduct is considered by reference to all those falling within the target group, including the educated, the not so well educated, the young, the elderly, etc.
- Thirdly, evidence that someone has ‘formed an erroneous conclusion’ can be tendered as evidence in court, but this in itself is not sufficient to establish a breach of s 52. The court determines, objectively, whether the conduct complained of is, or is likely to be, misleading or deceptive.
- Finally, there must be a causal link between the defendant’s conduct and the misconception.

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22 The Commonwealth Parliament could do so, for example, by relying on the interstate and overseas trade and commerce power contained in s 52(i) of the Australian Constitution. This is possible by virtue of s 6 of the TPA, which extends the application of the Act in certain circumstances. See, for example, Green v Ford (1985) ATPR 40-603.
23 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594.
24 Ibid 604.
25 Section 4(2) of the TPA.
26 Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) ATPR (Digest) 46-010 (Bowen CJ).
27 Taco Co of Australia Inc v Taco Bell Pty Ltd ATPR 40-303. See also, for example, Parkdale Custom Built Furniture Pty Ltd v Puxa Pty Ltd (1982) 149 CLR 191.
28 Weitman v Katies Ltd (1977) ATPR 40-041 (Franki J).
29 Ibid.
31 Above n 19.
It is important to note that s 52 is the most frequently litigated provision of the TPA. This is partly because the plaintiff and defendant need not be bound in contract, nor is it necessary for the plaintiff to prove intention or negligence on the defendant’s part. The plaintiff only needs to establish the above four elements and it is not a requirement that anyone was actually misled. The main remedies for breach of s 52 are damages, injunctions and ancillary orders. There is no ‘due diligence’ defence to an action for breach of s 52 of the TPA. In contrast, the ASIC Act makes defences available in cases of reasonable mistake, reasonable reliance on information provided by third parties, or where the exercise of due diligence could not have prevented a breach.

Silence as misleading and deceptive conduct

The key case that illustrates circumstances in which silence may amount to a breach of s 52, is *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*. Henjo owned a Sydney restaurant. They fitted it with significantly more tables and chairs than permitted by its liquor licence. Henjo advertised the restaurant for sale and Collins viewed and purchased the business. Henjo did not disclose that Collins would need to remove one third of the tables and chairs in order to comply with the licence. The contract for sale excluded liability for representations. The reduced (that is, lawfully allowable) seating number contributed to Collins’ business being unsuccessful and Collins sued. The Federal Court found that Henjo’s silence amounted to a breach of s 52. This case illustrates that the particular circumstances may give rise to an obligation to disclose relevant facts (here, the restaurant’s licensed seating capacity). Once a duty of disclosure is found to exist defences will not operate to exclude liability.

In *Kimberley NZI Finance Ltd v Torero Pty Ltd* French J, rather than applying a ‘duty of disclosure test’, formulated the ‘reasonable expectation test’. He said:

…unless the circumstances are such as to give rise to a reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that that fact does not exist.

The ‘reasonable expectation test’ was again applied by the Full Court of the Federal Court in *Demagogue Pty Ltd v Ramensky* and it is now considered the prevailing test. Black CJ stated that the law did not impose a general duty of disclosure. Instead, the main question should always be whether silence, in light of all the relevant circumstances, amounted to conduct that was misleading or deceptive, or likely to be so.

Section 52 and the banking and financial services sector

Actions for breach of s 52 have been taken against banks in a wide range of banking business. These include the giving of advice, the granting of loans, and the taking of guarantees and mortgages. The following

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33 There is, however, often a degree of uncertainty with respect to the class of persons, and the delineation of the target group, which ultimately determines whether certain conduct has the capacity to mislead. For extracts from relevant cases, see Steinwall, above n 20, 353-355.
34 Section 52 reads ‘misleading or deceptive, or likely to mislead or deceive’. See, for example, *McDonald’s System of Australia Pty Ltd v McWilliams Wines Pty Ltd* (1979) ATPR 40-140 at 18, 518 (Franki J).
35 The wide range of remedies available for breach of the TPA is contained in ss 80-87.
36 Section 82(1B) which was inserted into the TPA by the Corporate Law Economic Reform (Audit and Corporate Disclosure) Act 2004 (Cth) however allows for damages to be reduced in cases of negligence or fault on behalf of the plaintiff.
37 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GI.
38 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83.
39 *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) 46-054.
40 Ibid 53,195.
43 *Demagogue Pty Ltd v Ramensky* (1992) 39 FR 31, 32.
discussion, however, only focuses on silence as a form of conduct in selected types of banking/financial transactions.

**The opposing duties of silence and disclosure**

As outlined above, the common law does not recognise a general duty of disclosure between parties to commercial dealings. In addition, the banker’s duty of secrecy requires personal information to be kept confidential unless the banker can rely on one or more of the exceptions formulated in *Tournier*. It is the role of the court to determine whether silence amounts to misleading or deceptive conduct. This is decided in light of the particular circumstances, including the relationship between the parties and their expectations. A reasonable expectation of disclosure will arise in contracts *uberrimae fidei* and in relationships of a fiduciary nature. However, the obligation to disclose may also extend to relations between a vendor and purchaser, notably where there was an inducement by the vendor and corresponding reliance by the purchaser.

The difficulty in reconciling the two competing legal requirements of confidentiality and disclosure is highlighted by the case of *Kabwand Pty Ltd v National Bank of Australia Ltd*. In this case the National Bank acted as banker for both the vendor and purchaser of a strawberry business. The bank manager knew that the business was unprofitable and that the seller was indebted to the bank to the order of $240,000. He did not disclose this fact to Kabwand, the purchasers, who then sued for breach of s 52. The Full Court of the Federal Court held that, on the facts, the bank owed no duty to disclose the financial performance of the business. The court reasoned, that for a duty of disclosure to arise there must be a reasonable expectation that disclosure be made. But, because the purchasers knew of the bank’s duty of secrecy, there could be no reasonable expectation. Finally, in the absence of a reasonable expectation of disclosure, the bank’s silence cannot be considered misleading or deceptive. While this decision might seem reassuring from a bank’s point of view, Martin warns that bankers should always be mindful of the fact that the circumstances may in fact require disclosure by compulsion of law, thus falling within one of the recognised exceptions to the duty of confidentiality.

In the following two cases the court found that the bank had breached s 52 by failing to disclose relevant matters. In *Crisp v Australia and New Zealand Banking Group* the bank manager procured a mortgage over the applicant’s (Crisp’s) house as security for monies owed to the bank by a company of which Crisp’s wife and children were directors. The bank manager failed to inform Crisp that the bank had already dishonoured cheques drawn by that company. The dishonour was likely to have an adverse effect on the company’s business and it was therefore a relevant matter that required disclosure. The court accepted that Crisp would not have given the mortgage, had he been informed of these dishonours. The court found that the bank had engaged in misleading or deceptive conduct and declared the mortgage void *ab initio*.

In the case of *Plum v Commonwealth Bank of Australia* the applicant, Plum, informed the bank’s business development officer that he needed an ‘interest only’ loan to purchase certain land and a second loan to

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46 Ibid.
47 Ibid, obiter 50, 379 (Lockhart J). A misrepresentation may also arise where a literally true statement is coupled with silence as to a vital fact, or when changes in circumstances render an earlier true statement untrue. For a discussion, see *Trouton*, above n 42, 5-6.
develop thirty residential units on that site. The officer advised Plum to take out a cheaper ‘housing loan’ instead and to apply for a development loan at a later stage. The officer did not inform Plum of the bank’s procedures when processing development loans, nor did he give an indication of the likelihood of the second loan being granted. When the bank subsequently rejected Plum’s application for the second loan he sued for breach of s 52. The Federal Court said, that it was standard bank practice to advise clients that development loans were not granted automatically, hence the bank owed a duty to disclose this fact to the applicant. Here, the bank’s silence caused Plum to labour on under the fundamental misunderstanding that the second loan would be approved. Plum in turn acted on this mistaken belief and he suffered a loss. The court awarded Plum damages.

The above cases illustrate that there may be a fine line between the duty of confidentiality and the duty of disclosure. The former is subject to qualifications and the latter hinges on the existence of a reasonable expectation that any material matter would be disclosed. The obligation to disclose may arise from the relationship between the parties, from inducement and reliance and other relevant matters. It is therefore important that bankers consider whether their conduct, in light of the particular circumstances, is likely to mislead or deceive.

**Recommendations**

Martin strongly recommends that bankers remind all parties they are dealing with that they do owe their customers a duty of secrecy. Bankers should also suggest that the other parties direct any questions they may have to the bank’s customer directly for clarification. The circumstances may even require that the banker instructs the other parties to obtain independent advice. This advice shifts the onus from the banker to the other party and thus negates formation of a reasonable expectation of disclosure.

Furthermore, bankers should keep in mind that a breach of s 52 can occur even if their conduct did not actually mislead or deceive anyone, provided it had the potential to do so. Lastly, disclaimers may not be effective and due diligence is not an excuse for breach of the TPA.

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53 Martin, above n 49, 8.
54 Ibid.