

# *Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime*

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## *Abstract*

The banker's common law contractual duty of confidentiality to clients has been well established for over 86 years. The four qualifications to the duty of confidentiality were crafted in 1924 in *Tournier's Case* when crime was viewed as a local phenomenon. The question arises as to whether and how the qualifications have been adapted to permit international cooperation to deal with transnational crimes. The legislature in Australia and elsewhere has significantly expanded the ability of foreign law enforcement agencies and regulators to obtain domestic confidential bank documents. The courts have issued conflicting decisions regarding the scope of the public duty qualification, albeit occasionally authorising banks to disclose confidential information to foreign parties. Faced with inadequate legislative and judicial guidance, banks have drafted new standard form contracts permitting the disclosure of confidential information to foreign authorities without the knowledge of their customers or local authorities. There is a compelling need to codify the qualifications in a statutory instrument so as to deal with the legal uncertainties arising from *Tournier's Case*.

## **Introduction**

The banker's common law contractual duty of confidentiality to clients has been well established for over 86 years. In 1924, in *Tournier v National Provincial and Union Bank of England* ('*Tournier's Case*')<sup>1</sup> the English Court of Appeal held that there was an implied contractual term that a bank will not disclose information concerning its customers to third persons. *Tournier's Case* has been applied and followed in every common law jurisdiction. Indeed, *Tournier's Case* is perhaps the most frequently cited judicial decision in banking law. The contractual duty has been supplemented in various countries by equitable, statutory and constitutional doctrines protecting financial privacy.

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<sup>1</sup> [1924] 1 KB 461.

The common law contractual duty of confidentiality should be distinguished from bank secrecy of the Swiss variety which imposes criminal sanctions on unauthorised disclosure of banking information.<sup>2</sup> Excessive bank secrecy based on the Swiss model has been identified by international organisations and national governments<sup>3</sup> as the greatest single obstacle to fighting transnational crime.

Art 3(2) of the United Nations *Convention Against Transnational Organized Crime* ('*UNTOC*') defines an offence as:

[T]ransnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

The large number of states that have ratified *UNTOC*<sup>4</sup> indicates that states consider transnational crime as a significant problem which needs to be addressed by improvements in international cooperation. Both bank secrecy and bank confidentiality are areas that require enhanced international cooperation in order to combat transnational crimes such as drug trafficking, money laundering, tax evasion, human trafficking, people smuggling, and illicit manufacturing of and trafficking of firearms.

There is growing and significant literature on how international anti-money laundering standards<sup>5</sup> and multilateral transnational crime conventions<sup>6</sup> have sought to reduce excessive bank secrecy of the Swiss variety. Indeed, under pressure from international policy-making bodies such as the Financial Action Task Force and the Organisation of Economic Cooperation and Development, as well as governments in economically powerful jurisdictions, such as the United States of America, bank secrecy legislation in offshore financial centres has been significantly amended, especially in relation to money laundering and tax crimes.<sup>7</sup> However, little has been

<sup>2</sup> See David Chaikin, 'Policy and Fiscal Effects of Swiss Bank Secrecy' (2005) 15 *Revenue Law Journal* 90, 90–110.

<sup>3</sup> See, eg, United States Senate, Permanent Subcommittee on Investigations Staff Report, *Staff Report on Tax Haven Banks and US Tax Compliance* (2010); Jack A Blum, Michael Levi, R Thomas Naylor and Phil Williams, *Financial Havens, Banking Secrecy and Money Laundering* (December 1998) 17–8 <<http://www.imolin.org/imolin/finhaeng.html>>.

<sup>4</sup> *UNTOC* was opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003); there are 147 signatories and 164 parties.

<sup>5</sup> For example, the Financial Action Task Force Recommendation 4 provides that '[c]ountries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations': See Financial Action Task Force, *FATF Recommendations* <<http://www.fatf-gafi.org/recommendations>>.

<sup>6</sup> For example, art 40 of the *United Nations Convention Against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) ('*UNCAC*') provides that a State Party must ensure that 'there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.' See also art 46(8) of *UNCAC* which provides that bank secrecy may not be relied on as a ground for refusing to provide mutual legal assistance to a foreign country.

<sup>7</sup> See J C Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation* (Cornell University Press, 2006).

written about how the common law duty of confidentiality of the *Tournier's Case* variety interplays with transnational crime.

This article focuses on the four well-known qualifications to the duty of confidentiality in *Tournier's Case*: compulsion by law; duty to the public; the interests of the bank; and customer consent. These qualifications were crafted when crime was viewed as a local phenomenon. The application and relevance of those qualifications requires re-examination in light of the globalisation of crime<sup>8</sup> which accelerated in the 1980s and 1990s. The question of whether and how these qualifications have been adapted to permit international cooperation to fight transnational crimes is addressed in this article.

In the past 25 years, the legislature in Australia and elsewhere has significantly expanded the ability of foreign courts, law enforcement agencies and regulators to obtain local confidential bank documents. The 'compulsion by law' qualification to *Tournier's Case* has facilitated international cooperation by piercing the veil of bank confidentiality, thereby assisting in the prosecution of transnational crimes. However, the great weight of judicial authority is that the 'compulsion by law' qualification means compulsion under the law of the jurisdiction where the bank account is held. Consequently, disclosure of a bank secret to a foreign authority is generally only permissible where this is ordered by a local court or justified under local statutory enactment. The other qualifications to *Tournier's Case* have been less helpful. The courts have issued conflicting decisions concerning the scope of the 'public duty' qualification, albeit occasionally authorising banks to disclose confidential information to foreign parties, such as in cases involving significant international fraud. The 'self-interested' qualification has traditionally been viewed as permitting disclosure in very narrow circumstances, such as in litigation involving the bank and the customer. Faced with inadequate legislative and judicial guidance, banks have drafted new standard form bank/customer contracts permitting the disclosure of confidential information to foreign authorities without the knowledge of their customers or local authorities. The 'consent of the customer' qualification to *Tournier's Case* has the potential to eviscerate the duty of confidentiality in a contractual context, and yet there are no criteria as to the scope of the consent contractual clauses. In these circumstances, it is argued that there is a compelling need to codify the qualifications in a statutory instrument to deal with the legal uncertainties arising from *Tournier's Case*.

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<sup>8</sup> The globalisation of crime, its social context and legal ramifications have been documented by international organisations, governments and academics: see Peter Andreas, 'Transnational Crime and Economic Globalization' in Mats Berdal and Monica Serrano (eds), *Transnational Organized Crime and International Security: Business as Usual* (Lynne Rienner Publishers, 2002) 37; Margaret E Beare (ed), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption* (Toronto University Press, 2003); Mark Findlay, *The Globalisation of Crime: Understanding Transitional Relationships in Context* (Cambridge University Press, 2000); Barry Rider (ed), *Corruption: The Enemy Within* (Kluwer Law International, 1997); Richard D Atkins, *The Alleged Transnational Criminal: The Second Biennial International Criminal Law Seminar* (Martinus Nijhoff Publishers, 1995); Albin Eiser and Otto Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law: Documentation of an International Workshop in Freiburg, May 1991* (Max-Planck-Institut für ausländisches und internationales Strafrecht, 1991).

## II Scope and Rationale of the Duty of Confidentiality

It is well established that a banker owes a customer a duty of confidentiality concerning information supplied by the customer to the bank and information gathered by the banker in the course of banking business.<sup>9</sup> The landmark decision of *Tournier's Case* held that there is an implied contractual term between a banker and customer that the banker will not disclose to third parties information concerning the customer. According to *Tournier's Case*, the scope of the banker's duty is not limited to the 'actual state of the account (the amount of money in the account) of the customer' but includes 'any information derived from the account itself' as well as 'transactions that go through the account'.<sup>10</sup> In *Tournier's Case*, the confidential information was sourced from a third party bank in circumstances where inquiries were being made about the identity of the person to whom Tournier had endorsed a cheque. The bank breached its contractual duty when it disclosed to the employer of its customer that the cheque had been endorsed to a bookmaker.

There are other doctrinal bases for incorporating a duty of confidentiality in banker-customer relationships. Equity has imposed a duty of confidentiality in circumstances where there may be no contract between persons, for example, to prospective customers of banks, who may expect that information supplied by them is subject to the protection of the law.<sup>11</sup> In some instances, both contractual and equitable duties of confidentiality may be present. However, the equitable basis of the duty of confidentiality may provide a more solid and permanent basis for this duty, compared with the more fragile character of the contractual duty. The reason for this is that the contractual basis for the duty of confidentiality depends on the determination by the courts that such a duty is implied by contract, which may, by express provision, be amended by the parties to the contract.

### *A Rationale of Bank Confidentiality*

Bank confidentiality has been justified by a variety of legal, economic and social purposes. Although the fundamental banker/customer relationship is that of a debtor and creditor,<sup>12</sup> an agency relationship is also associated with many of the functions of a banker.<sup>13</sup> It is a general principle that an agent is bound by a duty of confidentiality to its principal in regard to information obtained during the agency relationship. As Professor Peter Ellinger has pointed out: 'The agent's duty of confidentiality is a facet of the principal's protection against unwarranted attempts

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<sup>9</sup> See George Weaver and Charles Craigie, *The Law Relating to Banker and Customer in Australia* (Lawbook, 2009) vol 2 at [2.3400]–[2.4770]; E W Wallace, 'Australia' in Francis Neate and Roger McCormick (eds), *Bank Confidentiality* (Butterworths, 1990) 1–33.

<sup>10</sup> *Tournier's Case* [1924] 1 KB, 473 (Bankes LJ); 485 (Atkin LJ).

<sup>11</sup> See *A-G (UK) v Guardian Newspapers Ltd (No 2)* [1988] 3 WLR 776, 806 (Goff LJ); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (Megarry J).

<sup>12</sup> See *Foley v Hill* (1848) 9 ER 1002, 1005; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110, 127; *Laing v Bank of New South Wales* (1952) 54 SR (NSW) 41; *Bank of New South Wales v Laing* (1953) 54 SR (NSW) 76; *Croton v The Queen* (1967) 117 CLR 326; *Grant v The Queen* (1981) 147 CLR 503.

<sup>13</sup> For example, a bank is the agent of a customer for the purpose of collecting cheques, and receiving interests on bills deposited with the bank: see Alan Tyree, *Banking Law in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2008) 43.

by outsiders to inquire into his (or her) affairs'.<sup>14</sup> Bankers as agents owe duties of confidentiality to their customers because of the trust placed by customers in the professional status of bankers.<sup>15</sup> Bank confidentiality is a practical necessity as bankers often have 'access to a good deal of information about [their] customer's business, which each customer would have reason to conceal from [their] commercial competitors'.<sup>16</sup> The disclosure by banks of details of a customer's financial affairs to 'the wrong person or at the wrong time, could do the customer harm'.<sup>17</sup>

A different rationale was expressed in *Tournier's Case* where the court considered that the credit of the customer depended on the strict observation by the bank of its confidentiality duty.<sup>18</sup> The rationale in *Tournier's Case* for implying a contractual duty of confidentiality in a commercial bank/customer relationship is applicable to a wider group of financial institutions. There is a strong argument that bank confidentiality is not limited to commercial banks, but also applicable to other financial institutions seeking deposits from customers. It has been held that there is an implied contractual duty of confidentiality between credit unions and customers,<sup>19</sup> and that, arguably, a similar duty is applicable to building societies<sup>20</sup> and merchant banks.<sup>21</sup>

Another conception is that bank confidentiality has an economic value to a customer which should not be disturbed unless justified by law. Related to this is the idea that banks should not be permitted to disclose customer-related information for marketing and other commercial purposes without obtaining the customer's prior consent. However, there are wider public interests in protecting the confidentiality of customers' secrets. The duty of confidentiality is frequently linked to the maintenance of customer confidence in the banking system<sup>22</sup> which is a major source of finance for businesses. The recent global financial crisis demonstrates that a lack of confidence in the banking system undermines business activity, growth and employment. If customers lose confidence in their banks, widespread withdrawals stemming from panic could be generated, leading to bank illiquidity and ultimately to bank liquidations.

The contractual duty of bank confidentiality has been supplemented by voluntary codes of conduct<sup>23</sup> and legislative enactment in a number of

<sup>14</sup> E P Ellinger, Eva Lomnicka and Richard Hooley, *Ellinger's Modern Banking Law* (Oxford University Press, 3<sup>rd</sup> ed, 2002) 166.

<sup>15</sup> See *Parry-Jones v Law Society* [1969] 1 Ch 1, 9 (Diplock LJ). See generally, Rosemary Pattenden, *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (Oxford University Press, 2003).

<sup>16</sup> *G S George Consultants and Investments Pty Ltd v Datasys Pty Ltd* (1988) (3) SA 726 (W) 726, 736 (Stegmann J).

<sup>17</sup> *Ibid.* For an example of a bank breaching its duty of confidentiality, giving rise to a successful claim of damages, see *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377.

<sup>18</sup> *Tournier's Case*, above n 10, 474.

<sup>19</sup> *Bodnar v Townsend* (2003) 12 Tas R 232.

<sup>20</sup> Alan Tyree, John O'Sullivan and David Cooper, 'Does *Tournier* Apply to Building Societies?' (1995) 6 *Journal of Banking and Finance Law and Practice* 206.

<sup>21</sup> Tyree, *Banking Law in Australia*, above n 13, 180, citing the decision in *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97, 115 (Hill J).

<sup>22</sup> Review Committee on Banking Services Law (UK), *Banking Services: Law and Practice Report by the Review Committee* (HMSO, 1989) [5.26] ('*Jack Report*').

<sup>23</sup> See, eg, cl 21 of the *Australian Banker's Association Code of Banking Practice* (2004) which repeats nearly verbatim the bank confidentiality principle in *Tournier's Case*: <<http://www.bankers>.

jurisdictions.<sup>24</sup> In some countries, the duty of confidentiality has been reinforced and/or given a constitutional basis in legislation with criminal penalties for unlawful disclosure.<sup>25</sup> The uncertain scope of the contractual basis for confidentiality has led some jurisdictions to enact a statutory right of confidentiality and then apply it not only to banks and financial institutions, but also to providers of financial services, trust companies and international business companies.<sup>26</sup> Where the duty of bank confidentiality is based on legislative or constitutional enactments, the rationale is often framed on wider grounds tied to basic human rights of privacy.<sup>27</sup> In smaller offshore jurisdictions that have sought to grow their financial services business, bank confidentiality is viewed as essential to economic development.<sup>28</sup> Legislation-based bank secrecy is treated seriously in countries such as Switzerland, where violations result in criminal fines and/or imprisonment.<sup>29</sup>

As the Jack Report on Banking Services observed in 1989, the roots of the duty of confidentiality ‘go deeper than the business of banking; it has to do with the kind of society in which we want to live’.<sup>30</sup> However, as the following analysis of the qualifications to bank confidentiality demonstrates, the advocates of bank confidentiality have been largely unsuccessful in preventing the continuous and deep erosion of that duty by statutory enactments and international agreements.

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asn.au/ABAS-CODE-OF-BANKING-PRACTICE/default.aspx>. The Code, a voluntary agreement, has been adopted by 19 banks operating in Australia and incorporated into written contracts between bankers and customers: see cl 10.3. A breach of the Code forms the basis of a complaint by individual customers and small businesses to the Financial Ombudsman who operates a self-regulatory dispute resolution service. See Financial Ombudsman Service, *Banking Code of Practice* (2011) <[http://www.fos.org.au/centric/home\\_page/about\\_us/codes\\_of\\_practice/banking\\_code\\_of\\_practice.jsp](http://www.fos.org.au/centric/home_page/about_us/codes_of_practice/banking_code_of_practice.jsp)>.

<sup>24</sup> See, egs, *Privacy Act 1988* (Cth); and *Personal Information Protection and Electronic Documents Act* SC 2000 (Canada).

<sup>25</sup> See, eg, art 47BA of the revised *Federal Law on Banks and Savings Banks 1934* (Switzerland) where bank secrecy violations may attract fines not exceeding CHF250 000 or imprisonment for a term not exceeding three years: See Chaikin, ‘Policy and Fiscal Effects of Swiss Bank Secrecy’, above n 2.

<sup>26</sup> See Rose-Marie Antoine, *Trusts and Related Tax Issues in Offshore Financial Law* (Oxford University Press, 2005) 98–100; Rose-Marie Antoine, *Confidentiality in Offshore Financial Law* (Oxford University Press, 2002).

<sup>27</sup> It is frequently stated that the right to financial privacy has a constitutional base. However, most constitutions that have privacy provisions do not explicitly refer to banking or financial privacy. See, eg, *Luxembourg Constitution*, art 28; and *Constitution of the Russian Federation*, arts 23–5. It has been held that the right to privacy in the *Constitution of the Bahamas*, art 21, did not include a ‘right not to have one’s personal banking information disclosed’: see *A-G (Commonwealth of the Bahamas) v Financial Clearing Corp* (Unreported, Commonwealth of the Bahamas Court of Appeal, Churaman, Ganpatsingh and Osadebay JA, 8 October 2002). See also the *Right to Financial Privacy Act* 12 USC § 3401-22 (2006) which addressed the US Supreme Court decision in *United States v Miller*, 425 US 435 (1976) (holding that customers of banks had no expectation of financial privacy).

<sup>28</sup> See Antoine, *Confidentiality in Offshore Financial Law*, above n 26, 33–8.

<sup>29</sup> For example, in Switzerland, 48 convictions for violating bank secrecy were recorded for the period 1993–2008: see Government of Switzerland, ‘Amicus Brief’, submitted in *USA v UBS AG*, 09: CV-20423-CIV-GOLD/MCALILEY, 30 April 2009.

<sup>30</sup> *Jack Report*, above n 22 [5.26].

### III Qualifications to Bank Confidentiality

The importance of confidentiality to banking systems does not mean that the duty of confidentiality is without limitation. This was recognised by the Court of Appeal in *Tournier's Case*, which considered that the contractual duty of confidentiality was not 'absolute but qualified'. Bankes LJ set out four qualifications to the duty of confidentiality:

On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.<sup>31</sup>

Bankes LJ's description of the qualifications to the duty of confidentiality was based on principle, rather than precedent. His Lordship's statement has been described as 'one of the most respected and celebrated instances of judicial law making in the entire field of banking'.<sup>32</sup> It has been approved, applied and reaffirmed by courts in every common law jurisdiction, including Australia, Canada, Hong Kong, Ireland and New Zealand.<sup>33</sup> The banker's duty of confidentiality and qualifications to that duty have been repeated in banking codes and inserted in standard form contracts between banks and their customers. The significance of the qualifications stretches beyond banking law. As Professor Rosemary Pattenden has argued, Bankes LJ's list of qualifications would apply to all cases 'where an obligation of confidentiality exists between any other kind of professional and the client', such as doctor/patient and lawyer/client.<sup>34</sup> Indeed, the qualifications are 'equally relevant to the parallel jurisdiction in equity' that imposes an obligation of confidentiality.<sup>35</sup>

### IV Compulsion by Law Qualification

In 1924, when the Court of Appeal issued judgment in *Tournier's Case*, 'the instances of compulsion by law on banks to release confidential information about customers were rare', with only two British statutory instances compelling disclosure, namely s 7 of the *British Bankers' Book Evidence Act 1879* and s 5 of the *Extradition Act 1873*.<sup>36</sup> It was well accepted that banks were under a stringent obligation to be careful when disclosing confidential information to government authorities to ensure that they were not breaching their legal responsibilities. Over time there has been a dramatic change in the relationship between governments and bankers, and particularly in the expansion of legislative requirements imposed on bankers. In Australia and elsewhere there has been a creeping erosion of the banker's duty of confidentiality through statutory enactments. There are dozens of Australian federal, state and territory statutes requiring banks to disclose

<sup>31</sup> *Tournier's Case*, above n 10, 473. The qualifications are repeated in cl 21 of the *Australian Banker's Association Code of Banking Practice* (2004).

<sup>32</sup> Weaver and Craigie, above n 9 [2.3400].

<sup>33</sup> See Dennis Campbell (ed), *International Bank Secrecy* (Sweet & Maxwell, 1992); Francis Neate, 'Introduction' in Neate and McCormick (eds), above n 9, xvi.

<sup>34</sup> Pattenden, above n 15, 337.

<sup>35</sup> See R G Toulson and C M Phipps, *Confidentiality* (Sweet & Maxwell, 1996) 48.

<sup>36</sup> *Jack Report*, above n 22 [5.06].

confidential information to courts and tribunals, law enforcement agencies, regulators and government authorities.<sup>37</sup> Prominent examples include legislation facilitating the production of evidence, disclosure laws relating to corporations and financial services, bankruptcy and insolvency, trade practices and anti-trust, tax and social security, and the full gamut of criminal investigation-related laws.<sup>38</sup> These statutory enactments illustrate the importance of relaxing banking confidentiality so as to meet the needs of regulators and law enforcement. They are part of a larger trend involving an expansion of the remit of law enforcement and the growth of the regulatory state<sup>39</sup> whereby new regulators and authorities have sought and obtained extensive investigatory powers. This has been justified on the ground that the investigation and prosecution of financial crimes must overcome bank confidentiality so as to obtain the evidence and seize the fruits of crimes.<sup>40</sup>

The legislative inroads into bank confidentiality have been assisted by the judiciary, who have recognised that the banker's duty of confidentiality is 'no more than a simple contractual one which, like any other contractual term, will be subject to the operation of the general law'.<sup>41</sup> In Australia, it is well accepted that public policy interests underlining statutory enactments will trump the private law of confidentiality applicable to the banker/customer relationship. There is no requirement that legislation expressly override the duty of confidentiality: it is sufficient for the contractual duty to be negated if the general terms of the statute are inconsistent with the duty of confidence.<sup>42</sup> In criminal investigations, statutory-based search warrants may be issued so as to obtain bank records of customers.<sup>43</sup> Subpoenas may be issued to compel banks to produce customer records in civil and criminal matters, giving rise to litigation on narrow issues pertaining to relevance, oppression and privilege.<sup>44</sup> Given the contractual basis of the duty of confidentiality, courts do not generally scrutinise bank documents produced in compliance with a subpoena to determine whether the disclosure will reveal confidential information about third parties.<sup>45</sup>

However, *Tournier's Case* did not consider whether the 'compulsion of law' qualification encompassed disclosure obligations to foreign authorities because

<sup>37</sup> See generally, Tyree, *Banking Law in Australia*, above n 13, 180–4; Weaver and Craigie, above n 9; and Wallace, above n 9.

<sup>38</sup> See, egs, *Australian Crime Commission Act 2002* (Cth) s 29; *Australian Securities and Investments Commission Act 2001* (Cth) ss 5, 29, 30; *Bankruptcy Act 1966* (Cth) s 77A; *Independent Commission Against Corruption Act 1988* (NSW) s 22; *Banking Act 1959* (Cth) s 62; *Income Tax Assessment Act 1936* (Cth) s 264; *Proceeds of Crime Act 1987* (Cth) ss 73–5; *Proceeds of Crime Act 2002* (Cth) ss 213–8; *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 40–6; and *Mutual Assistance in Criminal Matters Act 1987* (Cth) ss 13, 15, 34R–34ZF.

<sup>39</sup> See John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222, 222–38.

<sup>40</sup> For an examination of how countries cooperate in fighting transnational crime, see David Chaikin and J C Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave Macmillan, 2009) 115–53.

<sup>41</sup> *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) 134 CLR 475, 488 (Stephen J); see also *Federal Commissioner of Taxation v Australia & New Zealand Banking Group Ltd* (1979) 143 CLR 499, 521 (Gibbs ACJ).

<sup>42</sup> Wallace, above n 9, 3.

<sup>43</sup> See, eg, *TVW Ltd v Robinson and Cant* [1964] WAR 33.

<sup>44</sup> See, eg, *Re ACI International Ltd* (1986) 11 ACLR 240.

<sup>45</sup> This may be contrasted with the legal position in Switzerland where the confidentiality obligation extends beyond the banker/customer relationship to third parties: see Chaikin, 'Policy and Fiscal Effects of Swiss Bank Secrecy', above n 2.

*Tournier* was a purely domestic case, with both the bank and customer located in England, and no involvement of a government agency. However, as a matter of initial analysis, it would seem that this qualification to the duty of confidentiality would not encompass disclosure to foreign authorities. Support for this view is found in the reasoning of the judges in *Tournier's Case* that the duty of confidentiality is an implied term of the banker/customer contract. It is difficult to envisage on what legal basis a court would imply that there was a qualification to the duty of confidentiality where a foreign law required a local bank to make disclosure of bank records located in the local jurisdiction. Applying one of the Privy Council's five 'implication of terms' tests,<sup>46</sup> it is difficult to argue that such a term was necessary for the business efficacy of a banker/customer contract, even if the customer has business activities in a number of jurisdictions which may attract the interest of foreign authorities.

The great weight of judicial authority in common law jurisdictions is that the compulsion by law qualification means compulsion under the law of the jurisdiction where the bank account is held.<sup>47</sup> This is consistent with the idea that disclosures of confidences are justifiable only if they are 'required by the law applicable to the confidentiality obligations'.<sup>48</sup> It would be anomalous for a court, in the absence of legislative authority, to imply that a foreign court order or a foreign subpoena would impose a legal obligation on a local bank to make disclosure, especially since this may amount to a judicial recognition and enforcement of a 'governmental interest of a foreign state'.<sup>49</sup> The extensive case law<sup>50</sup> on whether the courts should authorise banks to disclose confidential information to foreign authorities is based on the assumption that the banks are not entitled to make this determination themselves by relying on this qualification.

On the other hand, disclosure by compulsion of law encompasses situations where local law expressly and specifically permits cooperation with foreign authorities. In the past 25 years the legislature in Australia and elsewhere has significantly expanded the ability of foreign courts, law enforcement agencies and regulators to obtain local confidential bank documents.<sup>51</sup> There is a wide range of statutory and judicial measures that allow the disclosure of banking information to assist foreign investigators, prosecutors and regulators. These include mutual

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<sup>46</sup> The five tests which must be satisfied before a term may be implied are: '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious, that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract': *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283.

<sup>47</sup> *FDC Co Ltd v Chase Manhattan Bank NA* [1990] 1 HKLR 277, 283 (Sir Alan Huggins VP), 292 (Silke JA). See also Sir Lawrence Collins, 'Choice of Law and Choice of Jurisdiction in International Securities Transactions' (2001) 5 *Singapore Journal of International and Comparative Law* 618. According to the leading decision in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, a bank account is located at the place where the records of the account are kept.

<sup>48</sup> Paul Stanley, *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008) 45.

<sup>49</sup> *A-G (UK) v Heinemann Publishers (Australia) Pty Ltd* (1988) 165 CLR 30, 42, 46–7. However, there is a trend in international agreements (eg the European evidence warrant) and national legislation (eg registration of foreign restraining orders under ss 35–35M of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to permit the enforcement of foreign governmental interests.

<sup>50</sup> See John White, 'Principles of Confidentiality in Cross-Border Banking', in Ross Cranston (ed), *Legal Issues of Cross-Border Banking* (Bankers' Books, 1989) 9–22.

<sup>51</sup> See Chaikin and Sharman, *Corruption and Money Laundering*, above n 40, 115–53.

assistance in criminal matters legislation, anti-money laundering laws, and bankruptcy and insolvency laws.

One of the most important pieces of legislation facilitating international access to banking records is the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (*MACM Act*). Pursuant to this legislation, Australia has concluded treaties and arrangements with other countries whereby it may request and grant international assistance in criminal matters. The *MACM Act* applies to criminal investigations and prosecutions; there is a separate statutory regime applying to international cooperation between regulators, for example between the Australian Securities and Investments Commission ('ASIC') and its foreign counterparts.<sup>52</sup> According to the Australian Federal Attorney-General's website, Australia has bilateral mutual assistance treaties or arrangements with 25 countries,<sup>53</sup> is a party to a number of multilateral mutual assistance treaties,<sup>54</sup> and may rely on diplomatic comity to provide international law enforcement assistance, even without a treaty.<sup>55</sup> Under ss 13 and 15 of the *MACM Act*, the Attorney-General or the Minister for Home Affairs may authorise the taking of evidence, such as the testimony of bankers, and courts may issue search warrants for bank records for the purpose of a foreign investigation or prosecution. The compulsory powers to obtain testimony from bankers and/or bank records in Australia may assist a foreign country in its investigation and prosecution of serious foreign offences and the recovery of the proceeds of foreign crimes. There are also powers under ss 34R–34W of the *MACM Act* which authorise the Australian Federal Police to give notice to financial institutions to provide information which may determine whether an account is held by a specified person or whether a particular person is a signatory to the account, and for the police to monitor activity on a specific bank account relating to a serious foreign offence.

The giving of mutual assistance by Australia to a foreign country is subject to statutory safeguards.<sup>56</sup> There are mandatory and discretionary grounds for the Attorney-General to refuse assistance to a foreign country. For instance, under s 8 of the *MACM Act*, the Attorney-General must refuse assistance to the foreign

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<sup>52</sup> See *Mutual Assistance in Business Regulation Act 1992* (Cth); see also discussion below.

<sup>53</sup> See Attorney-General's Department, Australian Government, *Australian Bilateral Mutual Assistance Agreements* (1 September 2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance\\_Relationshipwithothercountries\\_Australianbilateralmutualassistanceagreements](http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Relationshipwithothercountries_Australianbilateralmutualassistanceagreements)>.

<sup>54</sup> See Attorney-General's Department, Australian Government, *Australian Multilateral Extradition or Mutual Assistance Arrangements* (1 September 2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance\\_Relationshipwithothercountries\\_Australianmultilateralextraditionormutualassistancearrangements](http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Relationshipwithothercountries_Australianmultilateralextraditionormutualassistancearrangements)>. Examples of multilateral treaties that contain mutual assistance in criminal matters provisions include the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November, 1990), and the *United Nations Convention Against Corruption* ('*UNCAC*'), see above n 6.

<sup>55</sup> Under ss 10 and 11 of the *MACM Act*, Australia may request mutual assistance from 'any country' and receive a request from 'any country'; there is no requirement for a mutual assistance treaty or arrangement. Direct police-to-police assistance is permitted by s 6 of the *MACM Act*, but this could not encompass the obtaining of confidential bank documents by way of search warrants or court subpoenas except through the utilisation of the procedures of the *MACM Act*.

<sup>56</sup> Note the proposed changes to safeguards in sch 3 of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (Cth), particularly in relation to discrimination on the ground of sexual orientation, double jeopardy, and dual criminality.

country where the request was made for the purpose of prosecuting a person on account of the person's 'race, sex, religion, nationality or political opinions', or where the 'granting of the request would prejudice the sovereignty, security or national interests of Australia, or the essential interests of a State or Territory'. In this context, transnational organised crime is now considered to be a national and international security threat by the UN Security Council,<sup>57</sup> G20 and many countries, including Australia. It could be argued that in interpreting s 8 of the *MACM Act*, national security may override other objections to the provision of mutual assistance. However, there is nothing in the text of the Australian law (or in international legal mutual assistance conventions) to justify a hierarchy of mandatory grounds — for example, that it would be permissible to grant a request for national security reasons where the request for mutual assistance was made for the purpose of a political prosecution.

A significant legislative vehicle to obtain banking information is the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('*AML/CTF Act*'). Under this Act, financial institutions and persons providing designated services<sup>58</sup> are required to give to the Australian Transaction Reports Analysis Centre ('AUSTRAC'), the anti-money laundering ('AML') regulator and financial intelligence agency, reports about suspicious matters,<sup>59</sup> threshold currency transactions,<sup>60</sup> international funds transfer instructions<sup>61</sup> and threshold cross-border movements of currency.<sup>62</sup> These statutory provisions are designed to assist in the detection and investigation of crime and have had a dramatic impact on the banker/customer relationship. Indeed, the latest AUSTRAC annual report shows that it received more than 21 million reports from the private sector, constituting a massive invasion of bank/customer confidentiality.<sup>63</sup>

The reporting obligations imposed on financial institutions under the *AML/CTF Act* fall within the 'compulsion by law' qualification. Financial institutions are given protection under s 235(1) of the *AML/CTF Act* which provides a statutory bar to civil or criminal proceedings for any action done in purported compliance with the reporting obligations. There is an additional incentive to comply with the reporting obligations in that financial institutions are deemed under the *AML/CTF Act*<sup>64</sup> not to have been in possession of the information in the reports for the purpose of the money laundering offences in div 400 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). Consequently, financial institutions may be immunised from criminal prosecution for money laundering offences under the *Criminal Code* in that they are deemed not to be in possession of any incriminatory knowledge found in their reports.

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<sup>57</sup> See United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* (2010) 1, 18.

<sup>58</sup> Designated services include financial services, bullion and gambling services: see *AML/CTF Act*, ss 5–6.

<sup>59</sup> *AML/CTF Act*, s 41.

<sup>60</sup> *AML/CTF Act*, s 43. A threshold transaction involves the transfer of \$A10 000 in physical currency or e-currency.

<sup>61</sup> *AML/CTF Act*, s 45.

<sup>62</sup> *AML/CTF Act*, ss 53, 55.

<sup>63</sup> See AUSTRAC, *Annual Report 2009–10* (2010), 7 <[http://www.austrac.gov.au/annual\\_report.html](http://www.austrac.gov.au/annual_report.html)>.

<sup>64</sup> See ss 51, 69, 172 and 206 of the *AML/CTF Act*.

Foreign governments have potential access to confidential bank information collected under the *AML/CTF Act*. Under s 131 of the *AML/CTF Act*, AUSTRAC may communicate information collected under the *AML/CTF Act* to a foreign financial intelligence agency. The information may only be supplied if the government of the foreign country gives appropriate undertakings for protecting the confidentiality of the information, for controlling the use that will be made of it, and ensuring that the information will be used only for the purpose for which it is communicated. AUSTRAC has entered into agreements with financial intelligence units ('FIUs') in 58 jurisdictions<sup>65</sup> and is negotiating agreements with other jurisdictions of the Egmont Group.<sup>66</sup> Under these arrangements, AUSTRAC may reply to a request from another FIU in relation to investigations of foreign criminal offences. The major limitation is that information supplied to a foreign law enforcement agency for a specific purpose may not be transmitted to another agency without AUSTRAC's consent.<sup>67</sup>

There are other mechanisms for obtaining and transmitting confidential banking information to foreign parties.<sup>68</sup> These include the power of Australian courts to assist courts in foreign jurisdictions to take evidence from bankers or obtain bank documents, for example, pursuant to 'letters rogatory', including under the *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970*<sup>69</sup>. Specific legislation is also available empowering Australian courts to 'act in aid of' and be auxiliary to foreign courts having jurisdiction in bankruptcy or external administration matters.<sup>70</sup> Such powers include the power to obtain evidence from bankers so as to assist in the tracing and recovery of funds in bankruptcy and external administration. There is also Australian legislation facilitating foreign regulators to obtain confidential bank documents in cases involving financial services matters, anti-trust matters and prudential supervision matters.<sup>71</sup> For example, ASIC, the Australian Competition and Consumer

<sup>65</sup> Albania, Argentina, Armenia, Bahamas, Bermuda, Belgium, Brazil, Bulgaria, Canada, Cayman Islands, Chile, Colombia, Cook Islands, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Guatemala, Guernsey, Hong Kong, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Korea, Latvia, Lebanon, Malaysia, Marshall Islands, Mauritius, Mexico, Netherlands, New Zealand, Panama, Philippines, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, St Kitts and Nevis, Sweden, Thailand, Ukraine, United Kingdom, United States of America, Vanuatu, and Venezuela. See AUSTRAC, *Exchange Instruments* (5 January 2011) <[http://www.austrac.gov.au/exchange\\_instruments.html](http://www.austrac.gov.au/exchange_instruments.html)>.

<sup>66</sup> The Egmont Group is the international government body which provides a vehicle for cooperation between financial intelligence units in some 108 jurisdictions. Egmont Group, *The Egmont Group of Financial Intelligence Units* (2009) <<http://www.egmontgroup.org>>.

<sup>67</sup> See David Chaikin and J C Sharman, 'APG/FATF Anti-Corruption/AML/CFT Research Paper' (2007) (Research Paper, Asia/Pacific Group on Money Laundering/Financial Action Task Force, September 2007) <[http://www.apgml.org/issues/docs/17/APG-FATF\\_Report\\_on\\_Anti-Corruption\\_AML.pdf](http://www.apgml.org/issues/docs/17/APG-FATF_Report_on_Anti-Corruption_AML.pdf)>.

<sup>68</sup> See generally, David Chaikin, 'Asset Tracking in Australia' in B A K Rider and M Ashe (eds), *International Tracing of Assets* (Sweet & Maxwell, 2002) vol 1 Q1/1–Q1/39.

<sup>69</sup> The *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970*, opened for signature 18 March 1970, 847 UNTS 231 (entered into force on 7 October 1972). The *Convention* has 54 Contracting States. For an up-to-date list of Contracting States, see the Hague Conference website <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82)>.

<sup>70</sup> See *Bankruptcy Act 1966* (Cth); *Corporations Act 2001* (Cth) s 581; *Cross-Border Insolvency Act 2008* (Cth).

<sup>71</sup> See *Mutual Assistance in Business Regulation Act 1992* (Cth). In turn, Australian regulators obtain information from foreign regulators through Memoranda of Understanding. For example, ASIC has entered into arrangements with corporate securities regulators from 30 jurisdictions and is a

Commission ('ACCC') and the Australian Prudential Regulation Authority ('APRA') are empowered to use their coercive powers to assist foreign regulators with whom they have an agreement. Finally, the Australian Taxation Office ('ATO') may provide assistance to foreign tax authorities under bilateral Double Taxation Arrangements, and under Taxation Information Exchange Agreements, which may include access to confidential bank information.<sup>72</sup>

## V Public Duty to Disclose Information

The public duty to disclose information is the least specific and most controversial of the four qualifications. In *Tournier's Case*, Scrutton and Atkin LJ considered that there is a qualification to the banker's duty of confidentiality when there is a higher duty to prevent fraud or crime.<sup>73</sup> Bankes LJ stated that disclosure of confidential information is justified 'where there is a duty to the public to disclose', such as where 'danger to the State or public duty may supersede the duty of the agent to the principal'.<sup>74</sup> These obiter dicta are consistent with the general principles applicable to the law of confidentiality which permit disclosure on the ground of public interest, for example, so as to 'prevent serious harm'.<sup>75</sup>

The language of the public duty qualification may appear to be narrow, but there is elasticity in the concept of public duty. Indeed, this qualification lends itself to a large degree of flexibility, if not vagueness, in its application. It has been argued that the public duty qualification is wide enough to permit bankers to act as whistleblowers on their customers in cases of crime and fraud.<sup>76</sup> In support of this argument is the decision in *Gartside v Outram*, where Page-Wood V-C, in speaking of the defence to the equitable duty of confidence, stated:

The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the

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signatory to the International Organization of Securities Commissions ('IOSCO'), *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/OIR+-+Memorandum+of+Understandings?openDocument>>. ASIC's disclosure of confidential information obtained through the exercise of its compulsory powers is subject to Regulatory Guide 103 <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps103.pdf/\\$file/ps103.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps103.pdf/$file/ps103.pdf)>.

<sup>72</sup> Australia has Tax Information Exchange Agreements ('TIEAs') with 27 jurisdictions whereby information may be exchanged without regard to local bank confidentiality or secrecy laws. See Australian Taxation Office, Australian Government, *Countries That Have a Tax Information Exchange Agreement with Australia* (20 December 2010) <<http://www.ato.gov.au/content/00161158.htm>>; see also David Chaikin, 'Tax Havens: An Australian Perspective' in David Chaikin (ed), *Money Laundering, Tax Evasion and Tax Havens* (Australian Scholarly Publishing, 2009) 96–108.

<sup>73</sup> *Tournier's Case*, above n 10, 481, 486.

<sup>74</sup> Ibid 473. Bankes LJ cited Viscount Findlay's view in *Weld Blundell v Stephen* [1920] AC 956, 965.

<sup>75</sup> Toulson and Phipps, above n 35, 49, 70–91; Stanley, above n 48, 53–77. The question whether the law of banking confidentiality should be considered as a separate doctrine or whether it should be considered as part of the general doctrine of the law of confidence is not examined in this article.

<sup>76</sup> See Saul Froomkin, 'Secrecy, Confidentiality and Banking' in Commonwealth Secretariat, *Memoranda and Minutes of the Meeting of Commonwealth Law Ministers and Senior Officials* (Commonwealth Secretariat, 1990). A case study of whistleblowing is discussed in David Chaikin, 'Crimes of the Powerful: Liechtenstein Case Study', in Chaikin (ed), above n 72, ch 1, 7–26.

audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.<sup>77</sup>

Although the decision in *Gartside* concerned the equitable duty of confidence, the proposition that confidences which concern an ‘iniquity’ should not be afforded the protection of the law is also applicable to the contractual duty of confidence. The principle in *Gartside* has been developed by subsequent English judicial authorities to include cases of misconduct falling short of iniquity and breach of civil duty. In *Initial Services v Putterill*, Lord Denning MR expressed the view that disclosure of confidential information was permissible in cases of ‘any misconduct of such a nature that it ought in the public interest to be disclosed to others ... [including] crimes, frauds and misdeeds, both those actually committed as well as those in contemplation’.<sup>78</sup> In contrast, Australian judges have tended to construe the ‘iniquity rule’ more narrowly, refusing to authorise a breach of confidence merely because there is some ‘public interest in the truth’ or that ‘disclosure would possibly benefit the society’.<sup>79</sup>

Disclosure of confidential information must be to the person who has a ‘proper interest to receive that information’<sup>80</sup>—for example, in the case of a crime to the police, or a breach of corporations law to the corporate regulator.<sup>81</sup> In general, the courts have refused to lend the processes of the court to enforce claims of breach of confidence, contractual or equitable, where the balance of public interest is that the confidential information should be disclosed<sup>82</sup> or ‘when the consequence [of non-disclosure] would be to prevent the disclosure of criminality which in all the circumstances it would be in the public interest to reveal’.<sup>83</sup>

However, there is judicial authority suggesting that the public duty qualification does not justify whistleblowing. In *Bodnar v Townsend*, Blow J of the Tasmanian Supreme Court observed:

In the decades since *Tournier* was decided, the courts have shed almost no light on the scope of the exception to the duty of confidentiality

<sup>77</sup> *Gartside v Outram* (1856) 26 LJ Ch 113, 114 (‘*Gartside*’).

<sup>78</sup> *Initial Services v Putterill* [1968] 1 QB 396, 405; see also *British Steel Corp v Granada Television Ltd* [1982] AC 1096.

<sup>79</sup> In *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456, Gummow J stated:

Finally, if there be some other principle of general application inspired by *Gartside v Outram*, it is in my view of narrower application than the “public interest defence” expressed in the English cases. That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.

See also *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 33 ALR 31, 53–7 (Rath J); *A v Hayden* (1984) 156 CLR 532, 545 (Gibbs CJ), 573 (Wilson and Dawson JJ); 596 (Deane J); and *Kelly v Hawkesbury Two Pty Ltd (No 3)* (Unreported, Supreme Court of New South Wales, Young J, 26 November 1987); *British American Tobacco Australia Ltd v Gordon (No 3)* [2009] VSC 619 (24 December 2009).

<sup>80</sup> See *Initial Services Ltd v Putterill* [1968] 1 QB 396, 405–6; see also *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1980) 55 FLR 125, 166–7; *Legal Practitioners Complaints Committee and Trowell* [2009] WASAT 42 (13 March 2009).

<sup>81</sup> See, *Re A Company’s Application* [1989] 2 All ER 248.

<sup>82</sup> See, eg, *Beloff v Pressdram Ltd* [1973] 1 All ER 241; *Lion Laboratories Ltd v Evans* [1985] QB 526; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *Commissioner of Police and A-G (Bermuda) v Bermuda Broadcasting Co Ltd* [2007] SC (Bda) 147 (18 June 2007).

<sup>83</sup> See, eg, *A v Hayden* (1984) 156 CLR 532, 544–5.

concerned with circumstances giving rise to a public duty of disclosure. It is clear from the passages I have referred to in the judgments of Scrutton and Atkin LJJ that such a duty can exist when it is necessary to divulge information in order to prevent frauds or crimes. However this case concerned allegations of past criminal conduct, whereas the exception applies only in relation to the prevention of future fraudulent or criminal conduct. It is certainly not 'so obvious that it goes without saying' that there is a public duty to disclose information in order to assist in the administration of justice when well developed procedures exist for the obtaining of information by compulsive means for the purposes of investigations and court proceedings.<sup>84</sup>

Blow J's ruling is that the public duty qualification does not permit a bank to disclose past crimes committed by their clients. His Honour's decision is based on a literal application of the views of Scrutton and Atkins LJJ in *Tournier's Case*. It is consistent with what the English Court of Appeal stated in *Weld-Blundell v Stephens*<sup>85</sup> where the Court (which included two of the judges in *Tournier's Case*, Scrutton and Bankes LJJ) 'drew a strong distinction between confiding in a professional man an intention to commit a crime and confessing a past crime, and between voluntary disclosure and disclosure under process of law'.<sup>86</sup> As Young J of the NSW Supreme Court has observed, the public duty exception should not become a 'mole's charter', and would not generally justify disclosure of information to the tax authorities by a person subject to a duty of confidentiality.<sup>87</sup>

### *A Public Duty and Foreign Crimes*

The potential width of the public duty qualification in an international setting is illustrated by the 1989 decision in *Libyan Arab Foreign Bank v Bankers Trust Co*.<sup>88</sup> In this case the English High Court considered that the banker's duty of confidentiality may be relaxed in cases of public duty under foreign law. The facts may be summarised as follows. The London branch of Bankers Trust, a bank licensed in the United States of America, froze US\$131 million of dollar deposits of its customer, Libyan Arab Foreign Bank. The internal freezing order was made in response to American sanctions against Libya, which included an American Presidential order freezing assets of Libyan property controlled by US persons.<sup>89</sup> The American sanctions order purportedly applied extraterritorially to bank deposits in London.<sup>90</sup> One of the issues was whether Bankers Trust had breached its duty of confidentiality by disclosing information concerning the London bank

<sup>84</sup> *Bodnar v Townsend* (2003) 12 Tas R 232, 237.

<sup>85</sup> *Weld-Blundell v Stephens* [1919] 1 KB 520, 527 (Bankes LJ), 533 (Warrington LJ), 544–5 (Scrutton LJ).

<sup>86</sup> Toulson and Phipps, above n 35, 160–1.

<sup>87</sup> *Kelly v Hawkesbury Two Pty Ltd (No 3)* (Unreported, Supreme Court of New South Wales, Young J, 26 November 1987); see also *Brown's Trustees v Hay* (1898) 35 SLR 877, 880.

<sup>88</sup> *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 ('*Libyan Arab Foreign Bank Case*').

<sup>89</sup> See Presidential Executive Order No 12543, 51 Fed Reg 875 (9 January 1986); Libyan Sanctions Regulations, 31 CFR Part 550 (1986), made under the US *International Emergency Economic Powers Act*, 50 USC §§ 1701–7 (2006).

<sup>90</sup> See Henry Weishburg, 'Unilateral Economic Sanctions and the Risks of Extraterritorial Application: The Libyan Example' (1986–87) 19 *New York University Journal of International Law and Politics* 993.

accounts to American bank regulators.<sup>91</sup> Prior to the imposition of the Presidential freeze order, Mr Corrigan, the chairman of the Federal Reserve Bank of New York, telephoned Mr Brittain, the chairman of Bankers Trust, requesting that his bank pay special attention to the movement of funds of its Libyan clients. The next day Mr Brittain told the New York Federal Reserve that 'it looked like the Libyans were taking their money out of the various accounts'. Although this information was not correct, and Mr Brittain did not disclose the identity of any specific client, it was argued by the Libyan Arab Foreign Bank that the disclosure was in breach of Bankers Trust's duty of confidentiality under English law. In defence, Bankers Trust relied on three of the qualifications to *Tournier's Case* to justify its disclosure: (a) the bank's own interests required it to make disclosure; (b) the bank's client must be taken to have impliedly consented to disclosure; or (c) the bank's disclosure was pursuant to a 'higher public duty'.<sup>92</sup> The High Court rejected Bankers Trust's arguments in relation to two of the qualifications, but was sympathetic to the applicability of the public duty qualification to the duty of confidentiality. Staughton J expressed the following view:<sup>93</sup>

But presuming (as I must) that New York law on this point is the same as English law, it seems to me that the Federal Reserve Board, as the central banking system in the United States, may have a public duty to perform in obtaining information from banks. I accept the argument that higher public duty is one of the [exceptions] to a banker's duty of confidence, and I am prepared to reach a tentative conclusion that the exception applied in this case. I need not reach a final conclusion on that point, because I am convinced that any breach of confidence there may have been caused the Libyan Bank no loss.

Staughton J's opinion was that because the New York Federal Reserve had a public duty to request confidential information from an American bank in relation to its London branch, this meant that the bank was authorised under British law to disclose confidential information. This reasoning assumed that the public interests in the United Kingdom in favour of disclosure were the same as the public interests of the United States of America. The suggestion that the public duty qualification encompassed public duty under the law of a foreign country may be questioned in so far as the British government's policies on financial sanctions against Libya differed at this time from those of the United States of America. His Honour's obiter dicta may perhaps be explained by the fact that the bank's customer had accounts in New York and London, and that the New York-based bank officers had knowledge of the money transfers from New York to the London accounts of the Libyan customers. Further, the court appears to have deferred to the American bank regulator's interests in so far as this case concerned a major American bank with a London branch.<sup>94</sup>

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<sup>91</sup> The main issue was whether Bankers Trust was entitled to withhold payment of \$131 million of funds held in its London branch. The English court held that there was no legal justification for refusing to make payment as the banker/customer contract was governed by English law.

<sup>92</sup> *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728, 770-1.

<sup>93</sup> Ibid 771.

<sup>94</sup> The ultimate outcome of the case was that the US Treasury Department allowed Bankers Trust to comply with the English judgment by authorising the release of \$292 million to the Libyan Arab Foreign Trust Bank, 'in addition to interest for pre-sanctions breach of contract damages'. See 'Letter from Ronald Reagan to the Speaker of the House of Representatives and the President of the

The pragmatic view of the public duty qualification in the *Libyan Arab Foreign Bank Case* has some support in other English cases. An expanded view of the public duty qualification is evidenced in certain decisions by the English courts, which have responded to the increase in international financial crime by moulding existing doctrines to assist in the investigation and recovery of illicit assets. As stated by one senior British judge in 1998: 'It is trite to say that to deal with international fraud international cooperation is needed. This applies ... not only to governments and police forces but also to courts.'<sup>95</sup> This echoes the view of the British Columbia Court of Appeal that it was 'inconceivable that an honest banker would ever be willing to do business on terms obliging the bank to remain silent in order to facilitate its customer in deceiving a third party',<sup>96</sup> which may include a foreign third party.

There are two reported cases involving major international fraud where the English courts have relaxed the duty of banker confidentiality on public duty grounds. In *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA*,<sup>97</sup> a firm of accountants applied to the court for a declaration that its duty of confidentiality did not prevent it from supplying documents and information to a British Government inquiry into the collapse of Bank of Credit and Commerce International ('BCCI'). The accountants wished to voluntarily supply confidential bank documents to an inquiry into reputedly the biggest bank fraud in history. The High Court granted the declaration, holding that the public interest in confidentiality was outweighed by the public interest in disclosure of confidential documents. Millett J stated that: 'The duty of confidentiality, whether contractual or equitable, is subject to a limiting principle. It is subject to the right, not merely the duty, to disclose information where there is a higher public interest in disclosure than in maintaining confidentiality'.<sup>98</sup> The court considered that there was a strong public interest in disclosing documents to an inquiry that was mandated to investigate the supervisory functions and performance of the Bank of England in the context of an international fraud that had damaged the reputation of the British financial system.

In *Pharaon v Bank of Credit and Commerce International SA (in liq) (Price Waterhouse (a firm) intervening)*,<sup>99</sup> another case concerning the collapse of BCCI, the issue was whether the duty of confidentiality under English law was outweighed by the public interest in disclosure to a private party litigant in American civil proceedings. There were allegations of serious wrongdoing by BCCI and the prospect that the confidential bank information might assist in the recovery of funds for the benefit of BCCI depositors. The firm of Price Waterhouse, which was in possession of confidential bank documents in its capacity as group auditor of BCCI, had failed in the American courts to set aside a

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Senate Reporting on the National Emergency With Respect to Libya' (12 January 1988) <<http://www.reagan.utexas.edu/archives/speeches/1988/011288d.htm>>.

<sup>95</sup> See *First American Corp v Sheikh Zayed Al-Nahyan, Clifford v First American Corp* [1998] 4 All ER 439, 448–9 (Sir Richard Scott V-C).

<sup>96</sup> See *Canadian Imperial Bank of Commerce v Sayani* [1994] 2 WWR 260, 265–7.

<sup>97</sup> [1992] BCLC 583.

<sup>98</sup> *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 601.

<sup>99</sup> [1998] 4 All ER 455 ('Pharaon').

subpoena compelling the firm to produce documents located in England.<sup>100</sup> To avoid payment of a potential fine of US\$5 000 per day for contempt of the American court due to failing to comply with the American subpoena, Price Waterhouse then sought leave from the English High Court to comply with the subpoena. Rattee J engaged in a balancing exercise and held that the ‘public interest in making the documents relating to the alleged fraud ... available in the American proceedings does outweigh the public interest in preserving confidentiality’.<sup>101</sup> Although the English court authorised disclosure of the confidential documents for the purpose of private civil litigation in the United States of America, there was no suggestion that the party subject to the duty of confidentiality was entitled to, or was in a position to carry out, a balancing exercise in determining which public interest prevailed.

On the other hand, there is a contrary line of English judicial authority that has opposed the disclosure of confidential banking information to foreign authorities in the absence of compliance with international civil or criminal procedures.<sup>102</sup> In *X AG v A Bank*,<sup>103</sup> the English High Court upheld an interim injunction restraining the London branch of an American bank from complying with an American subpoena requiring the disclosure of bank records of an unnamed Swiss client of the bank in connection with an American Department of Justice tax-related investigation into the crude oil industry. Leggatt J observed that refusing to maintain the injunction would ‘involve this court tolerating a breach of that obligation of confidentiality which ... in the ordinary course must be maintained in the public interest’.<sup>104</sup> His Lordship held that the balance of convenience favoured the granting of the injunction against the bank, although this may have been influenced by the lack of evidence before the court of the alleged wrongdoing of the banker’s client.<sup>105</sup>

Similarly, courts in offshore jurisdictions have been reluctant to accede to the demands of foreign investigations that rely on unilateral and extraterritorial powers to obtain bank documents, particularly in tax-related cases. Courts in the Bahamas, Cayman Islands, Cook Islands, Isle of Man and Vanuatu have issued injunctions preventing the production of bank documents to foreign authorities, including courts.<sup>106</sup>

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<sup>100</sup> The US Court of Appeals had found that there was no ‘collision between the UK confidentiality laws and US discovery procedures ... [because] ... the English court has, in the past, recognised that the duty of confidentiality is or may be outweighed by countervailing public interest in the exposure of fraud’: *Pharaon* [1998] 4 All ER 455, 460 citing *First American Corporation v Price Waterhouse LLP*, 154 F 3d 16 (2<sup>nd</sup> Cir, 1998).

<sup>101</sup> *Pharaon* [1998] 4 All ER 455, 465.

<sup>102</sup> See also a parallel line of authority where English courts have refused to issue extraterritorial orders for disclosure of bank documents where alternative methods exist for obtaining evidence from overseas: see, eg, *Mackinnon v Donaldson Lufkin and Jenrette Securities Corporation* [1986] Ch 482; *R v Grossman* (1981) 73 Cr App R 302.

<sup>103</sup> [1983] 2 All ER 464. For the American litigation, see *Marc Rich & Co AG v US* 707 F 2d 663 (2<sup>nd</sup> Cir, 1983). See also Frederick Mann, ‘The Doctrine of International Jurisdiction Revisited’ (1984) 186 (111) *Recueil Des Cours*, 54–5.

<sup>104</sup> *X AG v A Bank* [1983] 2 All ER 464, 479.

<sup>105</sup> See Ali Malek and Clare Montgomery, ‘Cross Border Fraudulent Activity’ in Joseph Norton (ed), *Banks: Fraud and Crime* (Informa Professional, 1994) 129, 132–4.

<sup>106</sup> Antoine, *Confidentiality in Offshore Financial Law*, above n 26, 298–302.

As the compulsion of law qualification has dramatically expanded in application, it is arguable that the public duty qualification has become less relevant, if not otiose. In 1990, the *Jack Report* recommended that the public duty qualification to banker/customer confidentiality should be abolished because it served no useful purpose.<sup>107</sup> The British Government rejected this recommendation believing there was some utility in maintaining a generalised public duty qualification as a way of dealing with more sophisticated international financial crimes.<sup>108</sup> However, the argument in favour of flexibility in interpreting the public duty qualification is less persuasive today because the law has changed since 1990. Financial institutions in the United Kingdom, Australia and elsewhere have statutory obligations to report suspected crimes, including transnational crimes that amount to offences under local law.<sup>109</sup> It is no longer necessary to rely on the public duty qualification to cooperate with foreign or domestic law enforcement agencies. Indeed, it could be argued that the continuation of the public duty qualification is inconsistent with statutory obligations in that it circumvents the statutory regime of bank-regulated disclosure of suspicious transactions. For example, under the *AML/CTF Act* and accompanying regulations, the legislature and the regulator have provided legal guidance as to the circumstances of mandatory disclosure of suspicious matters, the content of the disclosures, and a range of ancillary obligations with which financial institutions are expected to comply.<sup>110</sup>

The residual argument in favour of maintaining the public duty exception is the need for confidential bank information to be disclosed in unforeseen circumstances not covered by the law. This argument has found favour in New Zealand courts, which have placed importance on flexibility above other considerations. For example, in *R v Harris*,<sup>111</sup> the New Zealand Court of Appeal found that the enactment of the *Financial Transaction Reporting Act 1996* (NZ), which required banks to report suspicious transactions, was not a 'complete code' and that the banks had an independent 'power and perhaps even a duty to consider and respond to police questions relating to a bank account'.<sup>112</sup> Keith J ruled that the public duty qualification to the duty of confidentiality in *Tournier's Case* had continued utility and that a bank officer was entitled to rely on this qualification so as to act as a witness for the prosecution in a drug money laundering case. His Honour thought that disclosure might also be permissible in order to alert 'the police, possibly in other countries, to suspicious circumstances, which might require investigation and the gathering of evidence'.<sup>113</sup> The *Harris* case shows that courts may be prepared to rely on the public duty qualification to close the

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<sup>107</sup> See *Jack Report*, above n 22.

<sup>108</sup> See UK Government, 'Banking Services: Law and Practice', (White Paper No Cm 1026, March 1990) [5.30].

<sup>109</sup> See, eg, *AML/CTF Act*, s 41.

<sup>110</sup> See AUSTRAC, *Regulatory Guide, Chapter 9: Reporting Obligations* (15 January 2010) <[http://www.austrac.gov.au/rg\\_9.html](http://www.austrac.gov.au/rg_9.html)>; AUSTRAC, *Public Legal Interpretation No 6 of 2008: Suspicious Matters and Suspect Transactions Reports* (16 March 2010) <[http://www.austrac.gov.au/files/pli6\\_smrs.pdf](http://www.austrac.gov.au/files/pli6_smrs.pdf)>.

<sup>111</sup> [2000] 2 NZLR 524 ('*Harris*'). See also David V Drinkwater and James E Fordyce, 'Canada' in Neate and McCormick (eds), above n 9, 69, who cite the case of *Canada Deposit Insurance Corp v Canadian Commercial Bank* [1989] 95 AR 24 (Alberta Court of Queen's Bench) for the proposition that the public duty of disclosure may include a situation where disclosure would be more efficient if carried out by the bank directly, rather than by way of discovery.

<sup>112</sup> *Harris* [2000] 2 NZLR 524, 527.

<sup>113</sup> *Ibid.*

enforcement gap between the statutory obligation to make disclosure under AML legislation and the public interest in banks disclosing confidential information.

In summary, there is significant confusion in respect of the scope of the public duty qualification, with conflicting decisions in various common law jurisdictions. The legal quandary is compounded by the lack of authoritative case law dealing with the public duty qualification to the contractual duty of confidentiality. This may suggest two possibilities. First, banks are uncomfortable with relying on the public duty qualification as a basis for disclosing confidential information because of its uncertainty in application. This is the view of banking law academics who have advised banks to act cautiously in relying on the public duty qualification.<sup>114</sup> Another explanation is that banks have informally relied on this qualification to assist law enforcement agencies in the detection and investigation of serious crimes, and that such bank practices have not been revealed to their customers.<sup>115</sup> In the author's professional experience,<sup>116</sup> the public duty qualification has been frequently relied on by financial institutions in the United Kingdom and Australia for the purpose of supplying customer-related intelligence on an informal basis to both domestic and foreign law enforcement agencies. Whether this practice continues today is not clear, especially since the enactment of AML laws that require the reporting of suspicious transactions and a greater public concern about financial privacy.

## VI In the Interests of the Bank Qualification

In *Tournier's Case*, Atkin LJ stated that:

[T]he bank has the right to disclose such information when and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer...<sup>117</sup>

Atkin LJ's formulation of this qualification is limited to situations where disclosure is 'reasonably necessary' to protect the bank's interests. This applies to cases where disclosure is necessary to protect the legal rights of the bank. In *Tournier's Case*, Bankes LJ gave an example of justifiable disclosure 'where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft'.<sup>118</sup> Similarly, Scrutton LJ referred to the case of a bank 'collecting or suing for an overdraft' or disclosing confidential information 'to an extent reasonable and proper for carrying on the business of an account'.<sup>119</sup>

<sup>114</sup> See, eg, Tyree, *Banking Law in Australia*, above n 13, 184; Weaver and Craigie, above n 9 [2.4170].

<sup>115</sup> See Evidence to Affairs Committee, the British House of Commons, London, November 1998, quoted in Cranston (ed), above n 50, 85–6.

<sup>116</sup> The author was the Senior Legal Officer in the Commercial Crimes Unit, Legal Division of the London-based inter-governmental organisation, the Commonwealth Secretariat, between 1983 and 1986, a Senior Assistant Secretary in the Australian federal Attorney-General's Department from 1986 to 1988, and also a legal practitioner and consultant on fraud matters to Australian and foreign banks from the late 1980s onwards.

<sup>117</sup> *Tournier's Case*, above n 10, 486.

<sup>118</sup> *Ibid* 473.

<sup>119</sup> *Ibid* 481.

These examples of what may be characterised as 'self-interested disclosure' are necessary for the business efficacy of a banker/customer relationship. It would make little business sense for a bank to be denied the right to sue a defalcating customer to recover a loan or enforce a security by being prevented from disclosing confidential information about a loan or security in its litigation pleadings. A reverse position also applies. Where a bank is the subject of a legal suit by a customer, the bank will be entitled to reveal the confidences of that customer so as to protect its legitimate interests. Since it is the customer who is disclosing the existence of the confidential relationship to the public through litigation, the bank is entitled as a matter of fairness to protect its own interests by revealing confidences that are part of its defence.

In *Tournier's Case*, Atkin LJ observed that the 'interests of the bank' qualification to the duty of confidentiality is not limited to disclosures involving customer litigation, but also disclosures against third parties in respect of transactions of the bank for or with the customer. The justification for disclosure of confidential information in third party litigation is that a bank should have a 'right to defend itself against potential liability to a third party which is attracted by virtue of its having processed the customer's transactions'.<sup>120</sup> The courts have gone further by permitting disclosure so that banks can defend their interests in suits brought by third parties, but also to enable them to vindicate their legal rights against third parties. For example, in *Hassneh Insurance Co of Israel v Mew Coleman J* held:

That the bank should be able to disclose the information if to withhold it would or might prejudice the bank in the establishment or protection of its own legal rights *vis-à-vis* the customer or third parties. The essence of the matter is that it might need to disclose the information either as the foundation of a defence to a claim by a third party, or as the basis for a cause of action against a third party.<sup>121</sup>

*Hassneh Insurance* is an example of what Brennan J of the Australian High Court considered a case 'where disclosure of the material is fairly required for the protection of the party's legitimate interests'.<sup>122</sup> The questions in respect of what is 'fairly required' and what are the 'legitimate interests' will be determined on the specific facts of a case, including the nature of the relationship between the confider and confidant.<sup>123</sup>

The 'interests of the bank' qualification does not mean that disclosure may be made whenever the bank considers that it is in its commercial interests to make disclosure.<sup>124</sup> An example of this limitation is found in the law relating to disclosure of confidential information to members of a banking group. Banks are usually organised as part of a banking group with various banking activities, such

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<sup>120</sup> *Nam Tai Electronics Inc v Pricewaterhouse Coopers* (Unreported, Court of Final Appeal of the Hong Kong Special Administrative Region, Li CJ, Bokhary, Chan, Ribeiro PJJ and McHugh NPJ, 31 January 2008) [52] ('*Nam Tai Electronics Case*').

<sup>121</sup> [1993] 2 Lloyd's Rep 243, 249 ('*Hassneh Insurance*').

<sup>122</sup> *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 36.

<sup>123</sup> Toulson and Phipps, above n 35, 49.

<sup>124</sup> A survey of banks in Australia in 2001 found that they did not consider that the qualification protected banks 'in circumstances where the purpose was to obtain a commercial benefit': see Australian Banking Industry Ombudsman, *Submission to the Review of the Code of Banking Practice* (2000) 13.

as mortgage lending, commercial banking, credit cards, funds management, private wealth, and trading, placed under separate corporate entities. It is well accepted that the disclosure of confidential information by a bank about a customer to a separate, albeit related, company that is part of the same banking group is a breach of the duty of confidentiality.<sup>125</sup> The reason for this is that a company and its holding, subsidiary or related companies are separate legal entities. It makes no difference that the management of the companies is the same or that the customer is also a customer of both related bank corporate entities. This principle was reiterated in *Bank of Tokyo Ltd v Karoon* by Robert Goff LJ, who stated:

[Counsel] suggested ... that it would be technical for us to distinguish between a parent company and a subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be abridged.<sup>126</sup>

The English Court of Appeal in the *Bank of Tokyo* case recognised that for the purpose of the duty of confidentiality, companies in a group are to be treated as separate legal entities, thereby preventing the sharing of confidential customer-related information between members of the group. The effect of this decision was to reduce the efficiency of communication of information between parts of a bank that are set up as separate companies. Law reform agencies in Australia and England have recommended relaxation of the law so that banks may share information about customers within a banking group as part of a risk management process to avoid financial losses.<sup>127</sup> The *Privacy Act 1988* (Cth)<sup>128</sup> introduced provisions dealing with the sharing of information among related companies, but these do not deal with the issue of transfer of information to related companies overseas. Legislative intervention is also evidenced in the *AML/CTF Act*, which allows banks in a designated business group ('DBG') to share with members of the group their suspicions about crimes without infringing the anti-tipping-off provision.<sup>129</sup> However, it is not practical for a licensed bank in Australia to include all foreign-related entities as part of the DBG so that multinational banks are constrained in communicating confidential information about suspected crimes concerning their customers to all members of the group. This is an example of a statutory provision which has the incidental effect of limiting private-to-private cooperation in fighting transnational crimes.

A strong judicial decision suggesting that the 'interests of the bank' qualification does not permit disclosure to foreign authorities is *FDC Co Ltd v*

<sup>125</sup> See *Bank of Tokyo Ltd v Karoon* [1987] AC 45, 64 (Robert Goff LJ) ('*Bank of Tokyo Case*'); *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607; *Bhogal v Punjab National Bank*; *Basna v Punjab National Bank* [1988] 2 All ER 296, 305.

<sup>126</sup> [1987] AC 45, 64.

<sup>127</sup> See Financial System Inquiry: Final Report (1997) 521 ('*Wallis Report*'), Chapter 11, Recommendation, 99 <<http://fsi.treasury.gov.au/content/downloads/FinalReport/chapt11.pdf>>. The *Wallis Report* recommended that companies in a banking group should have the legal capacity to share information about a customer unless there was some negative indication that the customer had refused consent. See also *Jack Report*, above n 22 [5.42].

<sup>128</sup> S 18N(1).

<sup>129</sup> The 'anti-tipping off' provision is found in the *AML/CTF Act*, s 123 which makes it a criminal offence for a bank to disclose to a third party (which would include a separate but related company) that it has filed a suspect matter report with AUSTRAC. The DBG exception is found in s 123(7).

*Chase Manhattan Bank NA*.<sup>130</sup> In this 1990 case a New York court required the Hong Kong branch of Chase Manhattan Bank to comply with a grand jury subpoena issued in connection with a tax investigation. A depositor with the bank obtained an interim injunction in Hong Kong prohibiting the defendant bank from complying with the American request. Clough J at first instance ruled that the injunction should be continued because the balance of convenience lay in favour of the plaintiff bank account holder, even though the plaintiff had not proved any commercial damage arising from a failure to grant an injunction. The Hong Kong Court of Appeal maintained the injunction, holding that the transfer of bank documents from the Hong Kong branch to American employees in the New York head office would amount to an unauthorised disclosure since this internal transfer would be for the purposes of surrendering documents to the jurisdiction of the United States of America. Huggins V-P in the Court of Appeal stated: 'all persons opening accounts with the banks of Hong Kong, whether local or foreign, are entitled to look to the Hong Kong courts to enforce any obligation of secrecy, which by the law of Hong Kong is implied by virtue of the relationship of customer and banker'.<sup>131</sup> Silke JA pointed out that:<sup>132</sup>

While I fully accept that the financial implication of this and of the foreign proceedings, on the face of it, would suggest that it would be in the interests of the Bank to disclose and therefore to excuse them under a *Tournier* exception from the performance of their obligation, I do not read that exception to be in reality such cover. It must mean in the interests of ordinary banking practice, such as when they find it necessary to sue upon an overdraft or matters of that kind. The issues here are very much wider than those narrow interests of the Bank as I see them to be.

The court in the *FDC Case* confined the 'interests of the bank' qualification to the original description in the *Tournier Case* and refused to take into consideration the potential heavy financial penalties faced by the bank in disobeying the American subpoena. More recent Hong Kong authorities have questioned whether the *FDC case* is binding authority on this issue. In the *Nam Tai Electronics Case*,<sup>133</sup> the Hong Kong Court of Final Appeal suggested in obiter dicta that 'developments in the law indicate that the self-interest qualification is now more liberally applied and regarded as extending beyond the narrow confines' as held in the *FDC Case*.

The expression of judicial opinion in the *Nam Tai Electronics Case* shows that there is continuing uncertainty not only in Hong Kong but in other jurisdictions such as Australia as to the scope of the 'interests of the bank' qualification. The lack of clarity of the law is exacerbated because there is no reported case where a court has permitted this qualification to be used to justify a bank cooperating with the demands of a foreign investigation.<sup>134</sup> However, it is arguable that the original

<sup>130</sup> [1990] 1 HKLR 277 ('*FDC Case*'). See Peter Ellinger, 'Extraterritorial Aspects of Banking Secrecy' [1985] *Journal of Business Law* 439.

<sup>131</sup> *FDC Case* [1990] 1 HKLR 277, 284–5.

<sup>132</sup> *Ibid* 292.

<sup>133</sup> *Nam Tai Electronics Case* (Unreported, Court of Final Appeal of the Hong Kong Special Administrative Region, Li CJ, Bokhary, Chan, Ribeiro PJJ, and McHugh NPJ, 31 January 2008) [45].

<sup>134</sup> See, however, *El Jawhary v BCCI* [1993] BCLC 396, discussed below.

rationale of the self-interested qualification, that is the vindication of the bank's legal rights, is equally applicable to instances where a multinational bank is subject to the prospect of financial penalties for failing to disclose confidential information to foreign authorities under an extraterritorial order of disclosure. Indeed, where the services of banks are misused by transnational criminals, there is a powerful policy argument that the banks should be armed with the legal capacity to disclose confidential information to foreign authorities.

## VII Consent of the Customer Qualification

It is trite law that a bank cannot breach its contractual duty of confidentiality by disclosure of information or documents if the customer consents to disclosure. That customers of a bank may waive their rights under a contract is well accepted by the leading academic textbook writers and judicial authorities.<sup>135</sup> Whether a customer of a bank has consented to disclosure is a question of fact that is determined by examining all relevant circumstantial evidence. The test is whether the customer's conduct, viewed objectively, has consented to disclosure so that the duty of confidentiality is waived.<sup>136</sup> The consent qualification may be viewed as an example of a waiver by a customer of the rights enjoyed under a banker/customer contract.

### A Implied Consent

A customer's waiver of confidentiality may be express or implied. Difficult questions may arise whether the conduct of a customer amounts to an implied waiver of confidentiality. In *Sunderland v Barclays Bank Ltd*<sup>137</sup> it was held that there was an implied consent to disclosure where the conduct of the customer was inconsistent with maintaining the duty of confidentiality. Similar reasoning was applied by the High Court of Australia in *Mann v Carnell*,<sup>138</sup> a case concerning waiver of legal professional privilege. More problematic has been the question whether banks may supply a reference about its customer to a third party based on an implied consent of the customer. This uncertainty has now been resolved, at least in England, by the decision of the Court of Appeal in *Turner v Royal Bank of Scotland plc*.<sup>139</sup> The issue before the court was whether the common banking practice of answering inquiries from other banks about the financial standing of customers fell within the consent qualification to the *Tournier's Case* duty of confidentiality. It was held that the customer had not impliedly consented to the practice and that the bank had breached its duty of confidentiality. The court noted

<sup>135</sup> See, eg, Tyree, *Banking Law in Australia*, above n 13, 186.

<sup>136</sup> *Nam Tai Electronics Case* (Unreported, Court of Final Appeal of the Hong Kong Special Administrative Region, Li CJ, Bokhary, Chan, Ribeiro PJJ, and McHugh NPJ, 31 January 2008) [37].

<sup>137</sup> *Sunderland v Barclays Bank Ltd* (1938) 5 LDAB 163. See also *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (1991) 23 NSWLR 571.

<sup>138</sup> *Mann v Carnell* (1999) 201 CLR 1, 13.

<sup>139</sup> [1999] 2 All ER (Comm) 664 ('*Turner's Case*'). See Alan Tyree, 'Implied Consent' (2000) 11 *Journal of Banking and Finance Law and Practice* 35; Richard Hooley, 'Bankers' References and the Bank's Duty of Confidentiality: When Practice Does Not Make Perfect' (2000) 59 *Cambridge Law Journal* 21, 21-3.

that the system of banks giving references about customers may be in the interests of the banks and some customers, but not necessarily in the interests of the majority of customers. It further observed that many customers were ignorant of the bank's practice, which had continued over many years, so that on the 'the face of it, such disclosure constituted a breach of the principle of confidentiality'.<sup>140</sup> On the facts of the case, it had been found that Mr Turner did not know of the banking practice, and that nothing had been said to him or put him on notice of the existence of the banking practice. Further, the bank 'went to considerable lengths to conceal from its customers the fact that it was giving references about their creditworthiness'.<sup>141</sup> The court held that there had been no customer consent; instead, the bank had 'unilaterally dispensed with the need for the customer's consent'.<sup>142</sup> The court refused to imply consent from the 'inactivity of its customer' in circumstances where the bank had not sought express consent to its practice of giving references.

*Turner's Case* provides a clear warning to banks that they should not readily assume that customers have consented to disclosure of confidential information, particularly where disclosure of such information may be potentially unfavourable to the customer's interests. Indeed, there would appear to be no role for an implied waiver in circumstances where a foreign public authority has requested confidential information from a bank about a customer. The likelihood that the confidential information may injure the interests of the customer may be assumed because of the entanglement with foreign governmental authorities.

### ***B Express Consent***

There is considerable discretion for banks to amend their written contracts with customers and enact provisions which protect the banks' commercial interests. For example, banks have protected their commercial interests by inserting amendments in written contracts to permit the disclosure of confidential information about their customers to members of a related company. Similarly, there would seem to be few limits on banks modifying their implied duty of confidentiality by express contractual enactment.

One possibility is for a bank, when faced with an extraterritorial request for information by a foreign authority, to request a customer to give express written consent to the disclosure of confidential information about them. In such circumstances, the customer, by signing a consent form, is *ex post facto* agreeing to the disclosure of personal confidential information to a specific and known foreign authority and is aware of the purpose of such disclosure.<sup>143</sup> By obtaining the customer's consent in a specific consent form, the customer is actively agreeing to disclosure and is aware of the nature of the organisation that may receive personal confidential information. *Ex post facto* consent to disclosure of confidential information is usually in response to specific requests from foreign law

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<sup>140</sup> *Turner's Case* [1999] 2 All ER (Comm) 664, 672.

<sup>141</sup> *Ibid* 668.

<sup>142</sup> *Ibid* 672.

<sup>143</sup> There has been an issue whether the customer's consent is genuine if the customer signs the consent form pursuant to a foreign court order compelling consent: see Antoine, *Confidentiality in Offshore Financial Law*, above n 26, 262–71.

enforcement agencies or foreign countries.<sup>144</sup> Consent in such circumstances is ad hoc and will, if given, protect the financial institution from potential conflicting legal requirements.

Another possibility is for a bank to obtain the customer's *ex ante* consent to disclosure of confidential information by amending its standard form contract. This possibility was envisaged in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,<sup>145</sup> where the Privy Council stated that banks may 'increase the severity of their terms of business' with customers if they wish to protect their commercial interests. Although banks have generally been reluctant to amend their written contracts to impose onerous terms on customers, there is a growing trend among banks operating in Australia and abroad to revise their standard form banker/customer contracts, thereby empowering them to disclose confidential customer information to foreign authorities, particularly in the context of anti-money laundering and economic sanctions investigations.<sup>146</sup> A recent empirical study found eight banks, including three of the four major Australian-owned banks, have inserted in their standard form banker/customer contracts clauses permitting disclosure of personal confidential information to foreign authorities.<sup>147</sup>

For example, customers of one major Australian bank have agreed that the bank:

[M]ay disclose any information concerning you to any law enforcement agency or court where required to do so under any law or regulation (including a law or regulation of a foreign place or jurisdiction).<sup>148</sup>

This consent clause purports to give a bank the authority to disclose confidential information to any law enforcement agency, including any foreign agency. It is drafted in very broad terms; the only significant limiting criterion in the exercise of the bank's discretion is whether disclosure is 'required ... under any law or regulation'. There are no other specific criteria as to the circumstances in which the Australian bank may disclose confidential information. For example, there is no obligation on the bank to weigh the balance of public interest between maintenance of confidentiality and disclosure. The lack of specificity in the contractual clause means that the customer will not necessarily know the identity of the foreign law enforcement agency or foreign court, nor the reason(s) and/or legal justification for the disclosure request. The clause may also be objectionable in that the banks are not contractually required to inform the Australian authorities about foreign requests for confidential bank information, although public policy considerations may dictate that the bank should communicate such requests to an Australian government agency.

<sup>144</sup> Ibid, above n 26, 262-71.

<sup>145</sup> [1980] AC 80, 106.

<sup>146</sup> See David Chaikin, 'A Critical Examination of How Contract Law is Used by Financial Institutions Operating in Multiple Jurisdictions' (2010) 34 *Melbourne University Law Review*, 34-68.

<sup>147</sup> Ibid 48-55.

<sup>148</sup> See ANZ, *ANZ Self Managed Super Service — Terms and Conditions* (1 March 2009), 3 <<http://www.anz.com.au/Documents/AU/Personal/investments-advice/154406-SMSF-TCs-72727.pdf>>. For other examples, including the Commonwealth Bank, Westpac, Macquarie Bank, Arab Bank, Bank West, Bank of Cyprus and HSBC, see Chaikin, 'A Critical Examination', above n 142, 50-5.

Similarly, there is no specific requirement that banks disclose to customers foreign requests for confidential information. A question may arise whether the bank is under a contractual duty to inform its customer that it has received the foreign request for confidential information, thereby giving the customer an opportunity to withdraw consent. It would seem that if the customer was notified of the foreign request and consequently withdrew consent prior to the bank making actual disclosure, the bank would be in breach of the duty of confidentiality if it were to make disclosure. However, there is a respectable argument that such an implied contractual duty to give notice would not exist once the customer had given *ex ante* consent to disclosure; such consent would prevent any duty arising. This argument is based on the statement of Nicholls V-C in *El Jawhary v BCCI* that 'where the case is within one of the qualifications to the duty of confidence, the duty, *ex hypothesi*, does not exist.<sup>149</sup> Therefore, no implied duty of confidentiality would arise in circumstances where customers have given their express *ex ante* consent to the disclosure of confidential information. This argument is reinforced by the view that there is no duty imposed on a bank to do everything possible to prevent the application of the qualifications of the duty of confidentiality.<sup>150</sup>

Subject to considerations of legal efficacy<sup>151</sup> and public policy objections,<sup>152</sup> it would seem that the customer consent qualification has the potential to eviscerate the duty of confidentiality so that banks may disclose confidential information to foreign authorities without the knowledge of their customers or local authorities. This is problematic because the blanket consent clause has been constructed without reference to any specific transaction, any particular government agency, or any established operational criteria.

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<sup>149</sup> [1993] BCLC 396, 400. The court permitted a variation of an injunction to allow a liquidator to disclose confidential bank information to liquidators in other jurisdictions on the ground that this was 'in the interests of the bank', but refused to impose an obligation on the liquidator to inform its customers of any such disclosure.

<sup>150</sup> See *Barclays Bank plc v Taylor* [1989] 1 WLR 1066, 1070, where the Court of Appeal rejected the suggestion that the bank was under an obligation to disclose to its customer that the police intended to apply for an access order for information concerning its customer's accounts. Compare *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824 where the Privy Council held that a bank is under a duty to inform its customer of the receipt of a subpoena. See also Toulson and Phipps, above n 35, 158.

<sup>151</sup> For a comprehensive examination of the legal and policy efficacy of these waiver of customer confidentiality clauses, see Chaikin, 'A Critical Examination', above n 146, 59–66. For example, the clause may be objectionable because there is a lack of true consent in that the customer is not 'fully aware of the consequences of what he or she is consenting to'. It may also be argued that it is unconscionable within sch 2 of the *Competition and Consumer Act 2010* (Cth): 'to require the customer to "consent" to disclosure of personal details as a pre-condition to the supply of goods and services': see Tyree, 'Implied Consent', above n 139. Tyree's argument, which was formulated in 2000, has been weakened by the enactment of the *AML/CTF Act 2006* which specifically provides that a bank must not provide designated services unless it carries out various due diligence obligations concerning its customer.

<sup>152</sup> It may be argued that the contractual consent clause infringes public policy on the ground that it is an attempt to contract out of obligations under the *Privacy Act 1988* (Cth). See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, [16.38]; see also Chaikin, 'A Critical Examination', above n 146, 65–6.

### *C Privacy Act and Consent*

The *Privacy Act 1988* (Cth) (*Privacy Act*) is relevant in this context since it applies to the transfer overseas of personal information of bank customers. The National Privacy Principles ('NPPs'), which are incorporated into sch 3 of the *Privacy Act*, bind banks and financial institutions carrying on business in Australia.<sup>153</sup> Principle 9 provides that an organisation may transfer personal information about an individual to someone who is in a foreign country only if one of six criteria is satisfied:

- (a) the organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the National Privacy Principles; or
- (b) the individual consents to the transfer; or
- (c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party; or
- (e) all of the following apply:
  - (i) the transfer is for the benefit of the individual;
  - (ii) it is impracticable to obtain the consent of the individual to that transfer;
  - (iii) if it were practicable to obtain such consent, the individual would be likely to give it; or
- (f) the organisation has taken reasonable steps to ensure that the information which it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the National Privacy Principles.

Principle 9 is designed to protect the privacy of individuals to ensure that personal information is transferred only to persons in a foreign country who are subject to a binding information privacy scheme substantially similar to the NPPs, or where 'the individual consents to the transfer', or in other circumstances.<sup>154</sup> Where the consent ground is utilised to justify disclosure under NPP 9(b), the consent must state the purposes for which the disclosure is intended. Further, under NPP 1.3, organisations are required to take reasonable steps to ensure that an individual is aware of the types of organisations to which personal information is

<sup>153</sup> The *Privacy Act 1988* (Cth) applies to organisations which have a link to Australia, including a body corporate incorporated in Australia or an organisation that carries on business in Australia: s 5B(2). It has an extraterritorial operation in that it applies to overseas acts and practices of organisations otherwise subject to the Act: s 5B(1).

<sup>154</sup> Office of the Privacy Commissioner, 'Submission to the Australian Law Reform Commission', *Review of Privacy—Issues Paper 31* (28 February 2007) 460–72 <<http://www.privacy.gov.au/publications/submissions/alrc/c13.html>>.

being disclosed. It is arguable that a generalised consent clause in a standard form contract fails to satisfy the requirement of the NPPs, unless it sets out in greater detail the purposes for disclosure and the specific organisations that will receive the confidential information.

## VIII Conclusions

The banker's contractual duty of confidentiality to clients and the qualifications to that duty have been well established for over 86 years. The growth of transnational crime has been accompanied by legislative enactments that have expanded the operation of the qualification to facilitate the investigation and prosecution of serious foreign offences. However, the state of the law on the nature of the qualifications to the banker's duty of confidentiality is unsatisfactory, especially in relation to disclosure of confidential information to foreign authorities. Three of the four qualifications to *Tournier's Case* do not provide clear guidance to a financial institution subject to extraterritorial requests for confidential information. Where local law obliges cooperation with foreign authorities, there is no difficulty in a bank complying with that obligation. However, apart from situations where there is legal compulsion, there is legal uncertainty as to when banks are permitted to disclose confidential information to a foreign jurisdiction. In particular, the public duty qualification offers little comfort to financial institutions when confronted with extraterritorial investigatory demands by foreign courts or foreign law enforcement agencies. The legal uncertainty is compounded because banks are not able to determine how the courts will balance the public interest in the duty of confidentiality versus the public interest in disclosure. Nor does the 'interests of bank' qualification provide any solace to banks ordered to comply with the extraterritorial demands for confidential information. In these circumstances, there is a risk that a bank may violate its obligations under the law of one of a number of competing jurisdictions. In this context, the consent qualification provides a potential avenue for protecting the commercial interests of banks. A number of banks have amended their standard form contracts to obtain *ex ante* express consent from their customers to the disclosure of confidential information to both local and foreign authorities. These contractual terms may be viewed as part of the bank's contribution to combating transnational crimes in a more expeditious manner. However, these generalised consent clauses are unsatisfactory as they fail to provide specific criteria about the manner in which they will be used by banks. They also do not address the fundamental and unresolved problem of the role of privacy in the detection, investigation and prosecution of financial crimes, such as money laundering.<sup>155</sup>

There is a distinct advantage in removing the legal uncertainties arising from *Tournier's Case* by codifying the banker's duty of confidentiality in statute. A model example of codification is s 47 of the Singapore *Banking Act*<sup>156</sup> which provides a focused, limited and practical list of circumstances allowing the

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<sup>155</sup> See discussion of the relationship between the *AML/CTF Act* and the *Privacy Act 1998* (Cth) in the Australian Law Reform Commission, *ibid For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [16.155], 614, [16.191]. The *AML/CTF Act* is to be next reviewed in 2014.

<sup>156</sup> Cap 19, 2008 rev ed.

disclosure of customer information.<sup>157</sup> The High Court of Singapore has held<sup>158</sup> that the statutory provision on bank confidentiality has replaced the common law principle in *Tournier's Case*. There is no room for argument in respect of the scope of the public duty and self-interested qualifications to the banker's duty of confidentiality because they are no longer available in Singapore. If new circumstances arise requiring additional qualifications to the duty of confidentiality, this may be dealt with by way of statutory amendment.<sup>159</sup> Given the current trend of banks inserting customer consent clauses in standard banker/customer contracts, consideration should be given to providing explicit statutory criteria as to the procedural and substantive requirements of disclosure when such clauses are invoked. This will provide financial institutions with greater legal certainty as to their legal rights and obligations when disclosing confidential information to foreign authorities. It will also protect the financial privacy rights of customers, who have signed *ex ante* consent clauses without having any idea as to how such clauses will operate in practice.

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<sup>157</sup> In relation to each of the qualifications to the confidentiality duty, sch 6 to the Singapore *Banking Act* sets out the purpose of the permitted disclosure and the person(s) to whom the disclosure may be made. For example, disclosure of customer information is permitted if the customer provides written consent. There is also a statutory qualification in relation to disclosure to a foreign parent bank supervisory authority. For a discussion of bank secrecy in Singapore, see Singapore Academy of Law, *An Overview of the Singapore Legal System* (26 April 2009) <[http://www.singaporelaw.sg/File/22\\_Banking&Finance.pdf](http://www.singaporelaw.sg/File/22_Banking&Finance.pdf)>.

<sup>158</sup> See *Susilawati v America Express Bank Ltd* [2008] 1 SLR 237 (Lai J).

<sup>159</sup> For example, when bank secrecy was perceived as imposing an obstacle to the development of the market for securitising mortgage loans and the outsourcing of customer data processing to third parties, the Singapore Government amended its law: see *Banking (Amendment) Act 2001* (Singapore). Singapore has also passed the *Income Tax (Amendment) (Exchange of Information) Act 2009* (Singapore) to enable its Inland Revenue Authority to exchange confidential information about bank customers to certain foreign authorities, but only after obtaining an order from the High Court of Singapore. See generally, Chaikin (ed) *Money Laundering, Tax Evasion and Tax Havens*, above n 71.