OPENING ACCOUNTS - A BANK'S OBLIGATIONS AND RIGHTS

1. INTRODUCTION

Both the common law and statute impose certain duties on banks when opening accounts for prospective customers. These duties have been expanded in recently decided case law, new Acts and international minimum standards that now place a considerable responsibility on banks.

In opening accounts the bank has three distinct obligations. They are:-

I. A common-law duty to safeguard the true owners of cheques as well as other members of the public who may suffer damage as a result of the fraudulent misuse of the account and the payment system.

II. A statutory duty to ensure that the bank account is not misused by criminals in money-laundering schemes or manipulated by them to prevent the detection of criminal activity or fraud.

III. A statutory duty to the supervisory authority to protect the safety and soundness of banks by ensuring that they know precisely who their clients are. In so doing they shelter the bank from reputational, operational, legal, and concentration risks which might otherwise undermine the integrity of the individual bank and perhaps harm the entire banking system.

In this dissertation I will attempt to clarify the scope of those duties and to investigate what is and what should be required of those who conduct the business of banking when opening accounts for their customers. What questions should be asked of persons who apply to open accounts? What documentation should be gathered? To what must the bank

official apply his mind? What independent checks should the bank undertake? To which specific risks should the bank be especially sensitive?

I will look at the jurisdiction of Australia (very aware in this field), which has dealt with the issue and has formulated the requirements of its banks when opening accounts.

I have also obtained practical information on the methods banks in South Africa use to manage the risks they face. I comment on the adequacy of these measures and suggest a comprehensive system they should employ to minimize the inherent dangers associated with the opening of bank accounts.

The recently passed Financial Intelligence Centre Act, 38 of 2001 provided an excellent opportunity for the Minister of Finance, by the promulgation of regulations, to set a statutory benchmark regarding the duty of care to be required of banks in establishing the identity and *bona fides* of prospective customers. Draft proposed regulations have been published by the Department of Finance.[1] The draft form of these regulations makes comment difficult at this stage.

The Act introduces "Know-your-customer" rules that derive from principles enunciated from time to time by the Basel Committee on Banking Supervision. These can serve two very important functions. First, they will combat money laundering and organised crime. Secondly, the measures will help raise the standard of care required of the collecting bank when opening an account. If the collecting bank does not comply with such statutory duties, I submit a judge will have no hesitation in finding that the bank's conduct was negligent vis-a-vis the true owner of a cheque or any other person who suffers damage as a result of that negligence.

Authority already exists for the proposition that transgressions by a bank of its own regulations constitute *prima facie* negligence.[2]

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[1] This dissertation was largely completed prior to the publication of the draft regulations which are available at www.gov.za, however an effort has been made to briefly comment on regulations.

[2] *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd(Basfour 130 (Pty) Ltd, Third Party)* 2002 (5) SA 101 at 109E.

And I will also refer to the limitations placed on duties. Bankers are not guarantors of the integrity of each and every customer nor can they be expected to be.

SOUTH AFRICAN COMMON LAW

2. LIABILITY OF COLLECTING BANK UNDER THE EXTENDED *LEX AQUILIA*

In English law a bank that collects a cheque for a person who is not entitled to the proceeds faces an action under the tort of conversion. This is a form of strict liability in which the reasonableness of the bank's actions is irrelevant. To penalize a *bona fide* bank in this way is unfair and makes the business of modern banking an extremely risky proposition. Section 4 of the Cheques Act of 1957 ameliorates this common law rule by providing immunity to the bank if it pays in good faith and without negligence.[3]

In South African law a similar situation is brought about by the Aquilian action. Unlike the restrictive 'definitions based' action in tort, our Roman Dutch law of delict is based on flexible principles as set out in our common law. It is this flexibility which allows it to adapt to the modern world and easily to recognise new wrongs which arise from time to time.

As with any action in delict, the true owner of the cheque proceeding against the negligent collecting bank must prove all the elements of Aquilian liability: 1) wrongful act or omission, 2) fault, 3) causation, 4) loss.[4] The true owner would have little problem in proving elements 2-4. The first element is a little more complicated as wrongfulness in the misuse of a bank account results in pure economic loss.

Most delicts involve physical injury to person or property which is *prima facie* unlawful.[5] As the misuse of a restrictively crossed cheque does not result in physical harm but in pure economic loss, the court must evaluate as a matter of policy whether to extend the

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[3] Ellinger E P and Lomnicka E *Modern Banking Law* 2nd Edition (Clarendon Press Oxford 1994) at 513.
[4] Boberg P Q R *The Law of Delict* Vol One (Juta & Company Limited 1984) at 25.
[5] *Cape Town Municipality v Paine* 1924 AD 207.

Aqulian action to cover such loss.[6] The two factors that the court takes into account in deciding whether to extend the relief to a case of pure economic loss are: 1) whether problems of undeterminable loss exist; and 2) whether a multiplicity of actions will result. Neither of these pitfalls mitigates against the recognition of liability of the negligent collecting bank. The nature of a cheque limits the potential claimants, and the quantum of the damage is similarly limited to the face value of the cheque.

The delictual liability of a collecting bank to the owner of a lost or stolen cheque was first recognised in principle by the Appellate Division in the case of *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd.*[7] This case dealt with the negligence of a bank in paying the proceeds of a cheque into the account of a person who was not the named payee. The court was driven to recognize the duty of care which should rest on a bank by two simple facts:- that it is only the collecting bank which is able to ensure that the correct person receives the funds and the drawer or true owner of the cheque is unable to take any steps to protect himself. To have held otherwise would have meant that banks could collect cheques recklessly and a restrictive crossing would be without force and effect.

In that matter the court was deciding an exception and therefore did not hear evidence or prescribe the extent of the actions the bank must take in order to avoid the label of "negligent". It is this element of fault that is most interesting and forms a large part of my dissertation.

I do not suggest that collecting banks provide an absolute guarantee that "Not Transferable" cheques be paid only to the payee, as is required under the tort of conversion. This is a form of strict liability that is inappropriate when applied to the particular problem of which is the subject matter of this dissertation. All that is required of a South African bank is that it acts in accordance with the standard of care of the reasonable bank. Should it do so and the fraud be too artful or novel to be detected by

[6] *Greenfield Engineering Work (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N).
[7] 1992 1 SA 783 (A).

reasonable care, or the chance of loss too remote or too expensive to guard against and the funds find their way into the wrong hands, no liability should attach.

Obviously the standard of care demanded of banks should be higher than that of the ordinary reasonable man. The activity of banking requires a certain expertise that the *diligens paterfamilias* does not possess. A bank's conduct must be measured having " regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs". [8]

Combrinck J in the case of *Kwamashu Bakers Ltd v Standard Bank of South Africa*[9] labeled the conduct of the bank as unlawful and alluded to this the elevated standard expected of banks when he stated " Moreover, it offends against one's sense of fairness and reasonableness for bankers who by statute are the only institutions entitled to take and collect negotiable instruments and are regarded by society as professional persons and institutions competent in dealing in money matters to, on the one hand, procure custom by inviting the public to bank with them and representing that they will collect cheques on behalf of their customers and on the other hand, saying *'there is a risk that when we collect a cheque it may not be for the true owner but although we are aware of this risk it is going to cost us too much to guard against it and therefore we are going to take no steps to protect the true owner.'* "

The size and the vast human and financial resources available to banks determine the high standard being expected of them. Having said this, banks are not to be viewed as omnipotent and infallible institutions whose conduct must guarantee that only the payee will receive the proceeds of a cheque.

However, the answer to the question "should a bank be liable for negligence in opening accounts?" has to be, yes, of course! The protection afforded to the true owner of a cheque, even one that has been crossed and marked "Not Transferable" would have very

[8] *Van Wyk v Lewis* 1924 AD 438 at 444.
[9] 1995 (1) SA 377 (D) at 394F.

little practical importance if the thief of a cheque could circumvent the crossing by simply opening an account in the same name as that of the payee. The collecting banker's negligent conduct consists not only in paying a customer who is not entitled to the proceeds but also in its antecedent conduct in opening such account.

It is well known in the banking industry that an account may be opened by a fraudster merely to be used as a conduit for intercepted or stolen cheques. Experience has taught banks that if a suspicious account is opened the bank runs the risk of "being made a necessary but unquestioning intermediary in a fraud". [10]

The precautions taken by a bank at the time the account is opened are crucial. Once the account is opened, the channelling of a stolen cheque through such an account becomes a relatively easy exercise.

The case of *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* (*supra*) accepted that the collecting banker's duty of care extends to the bank's decision to open an account.

In that case two thieves stole two cheques drawn by OK Bazaars and made payable to ` "KwaMashu Bakery Ltd" only. They bore the restrictive instruction "Not Transferable" boldly across the middle of the cheque. The thieves knew that once the account was opened, the depositing of the cheques and withdrawal of funds would be relatively easy.

To achieve their objective they opened an account at the defendant's Durban branch under the name and style of "KwaMashu Bakery Ltd Soccer Club". When the cheques were deposited, the name of the account to be credited was given on the deposit slip as "KwaMashu Bakery Ltd (Soccer Club)". The bank paid the money into that account. In deciding whether the bank had acted negligently Combrinck J adopted the test set out the English decision of *Marfani & Co Ltd v Midland Bank Ltd*[11] by asking what reasonable,

[10] *London Bank of Australia Ltd v Kendall* (1920) 28 CLR 401.
[11] [1968] 2 All ER 573 (CA).

practical and affordable measures the reasonable, prudent collecting banker would have taken to prevent the harm which resulted to the plaintiff. The judge recognized that the protection of the true owner starts with the banker who must "... not only satisfy himself of the identity of a new client but also gather sufficient information regarding such client to enable him to establish whether the person is the person or entity which he, she or it, purports to be".[12]

The general precautions suggested by the learned judge included checks (presumably telephonic) on the proposed client's employment address, the address given and the whereabouts of his next of kin. In that specific case the judge suggested the perfectly reasonable and prudent step of requiring the constitution of the soccer club as well as the names and addresses of its executives. He pointed out (I submit, correctly) that if proper precautions had been taken at the time the account was opened the loss would not have occurred. This is true of many cheque frauds and especially those involving restrictive crossings. One cannot fault the judge's reasoning and the steps he suggested are the core of the duty of collecting banks.

Much of the judgment dealt with the evidence of witnesses for the bank concerning the life cycle of a cheque and the sheer volume of cheques that must be sorted and processed in a very short space of time. It was this pressure that the bank offered as an excuse and a reason not to be burdened with the duty of care contended for by the owner of the cheque. They prophesied the collapse of the payment system if the court imposed such an onerous duty on banks. The judge rejected this argument. In doing so made a statement which I believe is of fundamental importance. He differentiated between the bank's conduct in opening an account with other acts of negligence involving cheques. The usual time pressures associated with the collection and clearance of cheques are absent when an account is opened.

[12] 395J-396A.

The precautions required "could in no way impact on the banking system or involve an unreasonable amount of time or cost".[13] The opening of a bank account is a one-off and very important act. Two or three days to process such application cannot be regarded as an unreasonable delay. No reasonable member of the public would so regard it.
I submit that two or three days is ample time to make the necessary inquiries to verify the identity and *bona fides* of the applicant.

Banks walk a fine line between making sufficient initial inquiries and subjecting its prospective clients to cross-examination and by doing so implying that they are dishonest. The competitive environment in which banks operate make them loathe to turn away or offend a prospective customer by exhibiting undue suspicion in circumstances that do not warrant it.

This anxiety not to offend does not relieve the bank of its duty. This was observed by Scrutton LJ in the English case of *A L Underwood Ltd V Bank of Liverpool*[14] when he said " If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire".

This is exactly the approach our courts should and do follow.[15] It is a policy decision of a bank to increase the risk it faces by opening many accounts some of which are of doubtful credibility if it considers the rewards to be worthwhile. In the same way a bank might decide to advance credit to a riskier market at a higher interest rate. However, in both circumstances it must live with the consequences of its decision. After all, members of the public are prisoners of the banking system. They cannot escape it. In return, they are entitled to protection and the duty of care resting on a bank at a particular point in time remains constant.

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[13] 396A.
[14] [1924] 1 KB 775 (CA) 793
[15] See *Columbus Joint Venture v ABSA Bank Ltd* 2002 (1) SA 90 (SCA) 102D-E

In my interviews with bank managers[16] I was told that they were often encouraged to open as many new accounts as possible. I was informed that the general health of a branch is measured in part by the number of new accounts opened. This creates a tension between the duty of the bank acting through its manager to ensure that only genuine bank accounts are opened, and the greater readiness to take a risk.

An argument that could be made for banks is that most people are honest and it is not the bank's duty to test the veracity of a prospective customer. However, these are days of increased fraud. Banking accounts operate on a mass basis. I submit that banks must be alive to the fact that fraud is on the increase in the society in which we live. The duty on banks must be viewed in the light of the circumstances prevailing at any given time. Such duty cannot be static and must adapt to the realities of banking practice and the mores of the community at large. This is consistent with the general principles of the law of delict which dictates that the content both of the elements of wrongfulness and fault are to some extent determined by the legal convictions of the community prevailing at that time.

The *faux pas* of offending the sensibilities of a prospective customer is better understood in the context of the society in which in occurs. The decision in the *Marfani* case took place in conservative England at a time when one could more safely assume the honesty of a prospective customer. At that time a bank account was not as easily obtained as it is in South Africa today. The English authorities reflect the importance placed on references in opening an account and appear to accept the word of a "gentleman".

The world and England have changed in 35 years. Most people will concede that one cannot accept as true the *ipse dixit* of even the most respectable looking gentleman. In modern South Africa people are more robust and understand that the act of opening a bank account by a complete stranger requires certain objective verification. In this age of credit checks and credit bureaus people are accustomed to being "investigated" to a certain extent and will not take offence should they be subjected to scrutiny.

[16] I interviewed the Branch Manager of the institution at which our firm operates its accounts on 14 July 2002 and a Branch Manager of another of the "big 4" on 17 May 2002.

On the other hand, bank officials are not required by law to assume the role of policemen whose function it is to expose thieves "or to play the role of amateur detectives or subject an account to microscopic examination."[17]

A judgment delivered in the Witwatersrand Local Division and confirmed by the Supreme Court of Appeal did, I submit, do justice between the parties but mostly for reasons that I suggest are flawed. This is the case of *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd.* [18]

The judgment is valuable in that the judge laid down useful principles and tests. However, when applying them to the facts of the case, I respectfully submit that Reyneke AJ reached some incorrect conclusions. Certain statements made by the judge go too far and set unrealistic expectations for bank officials.

The fraud was carefully thought out and the fraudster, Mr Wayne, equipped himself with a well prepared story, original documentation and a business plan, as well as a plausible excuse for his apparent lack of a credit history. The veneer of respectability usually accompanies the conman. As Donaldson J put it, "the ability to create a good impression is the stock-in-trade of the fraudsman."[19]

The Court, referred with approval to the precautions suggested by Combinck J in the *KwaMashu* case which are set out below:

> "As a first step towards protection of the true owner, I think it could be expected of a reasonable banker to not only satisfy himself of the identity of a new client but also gather sufficient information regarding such client to enable him to establish whether the person is the person or entity which he, she or it purports to be. Checks could be made on places of employment, address

[17] Lloyds Bank Ltd V Chartered Bank of India Australia and China [1929] 1 KB 40 at 81.
[18] 2001 (3) SA 132 (W).
[19] Lumsden & Co v London Trustee Savings Bank [1971] 1 QB 115 at 117.

> given, whereabouts of next of kin, etc before accepting the person as a customer. This could in no way impact on the banking system or involve an unreasonable amount of time or cost."[20]

The defendant's senior manager in charge of fraud investigation, a man with nine years of practical experience, was asked to comment on the duties set out above and whether he considered them to be too onerous. The manager's evidence was that the duty sought to be imposed was too theoretical. While the banks do carry out checks, fraudsters hire offices with telephones which makes attempts to verify the accuracy of information almost impossible. I submit that the response is misguided. It implies that because some fraudsters are skilful and some scams are difficult to expose, the bank should have no duty to take steps objectively to verify information. This cannot be the law.

The manager together with his counterpart from Standard Bank Limited who was called as a witness by the plaintiff, did, however, touch on a real problem not adequately dealt with by the judge.[21] It remains a problem to this day. That is the absence of effective legislation regulating the use of trade names. There is no doubt that this fraud and the one perpetrated by the villain in the case of *Powell and Another v ABSA Bank Ltd t/a Volkskas Bank*[22] were only possible because at present there is no way to verify whether a particular company or individual is entitled to conduct business under a particular trade name.

Original company documentation is worthless if the thief can assume any trade name he wishes in order to impersonate a payee on a stolen cheque. Statutory intervention in this regard is one of the suggestions I make in Chapter 6 below.

In dealing with the standard of care required and the reasonable steps to be taken by a bank in opening an account, the judge followed the reasoning in the *KwaMashu* case and held, quite correctly, I submit, that the duty must include objective inquiries to verify

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[20] 161I.
[21] See Malan ABLU 2000 at 17.
[22] 1998 (2) SA 807 (SE).

independently both the *bona fides* of the prospective client and the accuracy of the information and documentation provided. Simply to establish identity is insufficient.

After considering the information and documentation on hand, the question that the bank official must ask himself when opening the account is, I submit, not simply, "Is this person the man he says he is?" but rather " Are there reasons to believe that this person will fraudulently misuse this account? Are there any particular circumstances which increase the risk and warrant further investigation?". Reyneke AJ re-affirmed that the bank is under a duty of care when it receives and processes an application to open an account. The basis of the duty is that such an act is inherently risky. "A bank is free either to accept or decline the custom of a client. In opening an account and making the bank's facilities available to a customer, it creates a potential risk to the public and in particular to owners of cheques if that account is thereafter misused for fraudulent purposes."[23]

The judge developed the law by expressly deciding that the bank official must apply his mind to the information and documentation furnished. It cannot and does not discharge the duty of care by simply collecting documents and information in a robotic fashion thereby reducing the precautions to a farcical "ticking exercise". In certain circumstances the banks might have to go beyond the contents of the application form.

Was FNB negligent on the facts of the *Energy Measurements* case? The judge held it was, but imposed what I submit are too onerous duties on the bank official. He stated that he was aware of the dangers of judging the matter on hindsight but then proceeded to take an unrealistic view of what is required.

For example, the judge expected the bank official, on perusing the projected income statement, to notice that it included charges for the lease of a vehicle. This apparently should have sounded the alarm bells and the official should have realised that another financial institution had dealt with the company and could therefore provide a potential

[23] At 160C.

and independently verifiable trade reference. I cannot accept this. I submit it is unrealistic. This is the kind of microscopic examination we were warned against by the English cases.[24]

The judge also expected the bank official to notice that the credit bureau check revealed information that suggested that Mr Wayne was in South Africa when he was supposed to be in the United States of America. One must remember that a bank official is opening one account of many in the ordinary course of business. He cannot be expected to have an eye for detail, not merely of an amateur detective, but one worthy of Hercule Poirot.
In the same way, it cannot be expected of a bank official to deduce that the business the company had done in the past of R 44 300-00 should have provided for trade references. This the court did. But the deal could have been a one-off transaction with a foreign company.

With the benefit of hindsight the judge placed too onerous a duty on the official and called the discrepancies "glaring".[25] They are not. Another factor to be taken into account is that an official opening an account is in the normal course is not necessarily highly educated. The person in charge of opening accounts at the Buffelsfontein branch of a bank cannot not share the intellectual capacity of a judge traditionally chosen from the ranks of the best senior counsel and who, through many years experience, has developed a keen eye for details and discrepancies. To expect more from a branch level bank official is, in my opinion, unrealistic.

As stated before I do believe that the judge reached the right result. However, while I submit the bank was negligent it was not for the reasons set out above. It was negligent because it failed to satisfy itself of the *bona fides* of its prospective customer. The documents collected by the bank official in that case simply verified the identity of the applicant. This is not enough as the *bona fides* of the prospective client must also be independently verified.

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[24] Lloyds Bank Ltd v Chartered Bank of India Australia and China (supra)
[25] 167G.

Such *bona fides* could not be established from the documents and information furnished by Mr Wayne precisely because of the lack of information provided. Mr Wayne was deliberately vague and provided no employer details, trade references or business addresses. In those circumstances a positive duty was placed on the bank to go beyond the available and inconclusive information and documentation and undertake further investigations. This duty arose in part as a result of the paucity of information supplied by the applicant. Mr Wayne's explanation of his lack of credit history was perfectly plausible but had to be independently verified.

Also the mere fact that the customer wanted to conduct the account in a trading name which was not that either of the account holder or the director of the company warranted a special degree of care because of the greater risks for fraud inherent in these accounts.

What did the bank official do in this particular case to discharge the bank's duty? She simply collected documentation, verified its validity and undertook a credit check on the company and Mr Wayne. The credit bureau check which establishes whether any judgments or any adverse credit information is recorded is sometimes helpful in identifying thieves, but it is primarily aimed at addressing the bank's credit risk. This is not the same risk faced by the true owner of a cheque and the bank cannot discharge its duty to the true owner simply by doing a credit check.

Here was a man completely unknown to the bank, applying to open an account. He gave no banking details from other banks. Also, the bank's application form did not provide for any trade references or other references which could be checked. The official simply collected documents and accepted the applicant's explanation regarding the lack of credit and banking history. This was not enough. Faced with a stranger and with the lack of information the bank official erred in closing her eyes. She needed to take positive and independent steps to verify Mr Wayne's *bona fides.*

What should she have done in the circumstances? When a bank is dealing with a stranger, with no history, nor any verifiable connections to persons known to it, the opening of the account requires an increased duty of care. Telephonic checks on the business number should have been undertaken on two random occasions. In addition, the official should have asked for the trading address of the business and a bank official should have been sent to the premises physically to verify its existence and to view the goods which were to be sold in the normal course of business. If the new business as yet had no premises and was conducted from home, a similar investigation should have been conducted at the home of the applicant.

If the business were not yet up and running, the bank official should have requested the contact details of the business's suppliers or the suppliers he intended to use in South Africa or abroad. If this too had not yet been decided, the duty on the bank became steeper. In such event I believe the official should have taken the drastic step of asking for contact details of persons at the employers or universities that Mr Wayne claimed to have attended in the USA and these persons/institutions followed up telephonically.

Although these precautions may appear excessive, the profile of this particular applicant, the lack of information provided and the fact that the account was conducted through a trade name placed it in a high-risk category which justified such steps. One must also bear in mind that there is no obligation on the bank to accept the applicant's new business. If the suggested steps are viewed by it as not being cost effective, the bank should decline to open the account.

If these questions had been asked of Mr Wayne he would probably have walked out of the branch and never been heard from again. The fraud would have been prevented before it began.

I believe that the only practical way that a bank can approach the issue of account opening is to concede that not all applications can receive the same level of scrutiny. As I

suggest in Chapter 6 the banks should adopt a layered approach and manage certain problems by exception.

Some accounts bring with them a very low level of risk. Say the managing director of a long time customer of the branch, who has known the manager for many years, who runs a very successful business and whose account has always been properly conducted applies for a personal cheque account. For the purposes of argument let us assume that he also has his bond account at the institution in question applied for through the branch. He provides his work address, his home address and his telephone number. He furnishes his original identity document and completes the application in full. This account requires very little scrutiny and the duty to open the account can be delegated to the most junior employee of the branch as it is at the lowest of the risk spectrum.

The *Energy Measurements* case involved facts (or rather, the lack of facts) which placed the application for banking facilities by Mr Wayne on the risky side of the spectrum. Add to that the inherently dangerous nature of a "trading name" account. Such applications should be handled by a risk manager employed for that purpose on a regional basis who should make the necessary investigations and not stop until the *bona fides* of the applicant is established.

The duty of care resting on the bank regarding the opening of an account for an existing customer is not as stringent as the duty imposed on a bank when opening an account for a person unknown to it. This difference was discussed in the cases of *Powell and Another v ABSA Bank Ltd t/a Volkskas Bank* and *Columbus Joint Venture v ABSA Bank Ltd*.[26] This is the decisive factor which distinguishes the two cases and causes the courts to arrive at different decisions on very similar facts.

While I agree with the central issue of the *Powell* case which is that less is to be expected of a bank when opening an account for an existing customer, I respectfully suggest that the judge reached the wrong conclusion on the facts of that particular case and that justice

[26] 2002 (1) SA 90 (SCA).

was not done between the parties. In a way this case was the opposite of the *Energy Measurements* case which involved the bank's negligent conduct in failing to look beyond the primary documents and information furnished by a stranger. I submit that in the *Powell* case the bank, in dealing with a well-known customer, was not negligent because it failed to look beyond the application and the information provided. Rather, it was negligent because the contents of the application itself contained certain suspicious facts and glaring discrepancies which should have alerted it to potential fraud. To detect the fraud a reasonable and sensible bank official need not have been an amateur detective but simply on the alert.

The customer's identity was beyond question and his *bona fides* prior to the application were satisfactory. The information disclosed in the application however, threw his *bona fides* into question and should have aroused suspicions sufficient to warrant further investigation. The bank official concerned was indeed suspicious but failed to follow through on his doubts or to take the steps a reasonable banker should have taken in the circumstances.

In circumstances where an applicant for an account is an existing well known customer of the branch the bank's duty of care is less onerous. However, the bank is not relieved completely of such duty of care. This is what the judge in the *Powell* case seems to suggest.

> "In all circumstances I am inclined to hold that the reasonable banker might be excused from making enquiries from outside parties with a view to obtaining confirmation that an existing customer was entitled to the cheques which he delivered to his banker for collection. I am not prepared to hold that Kinghorn should not have accepted the word of a customer and that he should have carried out an independent enquiry."[27]

Is this an absolute rule? I think not. If an existing customer places himself on enquiry, the official cannot simply become a zombie because the applicant is a customer. The

[27] 821.

customer should have no such immunity and the bank official must still be expected to apply his mind to the application.

The *Powell* case dealt with a "trading name" account. As stated above an account in a trade name is inherently risky. From the outset this application should have been approached with extreme care.

Evidence given at trial by Mr Kinghorn ("Kinghorn"), the Defendant's manager, revealed that he had known Gerber since 1991 when Gerber had opened a savings account at the branch. He knew that Gerber was employed by Volkswagen as a test driver and that he often bought and sold cars. The manager accepted Gerber's statement that he had now decided to go into business as a used car salesman. The question as to whether Gerber was entitled to trade as "Volkswagen" must have aroused certain suspicions because Kinghorn did indeed undertake an enquiry, pitiful and incomplete though it was, as to whether the firm existed by scanning the telephone directory. There he found an entry for Volkswagen South Africa (Pty) Ltd but no entry for "Volkswagen Used Vehicle Sales". He did nothing further.

This case illustrates two additional factors which place such applications for account opening on the high side of the risk spectrum. These are:

1. The application for the account was in the name of a well known brand; and

2. the applicant currently worked for a company with a name very similar to that of the account he intended opening, which necessarily brings with it a very high risk of fraud.

This risk factor is the inside knowledge of an employee. He can impersonate the payee or he can use his position of employment at the drawee firm to effect payments by cheque to himself which are fraudulent and not due to him.

The failure to make inquiries on the opening of the account about the customer's employer was held to be negligent in the case of *Lloyds Bank Ltd v E B Savory & Co.*[28] I submit that on the opening of an account such inquiry is reasonable and desirable. However, I agree with Sir John Paget's[29] criticism that to expect a bank to verify the employment details of an account holder from time to time amounts to imposing an unreasonable burden on it.

I submit that because of the unusual risk factors set out in the *Powell* case above, the manager should at least have undertaken the following enquiries:

1. Followed up with Gerber the absence of a telephonic entry for his new business;

2. If the business were to be conducted at home a physical inspection of the 'premises' be undertaken by him;

3. Most importantly, Volkswagen South Africa (Pty) Limited should have been approached to ascertain whether Gerber or anyone else for that matter was entitled to trade under the name and style of 'Volkswagen Used Vehicle Sales'.

The judge referred to the *KwaMashu* case and distinguished it on the grounds that that case dealt with a new customer whereas the present case dealt with an existing client of the very branch at which he opened a new account. He stated "It is therefore quite clear that no further checks were necessary for the purpose of confirming Gerber's identity".[30] Of his identity, certainly, but what of his *bona fides*? The judge went on to say "There is no suggestion that Kinghorn – or any other member of the Despatch branch of Volkskas - had any reason to doubt Gerber's honesty while he was a customer of the bank during the period 1991 to December 1994."[31] I could not agree more but it was in December 1994 when the application to open the new account was made that the honesty and *bona fides* of Gerber became relevant. While one must accept that less is to be expected from a bank

[28] [1933] AC 201 at 215, 223, 233-4.
[29] Hapgood M *Paget's Law of Banking* Eleventh Edition (1996) at 467.
[30] 820H-I.
[31] 821C.

opening an account for an existing customer, it still has a duty of care and cannot be lulled into total complacency because it is dealing with a person known to it. An honest person may not be honest forever, just as a dishonest thief may become rehabilitated.

The risk factor regarding well known brand names has a caveat. This is the proliferation of franchise-type businesses in respect of which a person may have a perfect explanation for conducting business in that name. This, I submit, must be independently verified with the franchisor, as is discussed in Chapter 6 below.

The case of *Columbus Joint Venture v ABSA Bank Limited*[32] is a reminder that all that is to be expected of a bank is that it acts reasonably and not that it prevent all frauds. Certain frauds a bank cannot escape. If they are avoidable at all, it is only at a cost or effort which is unreasonable or impractical.

The *Columbus* case dealt with the application for an account by Mr Alexander Bertolis ("Bertolis"), an existing customer of the branch who had been known to the bank officials for two years. He had his personal cheque account at the branch and had applied for his mortgage bond with the defendant. Bertolis was employed by the plaintiff as group legal advisor, but unknown to his employer he was a dishonest former attorney who had been struck off the roll eight years before. His legal training was not entirely wasted as he typed and signed a purported franchise agreement between an existing firm of attorneys in Belgium called "Stanbrooke & Hooper" as franchisor on the one hand, and himself, as franchisee, as the other.

The presiding Malan J, began by tracing the history of a collecting bank's negligence in South African law as well as in other jurisdictions. After setting out the relevant principles he distilled a common principle that runs through the cases. This is that circumstances are quite different when a stranger opens an account as opposed to an account opened by an existing customer.

[32] 2000 (2) SA 491 (WLD).

The learned judge said:

> " Obviously, where the customer is an existing one much is known of him and the bank need not repeat the process unless circumstances call for inquiries to be made. A bank should also be careful not to inquire where inquiries might offend the customer and invade his privacy. A right balance should be struck: a bank should inquire where it is put on inquiry or the transaction is out of the ordinary. A bank official is not called upon to cross-examine the customer to determine whether he is lying."[33]

This is essentially a restatement of Reyneke AJ's proposition that the fundamental inquiry is not simply directed to identity. The essential requirement is *bona fides*. At the point that the account was opened Bertolis had not shown his true colours. There was nothing to suggest he was dishonest as his account appears to have been run in an acceptable manner.

Malan J held that, regard being had to his prior connections with the bank, it was reasonable for the bank to accept his word and the documents furnished and to open the account without making any further inquiries.

I respectfully agree with MalanJ's judgment and the reasons therefor. Let us examine the way in which he dealt with each ground of negligence advanced by the plaintiff:

1. He rejected the argument that the bank was negligent for not inquiring from a practitioner in Belgium whether Stanbrooke & Hooper actually existed. The judge said the details on the agreement were correct and there was no reason to doubt their correctness. He held that no telephone call was required in the circumstances. He went a step further by saying that a such a call would have revealed very little and would simply have confirmed the existence of Stanbrooke & Hooper.

2. The second ground of negligence advanced was that the bank should have inquired from Stanbrooke & Hooper whether the franchise agreement had indeed been entered

[33] At 510 H-I.

into. The franchise agreement was regular on the face of it and such an enquiry would only have been necessary had there been facts putting the bank on inquiry. Such facts were absent. Malan J observed (I submit, correctly) that little more could be expected from an honest man in the shoes of Bertolis.

> "To require the bank to telephone Belgium to verify the existence of the franchise is simply asking too much. A bank can generally accept what the customer tells it. It is not required to cross-examine its customer or act as a detective where there is nothing in the circumstances indicating something untoward."[34]

3. The judge rejected the third ground of negligence. No evidence had been adduced to show that it was illegal to practise in this country in the manner alleged.

4. On the fourth ground of suggested negligence, Malan J held that in the circumstances the bank was under no duty to investigate whether a business was in fact being conducted in South Africa. The franchise agreement was enough. To expect more from the bank would be to impose unreasonable and expensive duties on it.

The plaintiff's claim was dismissed with costs as it had failed to show any negligence on the part of the bank.

The decision was confirmed on appeal in *Columbus Joint Venture v ABSA Bank Limited*[35] in which Cameron JA delivered a judgment which brought some of the older authorities into line with current banking practice and the modern society in which we live. With respect, the judgment is an excellent survey of the law.

The judge agreed there were no grounds for holding that the bank was negligent and approved the principle that the approach to an existing client is very different to that required when opening an account for a stranger. He agreed that this was the distinguishing feature of the case. He went further and analysed the rationale of this

[34] At 511G.
[35] 2002 (1) SA 90 (SCA).

double standard. Obviously, the rationale is not that existing customers are inherently more honest as a class but "because existing clients generally have verified identities and confirmed work and residential contact details, and because, should the account be used for fraud, the customer can be traced and brought to book".[36] This "heightened accountability" operates as a "significant disincentive" to fraud.

The bank knows that when opening an account for an existing client, there is less risk of fraud as the client has less chance of escaping the consequences of any fraud with impunity and will usually be held accountable. The judge distinguished the facts in the *Columbus* case from those in the *Energy Measurements* case *supra* and the aggravated risk associated with the stranger Wayne, who walked in off the street and who had a much better chance of attempting and "getting away" with the fraud because the disincentive of being held accountable was absent.

The bank's conduct in the *Columbus* case cannot be faulted, but the prospect of accountability does not deter all individuals. The fact that this assumption is not fail-safe in all situations does not mean that it should not be an important factor in deciding whether the bank has discharged its duty of care.

All the information and documentation were authentic; the agreement was regular on the face of it and the plaintiff had very little on which to base its allegation that the bank was at fault. It apparently relied on the ease and relatively inexpensive precaution of making contact with Stanbrooke & Hooper to verify the existence of the agreement. The ease of the precaution is superficially attractive. The argument is this: "All the bank had to do was pick up the telephone and call". But Cameron JA rejected this approach and, with respect, rightly so. He held that unusual precautions, however easy, are only required when a bank should have suspected something untoward. The truth is that there was nothing in the application to have put the bank on enquiry or to question the existing customer's *bona fides*. This is the heart of the matter. The question the bank official

[36] At 97H-I.

should ask is: “Is there any reason to suspect that this account will be used for fraud?” I submit in these circumstances the answer was “No”.

Unlike Wayne in the *Energy Measurements* case, Bertolis did not walk in off the street. The risk was lower. Certain individuals like Bertolis have a self destructive nature that is so far removed from society in general that the tests adopted for most people do not apply to his desperate optimism. It is unlikely that Bertolis really believed that he would not be discovered eventually. However, it seems to me that he adopted a “live for the day” attitude and persisted with his fraudulent scheme regardless.

Such people are rare and I believe that a bank cannot be expected to design policies which cater for such an anomaly.

A humorous analogy could be the following: Your loyal wife of 20 years tells you she is going to visit her friend for tea. It would be the easiest thing in the world to take one minute to telephone her friend to verify that she did in fact arrive. In the normal course, in the absence of previous suspicious behaviour, a reasonable husband would not take such an insanely jealous step. This, however, does not mean that she did not meet her aerobics instructor at a motel for an afternoon liaison.

Both Cameron JA and Malan J did concede that one aspect of Bertolis’s application for the account brought an element of risk. That was that the account was opened in a name that was not Bertolis’s own but in the trading name of a firm. Malan J correctly observed that opening such an account “lends itself to misuse and calls for some explanation”. The explanation came in the acceptable form of the franchise agreement that was regular on the face of it coupled with a plausible explanation regarding the new practice to be established. No further steps were practical in view of the current system which does not regulate the use of trading names. This risk factor was also counterbalanced by the fact that Bertolis was an existing client.

Cameron JA rejected the duty argued for by the plaintiff in the following words:

> " It would make the bank the guarantor of the probity of its customers, or at least of their dealings and doings, as against all they injure by utilising banking facilities reasonably extended to them." [37]

The Plaintiff's appeal was dismissed with costs.

However, Cameron JA disagreed with Malan J's assertion that in making inquiries the bank should be careful not to offend the customer or invade his privacy. This fear of offending a customer has its roots in the English *Marfani* decision[38]. In current conditions where fraud is rife such an archaic attitude can no longer be tolerated, and Cameron JA specifically said that the fear of offending a customer cannot inhibit the banks duty of care in opening an account. In a twist of irony Cameron JA used Lord Diplock's statement in the *Marfani* judgement that as banking practice changes so does the duty of care of the reasonable banker and that cases decided 30 years before might not be a reliable guide to the steps a bank should take in any given circumstances.

A further point. What if Bertolis had not been an existing customer of ABSA Bank Limited and all other facts remained the same? An interesting question. Having regard to the principles discussed above, the bank's conduct would most certainly have been judged negligent. What steps would the judges have regarded as proper in those circumstances? I submit that the bank faced with a stranger, whose *bona fides* have not yet been demonstrated, would have had to make contact with Stanbrooke & Hooper in Brussels, Belgium to verify independently both the existence of the franchise agreement and whether Bertolis had the authority to conduct a bank account in that name. Anything less would have to be regarded as negligent. If the bank were not prepared to take those precautions to protect the general public the only other option would have been to decline Bertlois' application for the facilities.

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[37] At 100E.
[38] [1968] 2 All ER 573 (CA).

This reflects the current state of our common-law regarding a bank's duty of care in opening bank accounts for their customers.

3. FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001

The Basel Committee on Banking Supervision has issued principles and guidelines regarding account opening. Some of these guidelines as well as the recommendations of the Financial Action Task Force on Money Laundering have been introduced into South African law by the enactment of the Financial Intelligence Centre Act 38 of 2001("the Act") and the Prevention of Organised Crime Act 121 of 1998.

The stated intention of the Act is to combat money-laundering and to impose certain duties on institutions that may be used for such purposes. A juristic person called the Financial Intelligence Centre was established to supervise compliance with the Act by "accountable institutions". A schedule of "accountable institutions" is annexed to the Act and lists the kind of entities attractive to money-launderers. Included in the list are attorneys, estate agents, accountants, stockbrokers and casinos.

Also included in the list is "A person who carries on 'the business of a bank' as defined in the Bank's Act, 1990(Act 94 of 1990)".

Many duties are imposed on accountable institutions, some of which deal with a bank's duty to report suspicious transactions and certain cash transactions over the prescribed limit. These issues deal with the bank's obligations regarding the customer's conduct of an account. I will focus only on those provisions that have an impact on the bank's statutory duties when opening an account.

Section 21, which begins Chapter 4 of the Act, is entitled "Money-Laundering Control Measures" and is set out below for ease of reference:

"*Duty to identify clients*

Identification when business relationships are established or single transactions concluded

21. An accountable institution may not establish a business relationship or conclude a single transaction with a prospective client unless the accountable institution has taken reasonable steps to establish-

a. The identity of the prospective client;

b. If the prospective client is acting on behalf of another person, also-

(i) the identity of that other person; and

(ii) the prospective client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and

c. if another person is acting on behalf of the prospective client, also-

(i) the identity of that other person; and

(ii) that other person's authority to act behalf of the client."

This provision does not really extend the bank's common-law duty. It does no more than require verification of the identity and authority of a prospective client, which are duties already imposed on banks in terms of the common law.

Another section of the Act which is relevant for our purposes is section 42 which compels accountable institutions to formulate and implement internal rules to *inter alia* establish and verify the identity of persons opening bank accounts, which rules must comply with prescribed requirements.

Section 77 delegates the power to the Minister of Finance to make regulations which can differ for different accountable institutions regarding the content of the internal rules to be formulated and implemented in terms of Section 42.

Proposed draft regulations regarding the establishment of the identity of clients have been published but are I submit in a skeletal form at present.[39] These basic regulations often refer to "guidance notes" which the Financial Intelligence Centre is yet to develop and issue. These guidance notes will probably be institution specific and will no doubt flesh out the draft regulations and prescribe exactly what kind of steps a diligent accountable

[39] This dissertation was largely completed prior to the publication of the draft regulations which are available at www.gov.za, however an effort has been made to briefly comment on regulations.

institution must take in order to comply with its obligations to verify identity and information relating to its clients.

The Minister of Finance has, however, introduced some novel regulations that combat money-laundering, have the effect of protecting the true owner of a cheque and contribute to the safety and soundness of banks. These regulations bolster the common law and "raise the bar" in terms of the precautions that banks must take in protecting the true owner of a cheque. These regulations are also more stringent than the precautions that banks are taking at present.

The Minister has taken the first important steps in prescribing procedures relating to account opening and in determining the content of a bank's internal rules relating to the opening of accounts.

The advantage of this kind of intervention is that all the banks would be obliged to follow exactly the same standard of care. The usual concerns regarding the competitive environment in which banks operate would disappear as the measures would be mandatory for all banks. I submit that the supervisor would be a very useful scapegoat available to the bank to blame for any inconvenience caused to a difficult client. The official charged with the responsibility of opening the account could ask the necessary awkward questions and blame the department of trade and industry should the customer become irate.

In Chapter 6 I will discuss the novel regulations referred to above and suggest further regulations which would result in a high and uniform standard of care to be expected of banks when opening accounts.

4. RISK MANAGEMENT PRACTISED BY SOUTH AFRICAN BANKS

From reading the reported judgments, especially the *Columbus* and *Energy Measurements* cases, one does get a sense of the strategies that banks have in place to

manage the risk of account opening. In fact, it is those decisions that have contributed to banks raising the standard of their internal controls to comply with common law requirements.

While the principal focus of the law of delict is compensation, it also has a function in regulating future conduct by declaring through court decisions what is and is not reasonable conduct.

In attempting to examine the measures banks take to combat account abuse, I interviewed two bank managers.[40] I was also provided with the internal rules relating to account opening by one of the major banks.

The banks have adopted strategies which make the fraudulent use of a bank account difficult. However, I suggest more can be done to provide an even greater level of protection both to the general public and the bank itself.

As a first step in the protocol of account opening managers and bank officials are warned of the danger posed by opening accounts without properly identifying the customer. Such accounts are often used by criminals to deposit stolen cheques.

Officials are taught to be especially careful when dealing with persons who are cagey regarding their affairs and details and whose residence and businesses are located far from the branch.

Before an account is opened for an individual first time customer, the official is required to identify positively the individual by insisting on production of an original identity document (South African citizen), a valid passport that has not expired (non resident) or a certificate of particulars (minor).

[40] I interviewed the Branch Manager of the institution at which our firm operates its accounts on 14 July 2002 and a Branch Manager of another of the "big 4" on 17 May 2002.

A temporary identity document or an identity number is not sufficient to open an account. The official is advised of the fact that the first six digits of the identity is the holder's date of birth and that the next number must be 5 if the holder is a male. One major bank regards the establishing of identity as so important that it requires a particular bank official to take responsibility by prescribing a procedure whereby the official stamps and signs a copy of the identity document with a declaration which reads:

"I confirm that a comparison has been undertaken and found to be a true or reasonable likeness of the party".

Making the comparison and declaration part of the process of opening an account ensures that the task is undertaken each and every time and that a specific bank official takes responsibility for identification of the customer. This particular bank allows the opening of the account by a South African citizen with a valid original passport and a similar declaration is required together with the undertaking from the customer that his original identity document will be made available on receipt and the process of identification and declaration is followed again as above.

The bank's credit checks also unintentionally have the effect of making frauds more difficult. This is because of the rigorous investigations required and the verification of income earned. The bank officials are warned to be especially careful where the applicant is self-employed and operates from home.

When close corporations apply to open an account the following original documents are required:

- The Founding Statement or Amended Founding Statement;
- Certificate of Incorporation.

In addition a bank mandate form must be signed by the member opening the account which essentially stipulates the signing arrangements on the account. Further, positive identification of all members is mandatory as for individual accounts. Credit bureau checks are done on the close corporation concerned and on all members and signatories.

The official must also insist on a VAT registration number to be provided where the annual turnover is in excess of R300 000-00. Whenever a change of members takes place a certified copy of the amended founding statement is to be obtained and new mandate forms must be signed.

A fairly similar situation is required when a private company applies to open an account. The bank official will insist that the following original documentation be furnished:

- Certificate to Commence Business;
- Certificate of Incorporation;
- Certificate of Change of Name (where applicable);
- Memorandum of Association;
- Articles of Association.

Again the directors will have to sign the mandate and identity checks as set out for individuals will be required for all directors and signatories on the account. There are no surprises thus far, but what is comforting is the level of strictness that banks maintain regarding the above. Few, if any, exceptions are made regarding such procedures.

The real questions begin when the bank is faced with the riskier applications. They are –

(i) <u>Informal bodies: clubs, schools and churches</u>

The banks have learnt their lesson well after the *KwaMashu* case and insist on the following:

- Positive identification for individuals in respect of all officials appointed to operate on the account;
- Credit checks on all members of controlling body and signatories;
- A copy of the Constitution or Rules;
- A mandate form to be signed stating the signing arrangements and giving the names of office bearers;
- A national search on the trading name must be performed to ascertain that there are no other accounts with a similar name with that particular bank

(ii) Sole Proprietor

- Personal identification requirements as stated above must be conducted on the proprietor;
- Credit Bureau checks are performed on the individual and the business name, to ascertain whether entities with similar names exist;
- The account is to be opened in the trading name of the business;
- The management of the branch must ensure that the customer conducts business in the trade name furnished and where necessary an inspection of the location of the business is to be undertaken to confirm that the business exists;
- A search on a nation wide basis on the trading name must be performed to ensure that there are no other accounts with the same name with that particular bank;
- The only document required is the mandate to open an account.

(iii) "Trading as" accounts

This applies to all entities including sole proprietorships, partnerships, close corporations and private companies. The bank officials are advised to exercise extreme care when they receive applications to open accounts in 'trading as' names. However the very legitimate reasons that an entity may want to use a trading name is also recognised by bank policy. The applicant is encouraged formally to change the name of a shelf company to the trading name where possible.

The officials are expressly required to check whether the trading name belongs, or is similar, to a well-established company and a credit check is suggested to ascertain this. The officials are advised of the possibility that the business may be a franchised company, and if so the official is required to obtain a copy of the franchise agreement or to make contact with the franchise company concerned to obtain confirmation of the franchise agreement. If the trading name is unknown,

the bank official is required to visit the premises to establish whether the customer is legitimately trading in the trading name.

5. AUSTRALIAN LAW

Australian Banking Law and especially the law relating to negotiable instruments is heavily influenced by English law. Like South Africa, Australia adopted most of the provisions of the English Bills of Exchange Act 1882 and is still influenced by English case law on the subject of the collecting banker's duty of care and more specifically the collecting banker's duty of care in opening accounts.[41]

As with English Law, the basis of the collecting bank's liability by paying a cheque to a person who has no title thereto is an action instituted under the Tort of Conversion.[42] The Australians have since enacted the Cheques and Payment Orders Act 1986 (CPOA) which replaced and repealed the previous Act,[43] but the provisions excluding the bank's liability for conversion are almost identical and still require a bank which desires protection from an action based on conversion to show that the bank acted **in good faith** and **without negligence**.[44]

Australian Law has not always recognised the need for a bank to make proper inquiries before an account is opened. A Banking Law textbook published in 1975 had this to say on the issue of the absence of inquiry as a factor in assessing a bank's negligence:

> " It is felt that an Australian decision at the present time which placed any substantial weight on the failure of a banker to make enquiries and or check references on the occasion of opening an account would be anachronism and is unlikely to occur."[45]

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[41] Weerasooria W S *Banking Law and the Financial System in Australia* Fourth Edition (Butterworths 1996) at 425.
[42] Weerasooria at 425.
[43] Bills of Exchange Act 1909.
[44] S 95(1) Cheques and Payments Orders Act 1986
[45] Weaver G A, Craigie C R *The Law Relating to Banker and Customer in Australia* (The Law Book Company Limited 1975) at 503.

At present banks in Australia are under a duty to make proper inquiries before an account is opened following the decisions of *Lloyds Bank* and *Marfani.* If the bank does not make reasonable inquiries it may forfeit the protection of the CPOA and incur strict liability.

> " It is now well settled that in ascertaining whether a bank has been negligent, a court will take into consideration all the circumstances, both *antecedent* and *present*, to see whether they were so out of the ordinary course of events that it should have aroused doubt in the bank's mind and caused it to make enquiry. The opening of the account is a very material antecedent circumstance. The bank must show that in opening an account for a new customer it had made proper enquiries and acted as a careful bank." [46]

In *London Bank of Australia Ltd v Kendall*[47] the High Court of Australia considered whether the bank could avail itself of the protection of Section 88 of the Bills of Exchange Act 1909 in proving that it received payment for a customer without negligence. The court considered whether the transactio n of paying in the cheque and the antecedent circumstance of opening the account ought to have aroused doubts in the banker's mind and caused him to make inquiry.

The facts of the case were briefly, that a man intercepted a crossed cheque in the post and then opened an account under a false name, withdrew the money thereafter and vanished. The "respectable looking" man who spoke like an "educated man" said he was a merchant from Adelaide and wanted to open an account. In looking at the issue of the bank's negligence the court found that no credentials or references were provided by the man, no confirmation was given about his statement that he was an indent merchant. No references from the bank in Adelaide were offered or asked for. Interestingly, evidence by an official of Commercial Bank in Sydney at the time was to the effect that "his bank would not take from a stranger desiring to open an account crossed cheques for collection without first inquiring from the drawer."[48]

[46] Weerasooria at 432.
[47] (1920) 28 CLR 401.
[48] At 415.

The court recognised the need for an inquiry and held that the bank was negligent and stated:

> "The account as opened was suspicious: the customer was not merely unknown, but was doing something that needed some explanation in the absence of which the Bank ran the risk of being made a necessary but unquestioning intermediary in a fraud."[49]

Policy decisions on what is reasonable is always dependent on the particular facts of a case, this makes it difficult to prescribe concrete steps to be taken in all circumstances and perhaps the statements of Isaacs J are helpful in assessing whether a bank's actions are negligent or not.

"The only guiding principle is that, where doubt is once aroused as to the nature and true ownership of a cheque, the nature and extent of the inquiry proper to allay it must be measured by what, in the circumstances, a fair-minded banker, paying due regard to the reasonable exigencies of banking in relation to the person depositing the cheque, would consider it prudent to do in order to protect the interests of the true owner whoever he might be." [50]

This statement was approved and applied in the case of *Hunter BZN Finance Ltd v CG Maloney (Pty) Ltd & others.*[51]

In *Mason v Savings Bank of South Australia*[52] the Supreme Court of South Australia held that the bank in question was liable for conversion as it had not shown that it had received payments without negligence. In particular, the court held that the identity of the customer was not satisfactorily established, he was simply requested to provide a specimen signature and asked his address. No other inquiries were made of him as to his identity and he was unknown to the bank official opening the account. Furthermore there was the evidence of bank practice that an account should not be opened with a non-negotiable cheque.

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[49] At 414.
[50] At 417.
[51] (1988) NSWLR 420 (Commercial Division) at 445B.
[52] [1925] SASR 198.

In S*avings Bank of South Australia v Wallman*[53] the thief took advantage of genuine confusion and as the court stated, "It was only by a strange coincidence and a curious combination of mistakes that she was able to present the convincing appearance of ownership."[54] Mr Wallman sent a cheque in the post drawn in favour of "E M Jenkin" to Eliza Ann Maria Jenkin residing at 49 Alpha Road, Prospect. The cheque was erroneously delivered to Elsie May Jenkins who lived at 105 Main Road, North Prospect. The "wrong Jenkins" applied for and opened an account in the name of E M Jenkin. At the request of the bank she obtained a certificate from a respected person known to the bank certifying her signature and his personal knowledge of her. The court held that "it would be setting an extraordinary high standard of diligence to hold that in these circumstances a prudent banker ought to have made still further inquiry. Indeed, it is difficult to see what course of inquiry could have been pursued fruitfully."[55]

It appears that the court felt a great deal of sympathy for the bank and seemed to reason that the loss was not directly the result of the bank's negligence but more a result of pure coincidence. I submit that this case was incorrectly decided for two reasons: Firstly, it was proved that the surnames differed. "Jenkin" was the payee on the crossed cheque as opposed to "Jenkins" who applied to open the account. Secondly, the "correct" payee E M Jenkin already had an account at the **same branch** of the defendant bank. I realise that the case was decided in 1935 long before the advent of computers but the account was known at the branch. The bank failed to notice that the payee on the cheque was a customer of that branch and allowed a person with a name so similar to open an account and deposit the cheque. This must be judged to be negligent.

Weerasooria suggests that the case law regarding the negligence of banks in opening accounts is somewhat academic in the current Australian environment. This is because of the Financial Transactions Reporting legislation which became effective 1 February 1991. This legislation prescribes special procedures for account opening and the verification of customers.

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[53] (1935) 52 CLR 688.
[54] At 695.
[55] At 695.

> "The effect of the new statutory provisions will, to a large extent, minimise, if not prevent altogether, the innocent use of banks by thieves and swindlers to collect stolen/unauthorised cheques as was done before. On the other hand, if a bank had not complied with the current statutory requirements of identification, and account verification it would amount to evidence of negligence. Indeed, if banks abide by the stringent requirements of the FTR legislation it is unlikely for English cases like *Marfani* and *Lumsden* to occur in Australia. Nor can there be a repetition of fact situations of the Australian cases such as these cited at 25.22 where banks were duped into opening accounts for convincing rogues."[56]

The legislation that provides the Australian banking system with the protection that Weersooria refers to above include The Financial Transaction Reports Act No. 64 of 1988[57](FTRA) as amended and The Business Names Act 23 of 1996 (South Australia).[58] Constraints on the length of this dissertation permit me to deal only with the most important sections of the legislation. In addition, I have annexed hereto the complete text of the more important sections.[59]

The Financial Transaction Reports Act is a Federal Act which binds all the states of Australia and its main object as defined in section 4 is to "facilitate the administration and enforcement of taxation law".

In order to strengthen the collection of revenue, AUSTRAC (the Australian Transaction Reports and Analysis Centre) was created to regulate certain transactions and to *inter alia* insist on complete verification of persons opening and conducting bank accounts.[60] The effect of the provisions of the Act are that if the accountable institutions, which include banks, comply with the law, fraudsters will find it almost impossible to open an account without either revealing their identity or providing details which will ultimately allow police to trace them after they have perpetrated the crime.

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[56] Weerasooria at 435.
[57] www.parliament.sa.gov.au/catalog/legislation/acts/f/FINATRA-RSP.htm.
[58] www.parliament.sa.gov.au/catalog/legislation/acts/b/BUSINESSNAM.htm.
[59] See Annexure "B" at the end of this dissertation.
[60] S 35.

"Cash dealers" defined to include financial institutions such as banks are required to report on the prescribed form, subject to certain exemptions[61] *"significant cash transactions"*[62] involving transfer of amounts in excess of $ 10 000 and *"suspect transactions"*.[63]

The FTRA sets out extremely meticulous procedures regarding the opening of bank accounts and requires great detail regarding the person opening the account and all signatories on it. Also, the Act institutionalises the importance of obtaining good quality references before allowing a person to open an account. This in the words of our Cameron JA in the *Columbus* case acts as a "a significant disincentive to fraud."

Section 18 of the FTRA ensures that if an account is opened and is then utilised in a substantial way full "account information" must be available or the account is blocked until the information is provided.

The "**account information"** is defined in Section 1 and includes detailed information and documentation.[64]

The FTRA also requires **'identification references'** to open an account. Section 21 places a great responsibility on a person providing a reference to a bank regarding a person applying to open an account and even goes so far as to prescribe the content of the reference and makes the providing of a misleading reference an offence. This is an ingenious section as it shifts part of the responsibility for identification and verification of account applicants to members of the public who are required to propose and vouch for the credibility of applicants. This shifting of the regulatory responsibility would be welcome in South Africa with its limited resources and already overburdened banking administrators.

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[61] S 9.
[62] S 7.
[63] S 16.
[64] See Annexure "B".

The following terms are defined in Section 1 of that Act: "acceptable referee", "primary identification document" and " secondary identification document".

"Cash dealers" are required to keep records of account and signatory information obtained when opening accounts for a period of seven years after the day on which the account was closed.[65]

When accounts are transferred from ADI's (authorised deposit-taking institutions) there is an obligation on the transferor bank to provide the transferee bank with complete copy of all account and signatory information.[66] In addition, this obligation continues even after the account is closed with the transferor ADI.[67] This is also a very helpful provision as it makes inter-bank co-operation mandatory.

Another form of legislation which frustrates thieves in Australia is the Business Names legislation. I have chosen to look at the Business Names Act 23 of 1996 of the state of South Australia, but most have similar provisions. The Act prohibits a natural or juristic person from carrying on business in the state under a business name except in certain circumstances. Carrying on business is deemed to occur if a person causes an advertisement to be published that contains the business name and an address within the state.[68]

A 'business name' is defined as a **"name, style, title or designation under which a business is carried on"**.[69] A business name as the Australians call it appears to be the equivalent of what we understand to be a "trading name".

In terms of Section 7 if you want to conduct or even advertise for business in South Australia, your trading name must either contain your surname and initials if you are a natural person or must contain the full registered name of your company. If not, you

[65] S 23.
[66] S 23A.
[67] S 23B.
[68] S 4(2).

must apply in terms of the Act to register the business name. A "body corporate" is the equivalent of a juristic person which is incorporated in terms of the Australian Corporations Act 2001.

Preference is given to competing applications on the basis of the order of applications lodged with the regulatory authority[70] and registration expires after three years.[71] A register of business names registered under the Act is kept[72] and is open to the public[73] and must in terms of section 11(3) contain information relating to the names and addresses of both the business and the owner, whether or not the owner is a natural or a juristic person.[74]

Failure to comply with the provisions of the Act is an offence and if a "body corporate" or juristic person commits an offence than each director is guilty of the offence and liable to the same penalty.[75]

The Australians have also recognised the inherent danger arising from the abuse of trading names. So, section 17 disqualifies certain individuals from conducting business under a business name and section 18 requires the prominent display of the business name.

In terms of section 8(2)(b) the Commission considering the application is given the power to insist on documents to determine the application. The Commission must not register a business name if it is undesirable[76] or if it is likely to be confused with a registered business name[77] or the business name the registration of which expired during the preceding two months[78] or the name of a body corporate.[79]

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[69] S 1.
[70] S 9(1).
[71] S 10.
[72] S 11(1).
[73] S 11(4).
[74] See Annexure "B".
[75] S 22.
[76] S 8(4)(a)(i).
[77] S 8(4)(b)(i).
[78] S 8(4)(b)(ii).

It should be apparent to the reader that FTR legislation, if followed by Australian banks will result in very few frauds of the kinds recently experienced in South Africa, resulting in the cases of *Kwamashu Bakery*, *Energy Measurements*, *Powell,* and *Columbus Joint Venture,* all of which were decided from 1995 onwards. The FTRA was drafted in 1988 and it is interesting that I was unable to find any recent Australian cases dealing with the negligent opening of a bank account. Is this because Australians are inherently more honest than South Africans? The reason I believe lies in the protection afforded to the payment system by the FTR legislation which makes it virtually impossible to misuse bank accounts to collect stolen cheques. Some of the suggestions that I make below follow closely on the useful provisions of the legislation.

6. SUGGESTIONS FOR LEGAL REFORM

REGULATION OF TRADING NAMES

As stated above the current position regarding the regulation of trading names in South Africa is unsatisfactory and will continue to undermine the best attempts by banks and government to protect the general public from the fraudulent misuse of bank accounts and to combat money-laundering.

The use of a trading name is not suspicious *per se* and there are perfectly legitimate reasons that an entity might desire to conduct business under a trading name and these include goodwill, branding and convenience. The trading name phenomenon also goes hand in hand with the speed and advantage of purchasing shelf companies. If a businessman wants to conduct business through the vehicle of a company, he can, after the purchase of the shelf company, simply register as shareholder and director without having to go through the time consuming procedure of the registration of a company. The name of the company will then bear little relationship to the trading name and there is little reason or incentive for the company to change its registered name. It is not illegal for one incorporated company to trade via a number of business units each with its own

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[79] S 8(4)(b)(iii).

trading name.[80] The problem occurs when criminals abuse the informal and unregulated nature of trading names to achieve their fraudulent purpose.

The control and regulation of business names in South Africa is governed by the Business Names Act[81] which is a two page statute which essentially imposes certain duties on persons carrying on business to disclose in commercial documents and communications basic details about the business.[82] The Act allows the Registrar on application from an aggrieved person to order any person to cease carrying on business in that name if the complaint in the opinion of the Registrar meets certain criteria.[83] There seems to be little enforcement of this obscure act and there is no active regulation of business names in the sense that there is no requirement for the registration of business names. There is also no prohibition against trading in the same business name as another entity, although this may result in an aggrieved person with a similar business name obtaining the assistance of the Registrar by persuading him on application that the name is calculated to deceive the public.

It is clear that the South African approach is ineffective in the fight against fraud and is an attempt to regulate business names by exception.

All natural persons are uniquely identified by an identity number as are companies and close corporations that are uniquely identified by a registration number. The system is designed to ensure that no two persons, natural or juristic, will have the same identification number. However, if a person applies to operate a bank account in a trading name there is currently no identification number that is specific to that entity which has been verified by a registration process, during which identifiable individuals are responsible for its registration.

The solution, I submit, is for the legislature to intervene and make the registration of trading names mandatory under certain circumstances as is currently required in South

[80] *Two Sixty Four Investments (Pty) Ltd v Trust Bank* 1993 (3) SA 384 (W) at 385I.
[81] 27 of 1960.
[82] S3.

Australia. A trading names register could be set up under the auspices of the companies office by the creation of a new official responsible for the regulation of trading names, which could be called the Registrar of Trading Names. A "trading name" would be defined broadly as in the Australian legislation as "the common name by which a business is carried on" and would require registration where in the case of a sole proprietor does not contain a reference to that person's initials and surname or in the case of a juristic person is not identical to the registered name of the company or close corporation.

As in the Australian legislation a natural or juristic person would be deemed to be "carrying on business" if he/she/it published an advertisement containing the trade name.

While regulation does have obvious advantages it can also have the effect of stifling small business development by placing additional red tape obstacles in the path of an entrepreneur who wishes to commence business. Often, the cure for the disease can be worse than the disease itself. I submit that Australia is notorious for its over-regulation and this negative aspect must be avoided in South Africa.

South Africa's official unemployment rate is an unacceptable 29.5%.[84] The expanded definition dispenses with the requirement that in order to be classified as unemployed the person needs to have been actively seeking employment in the last four weeks prior to the survey. If this definition is used South Africa's unemployment rate is an almost unbelievable 40.64%! Of the 10.8 million people employed, 18% are employed in the informal sector. South Africa's over-riding requirement for economic growth and the realities of our developing economy require more flexibility than the rigid example of Australia.

In order to minimize the effect on small business and the informal sector, I suggest that registration of a trading name be required in all circumstances where the entity conducts

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[83] Section 5(1).
[84] Labour Force Survey- September 2001- www.statssa.gov.za.

any kind of bank account, save where the entity involved falls within the following exclusions:

1. Where the trading name contains the surname of the proprietor, or in the case of companies and close corporations if the trading name is identical to the name registered in the companies office;
2. Where the entity concerned operates a bank account in the trading name and in conducting the account undertakes only to transfer amounts that do not exceed of R 20 000-00 in individual transactions and to conduct the account in a manner in which the aggregate rand value of debits and credits in any thirty day period does not exceed R 50 000-00.

Exclusion number 1 will have the effect of encouraging juristic persons, where possible, to change the registration name at the companies office to their trading name. Cheques would therefore be made out to the company's registered name and so reduce the risk of fraud as no two companies or close corporations can have the same name or registration number. In addition, the registration process of a company involves the independent verification of the directors or members who become accountable to a certain degree should the entity be used for a fraudulent purpose.

Exclusion 2 will ensure that informal or small business will not have to bear the brunt of the increased regulation. Most frauds involve substantial sums of money. However, this exclusion does mean that certain smaller frauds may occur over a long period of time. This must be balanced against the greater good of stimulating the growth of small business that is essential for the economic development of South Africa. Also, what must be borne in mind is the fact that even where the exclusion applies the bank will still have a duty of care in opening the "trading name" account as it has at present, bolstered by the increased statutory responsibilities that I advocate below.

The Registrar of Trading Names shall not provide an entity with a Certificate of Trade Name unless he has verified the identity of the natural persons utilising the trading name and provided there are no other identical Trade Names registered with the Registrar. The

Register of Trading Names would be open to the public and would include the information required by section 11(3) of the South Australian Act.

Entities that apply to operate a bank account will have to comply with the legislation, subject to the two exclusions set out above. Failure to comply with the regulations will be a criminal offence with both the applicant, or its directors and (possibly) the bank official being subject to a fine and/or a prison sentence.

Any person carrying on business under a registered trading name should be required to display the trading name prominently on any documents relating to the carrying on of the business.

Failure to comply with the Act, or to prove the applicability of the exclusions will also have the more important effect that a person would not be able to open a bank account without the Trading Name Certificate from the Registrar of Trading Names. The regulations would ensure that a bank official may not open a bank account without a trading name certificate unless the applicant falls within one of the exclusions referred to above.

When applying for the opening of a bank account exclusion one will be easy to prove to the bank official, by providing him with an original Identity Document, Certificate of Incorporation or CK documentation. Only where the name in which the entity desires to conduct the account is different from the name on the registration documentation will the entity concerned have to provide a Trading Name Certificate.

Should a small business want to take advantage of exclusion number two, this will not be automatically apparent to the official opening the account. In these circumstances, the bank official must, after discharging his or her normal duty of care, open the bank account and place a "computer flag" on the account in accordance with exclusion two. If during the course of conducting the account an individual transaction is attempted in excess of the limits (what Australians would call the "infringement day") the computer

programme must deny the transaction and the customer must be called in to review the particular transaction and the future conduct of the account. The same will apply if the aggregate limit is exceeded as set out in the second part of the exclusion two.

REGULATIONS TO BE PROMULGATED UNDER SECTION 53 OF THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001

The draft regulations referred to in chapter 4 above have codified the precautions already taken by major South African banks and have proposed novel regulations which place additional responsibilities on banks in opening accounts over and above and the normal common law duty of care.

These include the requirement that an individual provide an income tax registration number[85] which increases the number of factors by which a bank can establish a person's identity and introduces a factor which is difficult to fraudulently overcome. In addition, the accountable institution must verify the residential address of a client by reasonably practical means.[86] I submit that these practical measures should include the furnishing of a rates and taxes, electricity or phone account. In addition the draft regulations will require that a company provide full details and residential addresses of both the manager of the company and each natural or legal person or trust that is able to exercise control by the majority of voting rights at a general meeting of the company.[87]

Minister of Finance should make further regulations specific to banks as is permitted by section 53(2)(a), which would include the formulation of internal rules to be prescribed to all banks concerning the establishment and verification of the identity of persons, as provided in section 42(1), (2) and (3). I submit that the regulations should include the following:

[85] Draft Regulation 3(1)(d).
[86] Draft Regulation 4(3).
[87] Draft Regulation 7.

INFORMATION AND DOCUMENTATION TO BE FURNISHED WHEN ACCOUNT IS OPENED

In addition to the usual information and documents requested by banks in opening the accounts which was referred to in Chapter 5 above, the following additional information and documents must be requested and suitable explanations given for the lack thereof. If the explanation given to the official opening the account is less than adequate the account must be referred to the risk official referred to below for further investigation. The additional information and documents requested should include the following:

- "account information" and "signatory information" referred to in the definitions section of the Australian Financial Transaction Reports Act (" FTRA").
- Personal accounts – credit card; medical aid card; latest electricity account; latest telephone account; driver's licence card; identification references;
- Business accounts - financial statements of the business; a description of the customer's principal line of business; a list of major suppliers and customers and their geographic locations; identification references; trading name certificate, if applicable.

One of the best safeguards to emerge from the FTRA is the requirement of "identification references". Section 21 of the FTRA should be incorporated in its entirety in the regulations making the necessary cosmetic changes when appropriate. This is an excellent way of making acceptable references a standard pre-requisite for opening an account. In this way the burden of the verification both of the identity and *bona fides* of the account applicant is shifted to the account applicant as well as a reputable and reliable person or company who is prepared to take the risk of endorsing the applicant in its application for banking facilities.

INTER-BANK CO-OPERATION

An inter-bank account database of all accounts in South Africa should be created. All registered banks who take deposits from the public shall be obliged to participate in the database. This inter-bank co-operation will on its own eliminate most frauds involving

stolen cheques or fraudulent and unauthorised payments. All the fraudsters referred to in the case law specifically chose to open their account at a collecting bank different from the drawee bank of the cheque stolen. They did this because they knew that in opening the account the bank would run a check on its computer regarding all accounts which it had open at the time.

Inter-bank co-operation will ensure that a criminal will be unable to take advantage of the fact that a particular official of a particular bank is only able to undertake a partial search which are the accounts opened at that bank. The official in opening the account will now have the ability within a matter of minutes to compare the applicant's proposed account name to every account open in the republic. The power of the computer networks to store, access, organise and share information must be harnessed in the fight against the criminals.

Currently, the banks have a joint banks credit bureau which enables them to list and share information on bad credit risks, when an applicant applies for an account or a loan. This sharing of information only addresses the credit risk facing the bank and does not fully address the risk faced to the general public by cheque fraudsters and money launderers. The new database will allow each bank access to limited account information on all customers of a particular bank, not just the adverse credit risk customers. The information will be limited to names, identity or registration numbers, addresses, names and addresses of directors, members and shareholders, and the nature of the business in relation to each account.

Whenever accounts are transferred from one bank to another the transferor bank shall be obliged by the regulations to provide the transferee bank with account information which should be defined in a similar manner as in the FTRA. In addition, account and signatory information shall be kept on the computer database for a period of 5 years after an account is closed.

CREATION OF MANDATORY POSITION OF RISK OFFICIAL

An official of the bank should be appointed on a regional basis charged with the responsibility of reviewing each account application which has any of the risk factors set out in annexure "A" of this dissertation. The maximum number of branches that each risk official shall be responsible for shall be regulated from time to time by the Minister of Finance. The official must have the requisite experience as well as knowledge of the fraud techniques commonly employed in relation to bank accounts. In addition the official must have an understanding of the common law and statutory obligations on banks in opening accounts. The official must attend conferences with his counterparts at other banks in order to ensure that the knowledge and expertise available is kept current and is consistent amongst all banks.

The "risk official" when faced with the following high risk applications must always ensure that both the identification of the applicant and his *bona fides* are established. Specifically the official shall take the following precautionary steps:

- New customer, lack of history, vague or unverifiable details

The risk official must check the inter-bank account database to ensure that no other account with the same or similar name is currently open, or has been conducted in the past. If the business is to be conducted from home the risk official must undertake a physical inspection of the business to verify that it actually trades, has the capability of undertaking the business described and does not appear to be a front for a fraudulent scheme or money-laundering activities. If the proposed business is a new one the risk official must make contact with the prospective applicant and verify his identity and honesty as far as possible by making contact with and obtaining references from no less than three independent parties. The ability to trace connections to the account holder should, as Cameron JA stated, serve as a disincentive to fraud by increasing the accountability factor.[88]

[88] *Columbus Joint Venture* case, *supra* at 97H-I.

- Well known brand name or franchisee

If an applicant applies for an account which is the same name as, or a name similar to, a well-known brand or other business enterprise, the risk official must make contact with the aforementioned enterprise to enquire whether the applicant has its permission to conduct business and a bank account in that name. If the applicant is a franchisee who opens an account in the trading name of the franchise group the risk official must make contact with and verify firstly, the existence of the franchise agreement and also whether the applicant is entitled to conduct a bank account in the franchise name.

- Account to be opened in a name similar to the trading name of the applicant's employer

The risk official must make contact with the employer to advise that the applicant intends opening an account in that name and to obtain information regarding the capacity in which the applicant is employed at the organization to assess the risk of intercepting cheques (*Energy Measurements)* or causing fraudulent payments to be effected (*Columbus Joint Venture*).

7. CONCLUSION

Although much of the law in this area focuses on the fraudulent theft of cheques in conjunction with the opening of bogus bank accounts, this merely reflects the state of the current technology and the methods used by bank customers today to make payments. Banks encourage their customers to use electronic transfer methods of payment rather than cheques as a safer and cheaper method. I submit that within the foreseeable future the use of cheques as a payment method will decline and will ultimately become a relic of a by-gone age and something of a quaint curiosity.

The absence of cheques will mean that many of the bases of negligence by collecting banks will disappear *eg*: paying contrary to a restrictive crossing. However, the problem of account opening will remain as a way, possibly the only way, in which a thief might

impersonate the payee and so will continue to be important as long as bank accounts are used to receive money.

As will now be apparent there are currently many common-law and statutory duties imposed on banks regarding the opening of accounts for their customers which provide a measure of protection to the general public against the fraudulent use of bank accounts. In addition, the banks themselves have formulated internal rules and procedures which go beyond those legal requirements. However, the current legal position does not provide adequate protection and the system could be greatly enhanced by statutory intervention which follows the example of the legislative reform in Australia.

ANNEXURE 'A'

PROPOSED RISK FACTORS TO BE CONSIDERED IN OPENING BANK ACCOUNTS

- The applicant's residence or place of business is not in the area served by the bank or branch;
- Disconnected telephone service or no record of employment;
- Lack of credit history;
- No previous bank account;
- A foreign applicant;
- A new customer to the bank;
- A trading name account;
- The proposed name of account the same as, or similar to, well known business or brand;
- The proposed name of account the same as, or similar to, that of franchise group;
- Proposed name the same as, or similar to, that of the employer.

ANNEXURE 'B'

AUSTRALIAN LEGISLATION

The Financial Transaction Reports Act 64 of 1988

"Section 4 - Objects of Act

The principal object of this Act is to facilitate the administration and enforcement of taxation laws."

"Section 18 Opening etc. of account with a cash dealer

(1) This section applies where:

(a) on a day (in this subsection called the *transaction day*) after the commencement of this section, a person:

(i) opens an account (other than a facility or arrangement for a safety deposit box or for any other form of safe deposit) with a cash dealer; or

(ii) becomes a signatory of such an account with a cash dealer;

and either of the following subparagraphs applies:

(iii) on a day (in this section called the *infringement day*), being the transaction day or a later day, the credit balance of the account exceeds $1,000;

(iv) on a day (in this section also called the *infringement day*), being at least 30 days after the transaction day, the aggregate of the amounts credited to the account within the last 30 days exceeds $2,000; or

(a) on a day after the commencement of this section (in this section also called the *infringement day*) a person:

(i) opens an account with a cash dealer, being a facility or arrangement for a safety deposit box or for any other form of safe deposit; or

(ii) becomes a signatory of such an account with a cash dealer.

(1) If, at the end of the infringement day, the cash dealer does not have the account information about the account, the account is blocked with respect to each signatory until the cash dealer has the information or the Director gives a notice under subsection 19(2)……..”

“account information, in relation to an account with a cash dealer, means:

(a) information identifying the account, including any identifying number; and,
(b) the name in which the account is held; and
(c) information, and documents, provided to the cash dealer by the holder of the account (whether provided in relation to that account or another account), as follows:
(i) an address, not being a Post Office Box address, for the holder of the account;
(ii) if the account is held in:
(A) the name or names of an individual or individuals; or
(B) the name of an unincorporated association;

that fact;
(iii) if the account is held in the name of a body corporate (other than as a trustee)—that fact and a copy of the certificate of incorporation (if any) of the body corporate;
(iv) if the account is held in a business name—that fact and a copy of the certificate of registration of the business name or, if registration was applied for but not yet obtained, a copy of the application;
(v) if the account is held in trust—that fact and the prescribed details of the trustees and beneficiaries of the trust.”

“Section 21 - Identification references

(1) An identification reference for a signatory to an account is a written reference by an acceptable referee, signed by the referee and setting out the name to be used by the signatory in relation to the account and stating that:

(a) the referee has known the signatory for the period specified

in the reference;
(b) during the whole of that period, or for so much of that period as is specified in the reference, the signatory has been commonly known by that name; and
(c) the referee has examined:
(i) a specified primary identification document for the signatory in that name;
(ii) a specified secondary identification document for the signatory in that name and a specified primary identification document for the signatory in a former name of the person; or
(iii) only a specified secondary identification document for the signatory in that name.

(2) An identification reference for a person by an acceptable referee shall also set out:
(a) the name, address and occupation of the referee and the basis on which the referee claims to be an acceptable referee;
(b) if the reference states that the referee examined a primary identification document for the person in a name different from the name to be used by the person in relation to the account—the explanation that the person gave the referee for the difference in names;
(c) if the reference states that the referee examined only a secondary identification document for the person—the explanation that the person gave the referee for the failure to produce a primary identification document; and
(d) the required details of the identification document or documents examined by the referee.

(3) An identification reference for a person by an acceptable referee

shall be signed by the person in the presence of the referee and shall contain a statement by the referee to the effect that the reference was so signed.

(3A) An acceptable referee, or any other person, must not:
(a) intentionally make a statement in an identification reference, reckless as to the fact that the statement is false or misleading in a material particular; or
(b) intentionally omit from an identification reference any matter or thing, reckless as to the fact that without the matter or thing the reference is misleading in a material particular.
Penalty: Imprisonment for 4 years.

(4) For the purposes of this Act, a failure by a person to produce a primary identification document shall not be taken to be sufficiently explained merely by the assertion that a primary identification document is not presently available to the person if the person could obtain a primary identification document within a reasonable time if the person took reasonable steps to obtain it.

(5) Nothing in subsection (4) shall be taken to require a person to apply for the issue of a citizenship certificate or a passport."

"acceptable referee means a person in a class of persons declared by the Minister, by notice in the *Gazette*, to be acceptable referees for the purposes of this definition."

"*primary identification document*, in relation to a person, in a particular name, means:

(a) a certified copy, or an extract, of a birth certificate of the

person; or

(b) a certified copy of a citizenship certificate of the person; or

(c) an international travel document for the person; or

(d) any other prescribed document;

that shows that name as the person's name."

"*secondary identification document*, in relation to a person in a particular name, means a document (other than a primary identification document) which establishes the identity of the person in that name."

Business Names Act 23 of 1996 (South Australia)

"Section 7 - Certain business names to be registered

7. (1) A person must not carry on business in this State under a business name unless,

(a)the business name consists of the name of the person; or

(b)the business name is registered under this Act in relation to that person.

Maximum penalty:$5 000.

(2) For the purposes of this section, the name of a person consists of,

(a) in the case of a natural person, the person's full name or the family name together with at least the initials of the person's Christian or given names;

(b) in the case of a body corporate, the full name of the body corporate.

(3) For the purposes of this section, a person does not carry on business under the person's name if the name is used with an addition other than,

(a) the name of a person with whom he or she carries on the business in association; or

(b) words indicating that the business is carried on in succession to a former owner of the business.

(4) This section does not prevent a person who is a trustee from carrying on a business in that capacity under another person's name or registered business name.

(5) If a person carries on a business under another person's registered business name as referred to in subsection (4), the person is to be taken to be the proprietor of that registered business name for the purposes of this Act.

(6) In this section,

"trustee" means,

(a) a person appointed or constituted trustee by act of parties, by order or declaration of a court or by operation of law; or

(b) an executor, administrator, guardian, committee, receiver or liquidator; or

(c) a person,

(i) having or assuming the administration or control of any real or personal property affected by any express or implied trust; or

(ii) having the possession, control or management of real or personal property of a person who is under a legal or other disability; or

(iii) acting in any other fiduciary capacity."

Section11(3)

The register must include the following particulars in relation to each registered business name as provided by or on behalf of the proprietor of the business name:

(a) a concise description of the true nature of the business carried on or proposed to be carried on under that name;

(b) an address for service of the proprietor and the address of each place in this State at which the business is or is proposed to be carried on;

(c) in the case of a proprietor who is a natural person, the full name, date of birth and residential address of the proprietor;

(d) in the case of a proprietor that is a body corporate, the corporate name and the address of the registered office, or principal office, in the State of the body corporate.

(3a) The Commission may include further information on the register at the request or with the consent of the person to whom the information relates.

Section 17 - Certain convicted offenders not to use business names

17. (1) A person who has been convicted within or outside this State,

(a) on an indictment of an offence in connection with the promotion, formation or management of a body corporate; or

(b) of an offence involving fraud or dishonesty punishable by imprisonment for a period, or maximum period, of at least three months; or

(c) of a prescribed offence against the Companies (South Australia) Code, the Corporations Law or the Corporations Act 2001 of the Commonwealth,

must not, within the period of five years after the conviction or, if the person was sentenced to imprisonment on such conviction, within the period of five years after release from prison,

(d) commence (or recommence) to carry on business in this State under a business name; or

(e) if the conviction occurred after the commencement of this section, continue to carry on business in this State under a business name,

unless,

(f) the business name under which the person carries on business is not required to be registered under this Act; or

(g)the person has obtained leave of the District Court to carry on business under the business name.

Maximum penalty:$5 000.

(2) A person who intends to make an application for leave of the District Court under this section must give the Commission at least 28 days' notice of the proposed application.

(3) The Commission may be represented and heard at the hearing of an application under this section.

(4) When granting leave under this section, the District Court may impose such conditions or limitations as it thinks fit and any person contravening or failing to comply with any such condition or limitation is guilty of an offence.

Maximum penalty:$5 000."

Section 18 - Use and exhibition of business name

18. A person carrying on business in this State under a registered business name must display the registered business name,

(a) prominently on any document relating to the carrying on of the business; and

(b) in a conspicuous position on the outside of each place at which business is carried on under that name.

Maximum penalty:$750.

Expiation Fee:$160."