

STOP THE PRESS: LAWYER GIVES ETHICAL ASSISTANCE TO BANKERS

The prevailing mood of the early years of this century can be seen as one of widespread dismay at the huge financial losses caused by the promotion of financial products and services that were not suitable for consumers and put financial institutions and economies at risk.

The global financial crisis highlighted the profound importance of the banking and finance sector to the wellbeing of consumers, businesses, employees, shareholders and governments.

It has led to a raft of reviews, reports and regulatory and other initiatives aimed at improving the workings of the banking and financial sector and the public's confidence in it.

Most recently David Murray, the Chair of the Australian Financial System Inquiry, has spoken of the need for banks to rebuild trust following the global financial crisis and to do this through leadership that brings about real cultural change.¹

Bankers' Oaths

The founders of the Banking and Finance Oath are global leaders in an initiative that aims to promote such a goal through individuals working in the banking and finance sector making a public commitment to abide by certain principles of ethical conduct.

This initiative was embraced and taken further in the Netherlands this year. From January the board members of Dutch banks have been required by law to swear a bankers' oath.² Draft legislation proposes the extension of this oath to other categories of bank employees.³

In addition the Dutch Banking Association has announced that it will require all employees of Dutch banks to swear such an oath, with breach attracting possible disciplinary action.⁴

In the United Kingdom, think tank ResPublica recommended that bankers be required to swear a bankers' oath in its July 2014 report 'Virtuous Banking: Placing ethos and purpose at the heart of finance'.⁵

Richard Lambert, whose May 2014 report recommended the establishment of a Banking Standards Review Council (BSRC) to be operational by 2015, was not in favour of this initiative, but nevertheless emphasised the need for such a body to encourage employees to "think through ethical dilemmas, and to take responsibility for their actions."⁶

Fundamental Questions and Some Possible Answers

This raises the question: How can ethical rules, codes of conduct or oaths improve ethical behaviour and what makes them most effective?

I come to this question as a lawyer reflecting on the ethical rules and practices adopted in my own profession and their effectiveness.

For ethical rules, codes or oaths to be effective it seems fair to postulate that:

- senior members of the profession must take a leadership role in adopting and promoting them
- they must be taken seriously and adhered to.

Enhanced public confidence may follow if the adoption of and compliance with codes is adequately publicised.⁷

Clearly, the importance of the consequences of breach for the effectiveness of ethical codes should also be considered. However, this is a topic for another day.

Both lawyers and bankers act in commercial contexts and will inevitably face some tough ethical decisions in the course of their careers. In addition, they may find they do not have much time for quiet reflection regarding such decisions. Ethical rules or principles will not always provide clear guidance on the course to adopt. Different ethical principles may sometimes suggest inconsistent courses of action. Thus to be effective ethical rules must also be supplemented by further ethical leadership, guidance, and training.⁸

Overarching Purpose

When considering the practical application of a set of ethical rules some guidance can be obtained from focussing on what the overarching purpose of the adoption of a particular set of ethical rules is.

Lawyers are subject to professional conduct rules which clearly illuminate the context in which ethical dilemmas need to be addressed. The NSW Barristers' Rules and Solicitors Rules state that solicitors and barristers owe their primary duty to the courts and the administration of justice. Even their duty to act in the best interests of their clients is subject to this primary obligation.

The conduct bankers' oaths are aimed at addressing is set out in the introduction to this article. ResPublica suggested that there are three core purposes of banking that bankers should endeavour to adhere to: "systematic prudential security; work for the prosperity of customers; promote the responsible creation of value".⁹ It seems to me that the Australian Banking and Finance Oath (BFO) has as its overriding rationale, the promotion of individual and societal economic wellbeing through the stability and integrity of the financial system and the promotion of products and services in the best interests of consumers.

The BFO embraces this overriding purpose most in the commitment to creating a sustainable future. The Dutch bankers' oath includes a pledge to "endeavour to maintain and promote confidence in the banking sector".

Guidance and Training

Ethical rules or oaths must be supplemented by ethical leadership, guidance and training. The importance of leadership and guidance from senior management is supported by some research on ethical attitudes which suggests that more experienced or older workers in the finance sector are more likely to strongly condemn unethical behaviour.¹⁰

Richard Lambert noted in his report the special requirements of good ethics training and the inadequacy of online or check-a-box type training. He suggested effective training might involve "presenting employees with difficult moral dilemmas and asking them to think their way through to a decision". He noted that the mooted BSRC could usefully work with the banks to identify and promote good practice in this area; looking at what government and other industries and organisations do.¹¹

In NSW, barristers and solicitors are required to devote at least one hour of their compulsory 10 hours of annual continuing education to the field of ethics and the regulation of the profession. (It occurs to me that some may consider this inadequate, in comparison with the significant responsibilities of the profession.)

Both the NSW Bar Association and the Law Society have Committees / Units that investigate professional conduct complaints and provide ethical guidance to members of the profession. The Law Society's Ethics Unit makes specialist "ethics solicitors" available to assist solicitors facing ethical dilemmas. It also conducts ethics education.¹² Barristers may approach senior counsel on one the NSW Bar Association's professional conduct committees for ethical guidance.¹³

The Bar Association hosts informative seminars which generally take the format of a discussion of practical situations in which ethical issues arise, led by a senior member of the bar.

The legal profession can also seek ethical guidance from: a widely available manual which covers a range of ethical issues; articles published by their professional associations or in academic journals and cases in which questions of unethical conduct have been considered.

The banking and finance industry may benefit from having greater access to this range of resources to promote discussion and learning about ethical issues.

Wrap-up

I hope that this article will provoke banking and finance professionals to engage in a discussion about what a commitment to the Banking and Finance Oath might achieve and how to ensure it is effective. Consideration might be given to what the legal profession does to promote ethical conduct and whether any aspects of its approach should be adopted or may be improved upon.

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¹ James Evers, 'Change Needed to Restore Trust: Murray', *Sydney Morning Herald*, 25 November 2014, p. 25.

² Bastiaan van der Linden, "Principles as 'Rules Of Thumb': A Particularist Approach to Codes of Ethics and an

² Bastiaan van der Linden, "Principles as 'Rules Of Thumb': A Particularist Approach to Codes of Ethics and an Analysis of the Dutch Banking Code," *Review of Social Economy* 71, no. 2 (June 2013): 209,

³ Pim Rank et al., "Netherlands: Legislation Dutch Financial Markets - Future Financial Supervision Regulations," *Mondaq*, accessed December 5, 2014, <http://www.mondaq.com/x/259868/Financial+Services/Legislation+Dutch+Financial+Markets+Future+Financial+Supervision+Regulations>.

⁴ Dutch Banking Association, "Future Oriented Banking," n.d., 14–17.

⁵ David T. Llewellyn, Roger Steare, and Jessica Trevellick, *Virtuous Banking: Placing Ethos and Purpose at the Heart of Finance*, July 2014, 14, http://respublica.org.uk/documents/ueq_Virtuous%20Banking%20Final%20new.pdf.

⁶ Richard Lambert, *Banking Standards Review*, May 2014, 17, <http://www.bankingstandardsreview.org.uk/assets/docs/may2014report.pdf>.

⁷ Jean-Michel Bonvin and Paul H. Dembinski, "Ethical Issues in Financial Activities," *Journal of Business Ethics* 37, no. 2 (2002): 191.

⁸ van der Linden, "Principles as 'Rules Of Thumb,'" 216–221.

⁹ Llewellyn, Steare, and Trevellick, *Virtuous Banking: Placing Ethos and Purpose at the Heart of Finance*, 3.

¹⁰ Outi Hartikainen and Sami Torstila, "Job-Related Ethical Judgment in the Finance Profession," *Journal of Applied Finance* 14, no. 1 (2004): 62, 66, 68, 70, 71.

¹¹ Lambert, *Banking Standards Review*, 21.

¹² Law Society of New South Wales, "About the Ethics Unit - Law Society of NSW," accessed December 5, 2014, <https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Ourrole/index.htm>.

¹³ New South Wales Bar Association, "Professional Conduct," accessed December 5, 2014, <http://www.nswbar.asn.au/for-members/professional-conduct>.