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Dear Ms Wong,

Thank you and ACCC for providing me and the other ANZ bank's customers an extension until later today to file this letter.

My name is Goran Latinovich. I believe there are meant to be rules in Australian banking, but that turned out to be incorrect. There are politicians, federal regulators, [redacted], and a banking association to protect bank's customers, but this did not happen in our case.

In August 2004, I signed a loan contract with ANZ bank, but it did not provide me with the essential documents that were part of my loan contract. [redacted]

In December 2006, I became aware of the fact that my bank had defaulted me, and this was referred to ANZ Bank in Newcastle and Sydney, but no action was taken. The following year, ANZ Bank, without complying with the loan contract, locked me out of the development and took away my rights to protect my property. [redacted] This was a serious act by ANZ Bank [redacted] because the development had been completed and all I required was sufficient time to sell the units. Instead, before I could recover the debt, ANZ Bank promoted the sale of the development as mortgagee in possession, which meant it was a fire sale.

The following year, I contacted ASIC because I believe there was sufficient equity in the development [redacted] However, neither APRA nor ASIC took no action. It may have been that I was too anxious because I was and, in the end, when ANZ Bank sold my development at a significant discount, the sale process far exceeded my debt.

I now believe this should have not happened if ASIC at that time had a responsibility to protect my rights. I have discussed this with people who attended meetings at Parliament House in 2018 and 2019 and they believe that ASIC was not an honest cop because it claims it cannot act for individuals, which has been the case since self-regulation was introduced by banks in 2003. However, my family's complaints were a national problems and damaged millions of businesses, but ASIC would still would not address our concerns.

I believe that the ANZ Bank had a duty to advise me of my rights under the 2004 Code of Banking Practice and the AS 4269-1995 Standard, which were an essential part of our loan contract. The bank, its directors and the licensee had not complied with the internal dispute resolution procedures in the Code, which stated banks must resolve disputes free of charge (clause 35.1(a)). [redacted] The Code, in clause 35.1(b), noted leading legal minds at this time had already published the essential elements of the effective complaint handling in the AS 4269-1995 Standard. [redacted]

We have found information that I have set out in this letter [redacted] that had to deal with my family's disputes fairly and reasonably. [redacted]

[redacted]

In 2021, small businesses and farmers could not simply contact a local solicitor when we had evidence that the 2003 Code that the bank adopted on 15 August 2003 and the 2004 Code that it adopted on 16 August 2004 [redacted]. There is no way to describe the decision by the politicians, regulators, the bank [redacted] and their association when we discovered that disputes could not be resolved free of charge. [redacted]

These Codes required ANZ Bank to provide us with effective disclosure of information. By failing to do this, the Code was simply a trick used by the bank to cheat small businesses and farmers out of property and assets, especially money. We wrote to the bank's directors, the federal regulators, the Commonwealth Ombudsman, and Senators, to find that **our bank had gone rogue.** Resolving disputes as required by the bank under clause 35 of the Code was [redacted] untruthful.

Are we now victims of the worst government in history?

On 16 December 2022, John Hewson - professor at the ANU Crawford School of Public Policy and former Liberal opposition leader stated:

The lesson of the recent history of the Liberal Party is that it doesn't learn from history.

Liberal Party leaders just stumble and fumble around these days, claiming the need to stand for Liberal Party values that should lead the party to victory-next time. This ignores the magnitude of the task, given significant shifts in the mix of voters -which was particularly obvious in the May 2022 federal election -and the fact that the party has won only one state election since 1999.

The Labor Party's review of the most recent federal election confirmed that Morrison was a major reason why it won. And the Australian Election Study released this week - the largest one on the federal election - found that Morrison was the least popular major party leader in the AES's 35-year history. Anthony Albanese rated more favourably than Morrison in eight of nine leader characteristics, with the biggest differences being in

perceptions of honesty, trustworthiness, and compassion. Greens leader Adam Bandt was also rated more favourably than Morrison.

In commenting on the study, one of its lead authors, Australian National University professor of political science Ian McAllister, referred to a "seismic shift" at the election and "a large-scale abandonment" of major political parties, as the vote for the Liberals and Labor fell to historic lows. The major beneficiaries were the Greens and independent candidates.

Understandably, there is genuine concern within the Liberal Party - federal and state - as to how best to position itself for future elections, especially in 2025. The decision to elect Dutton as the new leader, with his commitment to move the party to the right, was nonsensical, especially when the losses at the May 2022 election basically wiped out the influence of moderates.

The Coalition is falling further behind Labor, as Albanese has hit the ground running, meeting his election promises by getting essential legislation through the parliament on important issues of climate, industrial relations, and a national integrity commission. The latest Newspoll shows the gap widening in terms of both the relative party standing and a surge in support for Albanese, directly and as the preferred prime minister.

This has all happened in the last 30 years. In 1989, Bob Hawke's government commissioned Stephen Martin to commence a review of banking codes, and, in 1993, Paul Keating's government allowed the banks to publish the first Code. [redacted]

Bob Hawke's government and Martin Committee

In 1989, Bob Hawke's government commissioned Stephen Martin and his committee to review prospects of introducing a banking code. Martin's committee travelled and met leaders of countries that previously introduced codes and sought their views on whether it was appropriate to do so in Australia.

It was now 10 years after the Campbell inquiry, and the industry landscape of the banking sector had changed considerably with the introduction of new banks in a deregulated environment. In 1991, major banks were seeking growth by way of mergers and acquisitions in an effort to expand their market share.

There were concerns about the competitive banking sector caused by deregulations that followed the Campbell inquiry following the 1987 Stock Market Crash. This led the Parliament to commission a report that would review the success of deregulation within the sector to address the community's discontent and lack of confidence in banks. The intention was:

> *to go forward learning from the experiences of the 1980's and building on that experience to ensure that the 1990's and beyond reflect the very valuable knowledge that has been obtained … and ensures that the people of Australia have their interests in terms of a secure but strong financial system guaranteed.*

Stephen Martin then outlined the rules for banking code in 1991. The first such Code of Practice was established in 1993 but not adopted until 1996.

These businesses saw improved standards of customer protection set out in the Martin Committee's Report in 1991.

Stephen Martin also cited the inequality of laws and Courts to resolve bank's disputes by all but **a few of Australia's wealthiest people**. Prior to publishing his report, he expressed concerns for small business to redress banking disputes **noting, *high cost, powerful bank positions, unnecessarily protracted proceedings, inability to continue legal action and the failure to ensure adequate discovery***.

Stephen Martin also quoted **Former Governor General** and **High Court Justice Sir Ninian Stephen in 1991 who said: '*the Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court*'**.

The code was therefore introduced as an alternative to Courts with a cheap, speedy, fair, and accessible alternative for customers to resolve complaints justly.

On 20 December 1991, Paul Keating replaced Bob Hawke as Prime Minister and 2 years later Keating's government published the first banking code (the 1993 Code). It was adopted by banks in 1996, but the rules were compromised by the banks that did not agree to include all the government's recommendations.

John Howard's government and Wallis Report

On 11 March 1996, John Howard was Prime Minister and the rules changed.

The Wallis Report on the Australian Financial System in 1996-1997 stated:

The Wallis Report proposed some fundamental changes would be made to financial regulatory arrangements to increase the efficiency and effectiveness of the system and to build upon the existing achievements of financial deregulation.

The Australian financial system is experiencing ongoing change in response to changing customer needs, new technology and other economic policy reforms. It is argued that financial regulatory reform will allow the financial sector to better respond to these pressures.

It is recommended that a Corporations and Financial Services Commission (CFSC) be formed to provide Commonwealth regulation of corporations, financial market integrity and financial consumer protection. The current regulatory structure in these areas is argued to be inconsistent with the broadening direction of markets, has resulted in inefficiencies, inconsistencies, and regulatory gaps, and is not conducive to competition in the financial system. The new structure will help to overcome these problems.

The Australian Securities Commission (ASC) would be abolished, and its current functions folded into the CFSC, while the administration of financial consumer protection would be taken away from the Australian Competition and Consumer Commission (ACCC) and placed with the CFSC. Some functions of the Insurance and Superannuation Commission (ISC) would also be incorporated into the CFSC. The CFSC should have powers provided by legislation which are commensurate with its responsibilities.

It is also recommended that a single prudential regulator, the Australian Prudential Regulation Commission (APRC), be formed for the entire financial system to provide integrated and consistent supervision of financial institutions for safety purposes. A single prudential regulator offers regulatory neutrality, greater efficiency and responsiveness, greater resource flexibility, economies of scale and lower costs in regulation, and more flexibility to cope with likely future changes in the financial system.

Regarding the failure of financial institutions, it is recommended that the depositor protection mechanism which currently applies to banks be extended to all deposit taking institutions under APRC regulation. Here, depositors have priority over other stakeholders in the disposition of remaining assets of the institution after liquidation. Explicit deposit insurance schemes do not seem to be practicable or workable. Existing forms of prudential regulation, such as capital and liquidity requirements, should continue to operate.

It is proposed that the Trade Practices Act would continue to apply to the financial system and that the ACCC be the sole competition policy arbiter on mergers and acquisitions in the sector. The current 'six pillars' policy, prohibiting mergers between the four largest banks and two largest life offices, should be abolished and such decisions left in the hands of the ACCC. It is not possible to say much of any value about merger proposals in the abstract and each requires its own particular examination.

Second, it could be argued that the formation of a single prudential regulator for the entire financial sector, the APRC, will reduce the effectiveness and efficiency of prudential regulation. It is argued that this will arise because of the size and complexity of the regulatory task set for the APRC. The proposed single prudential regulator might also be criticised on the grounds that it will encourage non-deposit institutions, and their customers, to increase their risk exposure in the belief, albeit mistaken, that Commonwealth Government protection for bank deposits has been extended to other financial assets.

Third, separating prudential regulation from the RBA might be challenged on the grounds that it might slow down the provision of emergency loan assistance to institutions in times

of distress, since such assistance would, under the Report's proposals, require mutual agreement and coordination between the APRC and the RBA. Separation might also be criticised for closing off the option of the coordinated deployment of monetary policy and prudential policy instruments.

Also, it could be argued that the issue of mergers between the four largest banks is of such national importance that it justifies the continuation of explicit Commonwealth restrictions in this area. The Commonwealth Government has already announced such a position.

The Reports rather ambivalent attitude towards direct foreign investment in the finance sector might be criticised on the grounds that it sits very oddly with concerns with increasing financial sector efficiency and does not explicitly deal with current issues such as the role of foreign bank branches in Australia. As an alternative, it could be argued that one strength of explicit deposit insurance schemes is that they facilitate a better role for such branch operations. Well-designed deposit insurance schemes might also generate efficiency, equity, and safety gains in the finance sector. It could be argued that these issues were not adequately discussed in the Report.

Chapter One: Changing Customer Needs

Changing customer needs are helping to reshape the financial system by influencing choices on distribution channels, financial products, and financial suppliers. In turn, such needs have been primarily influenced by changes in demographic structure, work patterns, the financial assets and liabilities of households, awareness of value and willingness to adopt new technology.

The Australian population is ageing. This increases the importance of assets to fund consumption in their retirement. The Commonwealth Government has sought, through superannuation initiatives, to encourage private asset accumulation and reduced dependence upon the age pension in retirement. This has led to a shift in household financial assets into market-linked investments, meaning that households are bearing

more investment risk than in the past. Improved financial advisory services and increased efficiency in funds management are thus required.

The number of people working extended hours continues to increase. Thus, many people have less leisure time and less time available to manage their financial affairs. Such people will have a greater need for financial products which offer convenience and ease of access. At the same time, consumers will experience greater variability in the timing of income. Those spending longer periods in education, those in part-time employment, the unemployed and those in early retirement will generate a greater need for financial products which smooth cash flows and spending over their life cycles.

Households continue to accumulate assets and liabilities. Thus, they now rely more on the financial system and have greater exposure to financial institutions. They will be more concerned with issues of financial efficiency and safety. Those with greater net financial wealth will tend to shift their assets towards more risky, higher return products such as market-linked investments. Consumers are becoming increasingly aware of value for money in financial products and services. Information sources on the financial system have proliferated. Rising fees and charges on transactions services have increased customer value awareness. The rising range of housing loan products has encouraged consumers to shop around for the best deal. There is also an increased willingness to take up new technologies providing financial services. This is related to increased familiarity with the new technologies in the workplace and in the home.

Chapter Four: The Changing Financial Landscape

The financial system has undergone, and will continue to undergo, four central types of structural change. There is an increased focus upon efficiency and competition, globalisation of financial markets is continuing, financial market widening, and the development of financial 'conglomerates' has arisen, and a further shift from financial institutions to direct connections between capital suppliers and final users, through financial markets.

Financial institutions have improved their ability to identify costs and profits entailed in products and services they offer. The use of customer and product profitability models allows institutions to price products and services more accurately. As these methods come to be more widely used, they will combine with enhanced competition to generate pricing which more accurately reflects the underlying cost of supply, thus raising the economic efficiency of the financial sector.

Specialist financial providers have overcome barriers to entry in the most profitable financial markets and have thus intensified competition in these areas. Such intensified competition has increased pressure to abandon inefficient pricing in other services which have been traditionally used to 'cross-subsidise' other products. More efficient pricing will encourage consumers to use lower-cost channels of access to products and services, thus reinforcing the trend to greater efficiency in the financial system.

Australian markets have become increasingly global over the last decade and now have a relatively high level of integration with international markets. Australian businesses and markets have responded in four ways. Fundraising by corporations and institutions is becoming increasingly global. Foreign inward and outward investment are both growing. Trading on share, bond and foreign exchange markets is becoming increasingly international. The location decisions of many financial services corporations reflect an international perspective. However, at this stage the globalisation of retail financial services is still relatively undeveloped.

Increased globalisation intensifies competition for domestic financial suppliers, increases pressures for rationalisation and international harmonisation of financial regulation in Australia, and heightens the exposure of Australia to world financial trends and shocks.

Chapter Five: Philosophy of Financial Regulation

Regulation of all markets for goods and services can be categorised according to three broad purposes. First, ***regulation is to help ensure that markets work efficiently and competitively****, and thus to overcome sources of market failure. Second, regulation can prescribe particular standards or qualities of service, especially where the consumption of*

goods and services carries risks, so that safety is a focus of concern. Third, regulation can help achieve social objectives such as, for example, 'community service obligations' which typically take the form of price controls.

More particularly, general financial system regulation can be motivated by four considerations. Financial market integrity regulation aims to promote confidence in the efficiency and fairness of markets. Financial market prices can be sensitive to information, and this raises the potential for misuse of information. For this reason, regulators impose specific disclosure rules (such as prospectus rules) and conduct rules (such as prohibitions on insider trading) on financial market participants.

Consumer financial protection arises from the complexity of financial products and the consequent scope for deception, misunderstanding and dispute. Competition regulation of financial markets arises from concerns over the anti-competitive effects of market concentration and collusion between financial market participants.

Chapter Seven: Conduct and Disclosure

Financial markets cannot work well unless participants act with integrity, to ensure mutual trust, and ***unless there is adequate disclosure to facilitate informed judgements****. Regulation is necessary to ensure that these conditions hold. Market integrity regulation seeks to ensure that markets are sound, orderly, and transparent, users are treated fairly, the price formation process is reliable, and markets are free from misleading, manipulative, or abusive conduct. Consumer protection regulation seeks to ensure that retail customers have adequate information, are treated fairly, and have adequate avenues for redress.*

Such conduct and disclosure regulations currently undertaken by several Commonwealth agencies, such as the Insurance and Superannuation Commission (ISC), the Australian Securities Commission (ASC), the Australian Competition and Consumer Commission (ACCC), and the Australian Payments System Council (APSC).

Most such regulation is based on the institutional form of the service provider, although market integrity regulation is conducted on a functional basis by one agency alone, the

ASC. This regulatory structure is inconsistent with the broadening structure of markets, has resulted in inefficiencies, inconsistencies, and regulatory gaps, and is not conducive to competition in the financial system.

Chapter Eight: Financial Safety

Financial safety is fundamental to the smooth operation of the economic system. Government intervention through prudential regulation provides an added level of financial safety beyond that provided by conduct and disclosure regulation. The intensity of prudential regulation should be proportional to the degree of market failure it addresses, but it should not involve a government guarantee of any part of the financial system.

The current framework for prudential regulation is institutionally based, with separate agencies regulating the activities of each class of institution. The Reserve Bank Australia (RBA) covers banks and the payments settlement, the ISC covers life and general insurance and superannuation, while the state-based Financial Institutions Scheme, coordinated by the Australian Financial Institutions Commission (AFIC) covers credit unions, building societies and, it is expected, friendly societies from 1 July 1997.

Prudential regulation should be imposed on institutions licensed to conduct the general business of deposit taking from the public, or offering capital backed life products, general insurance products or superannuation investments. A single Commonwealth agency, the Australian Prudential Regulation Commission (APRC), should be established to carry out regulation for all these products. That is, it should conduct prudential regulation throughout the financial system. The APRC should be separate from, but cooperate closely with, the RBA.

***The Committee's complete set of recommendations include**:*

Recommendation 1: Corporations Law, market integrity and consumer protection should be combined in a single agency.

Recommendation 2: The Corporations and Financial Services Commission (CFSC) should have comprehensive responsibilities.

Recommendation 3: The CFSC should administer all consumer protection laws for financial services.

Recommendation 7: The CFSC should have powers to use a combination of regulatory approaches.

Recommendation 8: Disclosure requirements should be consistent and comparable.

Recommendation 13: A single licensing regime should be introduced for financial sales, advice and dealing.

Recommendation 14: The CFSC should have power to delegate accreditation responsibilities to industry bodies.

Recommendation 35: Prudential regulation of DTIs needs to be consistent with international requirements.

Recommendation 44: The APRC should promote more transparent disclosure.

Recommendation 56: The RBA should remain responsible for system stability.

Recommendation 61: A Payments System Board should be formed within the RBA.

Recommendation 80: The ACCC should administer competition laws for the financial system.

Recommendation 87: Takeover and merger provisions are needed for collective investments.

Recommendation 95: Institutions should have freedom to set fees and charges based on costs.

Recommendation 108: Regulatory agencies should have boards, with majorities of independent directors.

Recommendation 109: Regulatory agencies should improve their reporting.

Wallis Report offers blueprint for competition – by Don Harding of Freehill Hollingdale & Page

The commission considering financial regulation in Australia has recommended a new format for regulation, aimed at boosting financial services competition.

The Wallis Inquiry, the first major inquiry into Australia's financial system since 1981, published its 771-page Report in April. The 115 recommendations add up to a call for radical reform of financial sector regulation.

The Inquiry was established in June 1996 by the Commonwealth Treasurer, Peter Costello, under the chairmanship of Stan Wallis, formerly managing directors and now deputy chairman of Amcor and the president of the Business Council of Australia.

As well as assessing the impact of changes resulting from the Campbell Report of 1981, the Committee was required to make recommendations as to the regulation that would be necessary to ensure an 'efficient, responsive, competitive, and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness.'

One of the central recommendations of the Report is a shift away from regulation by type of financial institution to regulation based on function. The objective is a level regulatory playing field more conductive to competition and innovation, particularly as technological innovation and an evolving business environment generate a growing array of participants, products and distribution channels. The idea is to set ground rules which permit movement away from traditional categories of banking, insurance and financial exchanges.

One of the objects if to allow for competition which may emerge from providers of financial services, from foreign entry into the Australian market and from increasing globalisation of financial markets. The Report acknowledges that 'as globalisation increases, investors will increasingly be represented by global fund managers, with scant loyalties to products or markets'

New mega-regulators

The Report recommends a restructuring of regulators, with three major regulators emerging.

The Reserve Bank of Australia.

Stability of the financial system would remain the responsibility of the Reserve Bank of Australia, but some of its roles would be shed. It would continue to have powers as a lender of last resort for the financial corporations operating the exchanges and settlement of accounts with it.

John Howard's government and Taskforce on Industry Self-Regulation

In 1999, Howard commissioned the Taskforce on Industry Self-Regulation to carry out a review that would make banking fairer for customers. The recommendations of the Taskforce on Industry Self-Regulation were selected by Howard and his government.

On 14 August 2000, the Industry Self-Regulation in Consumer Markets report prepared by the Taskforce on Industry Self-regulation stated:

Members of the Taskforce on Industry Self-regulation:

- *Berna Collier, (Chair) Professor of Commercial Law Centre for Commercial and Property Law Queensland University of Technology*
- *Mark Paterson, Chief Executive Australian Chamber of Commerce, and Industry*
- *Gary Potts, Executive Director, The Treasury*
- *Louise Sylvan, Chief Executive Australian Consumers' Association*

Self-regulatory schemes tend to promote good practice and target specific problems within industries, impose lower compliance costs on business, and offer quick, low-cost dispute resolution procedures.

Dispute procedures and sanctions

Industry adherence to self-regulatory schemes is essential *to ensure that the benefits flowing from the standards of practice set by schemes are passed onto the consumer (p.71).*

Where the standard of conduct has been breached, ***self-regulatory schemes should incorporate complaint handling and dispute resolution mechanisms to provide***

***appropriate redress to consumers**. The appropriate redress mechanism will depend on the nature of the specific problem and the consequences of non-compliance (p.73).*

***Industry needs to manage the risk of anti-competitive practices** in schemes, particularly where sanctions are involved (p. 77).*

Cost-effectiveness

Self-regulation comes at a cost, in administration, promotion and compliance. However, self-regulation can be cheaper (in terms of compliance costs) and more flexible than government regulation and the court system. Ultimately, the consumer bears the cost of regulation in most cases as it is part of a firm's cost structure (page 82).

*Self-regulatory schemes tend to promote good practice and target specific problems within industries, impose lower compliance costs on business, and offer **quick, low-cost dispute resolution procedures**.*

*Another form of self-regulation is the use of **internal complaints handling departments and procedures**.*

***Monitoring of self-regulation is essential** to ensure it is relevant to industry addressing specific problems and improving market outcomes. In this context, reviews and annual reporting are important tools for monitoring schemes and can also assist in the transparency and accountability of schemes. Preferably, reviews should be periodic, independent and the **results made publicly available**.*

Any funding arrangement for self-regulation should be transparent and designed so as not to put businesses at a competitive disadvantage through excessive compliance costs.

Self-regulation is very broad and covers guidelines, quality management systems, standards, Codes, dispute resolution schemes etc. Although there is no one model for good self-regulation, the Taskforce considers that there are elements of good practice that are consistent amongst schemes.

As touched on above, although self-regulation is the responsibility of industry, both consumers and the government are stakeholders. The Taskforce considers that

consultation is not only important to ensure credibility of a scheme, ***but consumers can help identify specific problems*** *within an industry and government can identify social or public policy objectives.*

The ACCC commented that in many cases a Code fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the Code or fail to follow it in day-to-day dealings.

Complaint handling

Depending on the nature of the specific problem, self-regulation should incorporate complaint handling and dispute resolution mechanisms to provide ***appropriate redress to customers*** *where the standard of conduct was breached. Redress encourages industry members to react promptly and fairly to complaints by having internal complaint resolution mechanisms and, where appropriate, subscribing to some form of fair and independent dispute resolution scheme.*

These processes are essential to ensure that dissatisfied consumers have access to cost-effective mechanisms for resolving their complaints about the conduct of members of the Code. The formal legal system involving court litigation is not designed to provide quick and cheap complaints resolution.

ASIC stated that accessible and effective complaint resolution mechanisms serve to buttress consumer confidence. They can also provide benefits to business, for example, by enabling industry to identify and address systemic consumer problems, thereby maintaining consumer confidence and avoiding the need for government intervention.

The Taskforce considers that businesses should establish fair and effective internal procedures to address and respond to consumer complaints and difficulties:

(a) ***within a reasonable time****;*

(b) ***in a reasonable manner****;*

(c) ***free of charge to the customer****; and*

(d) without prejudicing the rights of the consumer to seek legal redress.

David Bell and Australian Bankers' Association's statements

On 3 September 2001, ABA Review of the Code of Banking Practice, released a media, stating:

David Bell, ABA Chief Executive, said the improved self-regulatory Code, to be completed by the first quarter of next year, will be another down payment by the industry in addressing its social obligations.

'The banking industry is taking more important steps as banks move to take up key recommendations made by the independent reviewers of the Code, Mr Richard Viney.

'A principle of fairness will be drafted into the code, it will be extended to cover small businesses, not just consumers, and a consultative forum will be formed.'

'The changes to be made to the self-regulatory Code will substantially improve the standards of disclosure and conduct which subscribing banks agree to observe when dealing with their customers. A clear and updated Code will benefit consumers and small businesses.

'Banks also agree it is crucial that the Code is extended to cover small businesses and our aim has been to treat consumers and small businesses the same under the Code, wherever feasible.'

Key recommendations in the Code review have been responded to positively by banks.

The responses will see:

- *A principle that banks will act fairly and reasonably toward their customers will be included in the Code;*
- *Consultative forum to be formed.*
- *Code extended to cover small businesses.*
- *Monitoring of banks' compliance with the Code and accountability for Code breaches;*
- *A provision for a sympathetic consideration for customers suffering financial difficulties.*

- *Better information for prospective guarantors about the debt they're guaranteeing;*
- *Code to be reviewed every three years.*

On 13 September 2001, The Treasury released a media report, stating:

Appointment of a member of the Australian Securities and Investments Commission

The Governor-General Council has today appointed Professor Berna Collier as a full-time member of the ASIC. The appointment is 3 years commencing on 5 November 2001.

Professor Collier will join the ASIC Chairman, Mr David Knott and Deputy Chair, Ms Jillian Segal, on the Commission, returning its membership to 3. Professor Collier's skills and experience will be of great benefit to ASIC, particularly with a number of major corporate investigations currently under way and with ASIC likely to be involved in the HIH Royal Commission.

Professor Collier is currently Clayton Utz Professor of Commercial Law in the Faculty of Law at the Queensland University of Technology. She is also Co-Director of the Centre for Commercial and Property Law, Queensland University of Technology and a consultant with Clayton Utz, Brisbane. Collier previously practiced law in both Melbourne and Brisbance and has written extensively in relation to insolvency, corporate and commercial law, and medico-legal practice. She chaired the government's Taskforce on Industry Self-Regulation from August 1999 until August 2000.

On 12 August 2002, ABA released a media statement:

> *Bank customers to benefit from key industry standards on* ***transparency, fairness, conduct and accountability.***
>
> *Chairman of the ABA, David Murray said 'The Code sets out the banking industry's* ***key commitments and obligations to customers on standards of practice, disclosure and principles of conduct for their banking services.****'*
>
> *This self-regulatory Code allows competition and market forces to work to encourage even higher standards for the benefit of banking customers.*

Adoption of the Code will be a mark of quality and customers should be encouraged to check if their bank subscribes because it is a ***binding contract between a bank and its customers for which the institution will be held accountable.***

The Code is valuable safeguard for these customers – it will benefit the customers and assist a better understanding of the standards the banks will follow in day-to-day banking, complicated financial transactions and ***even if the customer experiences financial difficulty.***

This Code has real teeth as I know of no other banking Code in the world that is enforceable as a contract by the customer.

I will have much greater guidance and support in reviewing a particular case, and it will help me decide whether a bank has observed good banking practice.

Banks that have adopted the original Code will adopt the new Code in August 2003, unless a bank indicates to the contrary. Banks that are not members of the ABA are free to adopt the Code if they so wish.

For the new Code, there will be a ***Monitoring Committee*** *which will report on compliance with the Code, conduct its own investigations, request banks to remedy breaches of the Code and in certain cases publicly name of non-compliant bank.*

The Frequently Asked Questions, dated 12 August 2002, David Bell, ABA Chief Executive, stated:

The Code of Banking Practice is the banking industry's customer charter on good banking practice. The revised Code of Banking Practice - Launch Publication August 2002 will come into effect in August 2003 when individual banks adopt this new Code.

The Code establishes the banking industry's key ***commitments and obligations to customers on standards of practice, disclosure, and principles of conduct for their banking services.*** *When your bank adopts the Code, it will become a* ***binding agreement*** *between you and your bank.*

The Code is not legislation, however, banks that adopt the Code are ***contractually bound*** *by their obligations under the Code.*

What key commitments does my bank give me?

On adopting the Code, your bank will:

• continuously work towards improving its standards of practice and service;

• provide general information about rights and obligations under the banker/customer relationship;

• provide information in plain language;

• act fairly and reasonably towards you in a consistent and ethical manner – your conduct, the bank's conduct and the banking services contract will be considered.

Can I ask my bank to give me copies of my documents?

Yes, in particular, you can request a copy of any contract between you and your bank relating to a banking service you have or had with the bank, which will include applicable terms and conditions and standards fees and charges.

How does my bank decide if I can get credit?

Your bank has to form its own opinion about your ability to repay a loan and it has credit assessment tools to help with this decision.

The Code says that during this assessment and decision process, the bank must exercise the care and skill of a diligent and prudent banker.

How will the bank's compliance with the Code be monitored?

Banks have agreed to have their compliance with this Code independently monitored by a panel to be called the Code Compliance Monitoring Committee (CCMC). ***CCMC will be set up as an independent body*** *with consumer, small business, and banking industry representatives.*

[The] CCMC will be able to receive complaints from anyone who thinks that a bank has breached the Code. CCMC will have power to investigate that complaint and

decide whether a breach has occurred. If the breach is ***serious or systemic****, the CCMC can publicly name the bank on its annual report****. CCMC can also name a bank that fails to comply with a request from CCMC to remedy a breach,*** *or has breached an undertaking given to CCMC, or has taken insufficient steps to prevent the recurrence of a breach.*

If I have a dispute with my bank, how should the bank handle my dispute?

If your complaint is not immediately resolved, ***the bank must handle the dispute through its free internal dispute resolution process****. You'll be given the name and contact number of the person investigating your dispute and within 21 days you'll be told of the outcome. If more time is needed to complete the investigation, you will be told, but the bank must complete investigation within a further 24 days (total time from receipt of complaint is 45 days), unless there are exceptional circumstances.*

If the bank is unable to resolve the dispute within 45 days, unless the bank is waiting for you to reply to a request, it will tell you why and when a decision can be reasonably expected. In the meantime, the bank will give you monthly updates.

On 10 December 2002, David Bell formed a high-level taskforce to combat fraud, stating:

The ABA is very concerned about the impact of fraud on bank customers and the community and has set up a new high-level Taskforce to tackle this complex criminal behaviour.

David Bell, Chief Executive of the ABA said, 'Fraud has serious consequences for all Australians, particularly those victims whose trust has been betrayed'

Fraud prevention has always been a priority for the banking industry and Australian banks continue to be very aggressive and progressive in managing operational risks.

[The] ABA members banks make substantial investments each year in the latest ***fraud detection and prevention*** *technology and constantly review security tactics in an effort to stay ahead of the criminals.*

The ABA's Fraud Taskforce will have three objectives:

1. *Identifying the areas of highest risk, and the most important emerging threats;*
2. *Reviewing and analysing prevention a detection measures in use in Australia and internationally. This will be done in partnership with law enforcement agencies administrator using the highly skilled fraud investigation teams in the banks.*
3. *Determining the most appropriate solutions for the identified threats and developing an industry response plan.*

On 14 March 2003, a media release states:

The Fraud Taskforce, convened by the ABA, will today begin three major projects aiming to improve fraud prevention in the community.

The development of voluntary Industry standards on Security and Fraud Prevention will be targeted at all banking transactions, electronics and face-to-face. The standards will cover interface requirements, authentication and verification processes and source document validation.

The Taskforce now comprises representatives from Banks Heads of fraud and Security, Australian Federal Police, Police Services from all states and the ACT, Visa, Mastercard, etc.

Mr Bell said, *'then the formation of the Fraud Taskforce was announced in December last year, it was agreed that wider membership, other than banks was needed to tackle fraud,'*

'In addition, an aim of the Taskforce is to increase cooperation across sectors because this crime impacts private and public institutions and their customers.'

On 1 August 2003, a media release titled 'Revised 2003 Code of Banking Practice', stating:

The ABA has released today the revied Code of Banking Practice for personal and small business customers of banks.

David Bell, Chief Executive of the ABA said, 'the ABA is delighted to provide this revised Code of Banking Practice which followed extensive consultation with consumer, business groups and regulators, and the contents of the revised Code reflects their inputs.'

'The Code of Banking Practice brings a series of major benefits for bank customers, both personal and small business, which enhances the banking services available from their bank.'

The revised Code builds significantly on the earlier edition (1993) and among the new provisions:

- *Small business is included for the first time*
- *Provision of information for prospective guarantors before they commit to guaranteeing someone else' debt*
- *Provision of important information on credit card chargeback;*
- *Helping customers cancel direct debit authorities*
- ***To try and help customers suffering financial difficulties with their banks loan, overcome those difficulties with the customers' agreement.***

Mr Bell said 'The Code meets and beats similar Codes in other countries such as the UK, Canada, New Zealand, and Hong Kong. The ABA's Code of Banking Practice stands out both in scope and the specific customer benefits it provides.

'The revised Code is a major step forward by Australian banks in listening to community concerns and delivering change. This Code reinforces and complements Australia's world class banking system and bank customers have a code that will bring a new dimension to their freedom of choice in banking services.'

'The regular 3-year review of the Code ensures that we can continue to develop and improve the Code in response to industry conditions and customer demands. Banks will submit to independent monitoring of their compliance and if a bank has systemically or seriously breached the Code, it is liable to be publicly named.'

'A bank must be sure it is ready to comply with its obligations under the revised Code before it adopts it, because the Code is an enforceable contract between the bank and the customer.'

Once the bank has adopted the Code, ***it binds the bank contractually to the customer****. So, if a bank breaches the Code, it has breached its contract to the customer.*

There have been two changes regarding the definition of a small business:

- *The definition of what is a 'small business' now makes it clear that the number of people engaged in the business includes employees, who are people employed under a contract of services, and people engaged, for example, via an employment agency.*
- *The definition also helps to clarify that a business that acquires a banking service is not a small business if it uses the banking service in connection with a business that does not meet the people engaged in the business' test in the definition. This avoids the possible unintended capture of large businesses under the Code.*

The 2003 Code requires banks to comply with the AS 4269-1995 Standard.

The AS 4269-1995 Standard states:

> *The AS 4269-1995 Standard prepared by the standards Australia Committee on Complaints Handling by the OB/9 members.*
>
> *The following interests are represented on Committee OB/9:*

- *Australian Consumers Association*
- *Department of Consumer Affairs, NSW*
- *Law Consumers Association*
- *Law Institute of Victoria*

- *Law Society of NSW*
- *NSW Law Reform Commission*
- *Office of Consumer Affairs, QLD*
- *Office of Fair Trading and Business Affairs, VIC*
- *Trade Practices Commission*

This Standard sets out the essential elements for the management of complaints from inception to satisfaction or final determination, as the case may be, irrespective of the nature of the complaint or the size of the organisation receiving the complaint.

Section 1: Scope and Purpose

This Standard sets out the essential elements for the management of complaints from inception to satisfaction or final determination irrespective of the nature of the complaint or the size of the organisation receiving the complaint.

Its purpose is to provide a complaint handling framework for the complainants as well as complaint recipients. It will serve as a reference document on issues where a common interpretation is desirable.

Section 2: Essential Elements of Effective Complaints Handling

2.3: Fairness *A complaints handling process shall recognise the need to be fair to both the complainant and the organization or person against whom the complaint is made.*

2.5 Visibility*: A complaint handling process shall be well publicized to consumers and staff and shall include information to consumers about the right to complain.*

2.6 Access: *A complaints handling process shall be accessible to all and ensure that information is readily available on the details of making and resolving complaints. The complaints handling process and supporting information shall be easy to understand and use, and be in plain language. . .*

2.8 Responsiveness *Complaints shall be dealt with quickly and the complainants shall be treated courteously.*

2.9 Charges *Complaints handling shall be at no charge to the complainant, subject to statutory requirements.*

Section 3: Implementation of The Essential Elements

3.1 General: *These guidelines help organisations establishing and maintaining a complaint handling process in accordance with the essential elements in Section 2.*

The overriding aim of any complaint handling process is to turn dissatisfied consumers into satisfied consumers. This is the best done by speedy and effective remedies at the first point of contact.

3.2 Commitment *For effective complaints handling, there needs to be commitment at all levels within the organisation. It is particularly important that this is demonstrated at, and promoted from, the organisation's highest level.*

The development and review of policies should be given sufficient organisational priority and be adequately and appropriately researched.

3.3 Fairness: *the complaints process shall recognise the need to be fair to both the complainant and the organisation or person against whom the complaint is made.*

The process shall be based on the complainant's right to:

(a) be heard;

(b) know whether the organisation's relevant product and service guidelines were followed;

(c) provide and request all relevant material to support the complaint;

(d) be informed of the criteria and processes, including the avenues for further review, applied by the organisation dealing with complaints;

(e) confidentially, if requested

The person or organisation about whom the complaint is made shall have the right to:

i. amass sufficient detail about the complaint to enable that person or the organisation to properly investigate and respond to the complaint;

ii. place all relevant material before the person investigating the complaint; and

iii. be informed of the decision and the reason for the decision

3.4 Resources *People are the single most important resource in the complaints handling process. It is important that staff are appropriately selected and provided with sufficient training and support to ensure that complaints are dealt with appropriately. Such training should form part of induction for new staff and be regularly reinforced and updated.*

In organisations which have staff dedicated to complaints handling or investigation, there should be training in product or service knowledge, interpersonal and communications skills as well as the details of the policies and procedures of the organisation.

It is important for staff handling complaints to have resources that will enable them to perform their duties efficiently and effectively. Adequate numbers of staff with sufficient delegated authority shall be available in the decision-making process.

These resources could include:

(a) easily accessed, detailed complaints handling procedures manuals, reference material and databases – preferably computerised

(b) good telephone handling equipment to enable hands-free operation

(c) access to all levels of the organisation as necessary to solve a complaint

3.5. Visibility *the existence of the complaint handling system, its purpose and the method of accessing it, need to be publicised in such a way that people with complaints are encouraged to make their complaint known to the relevant organisations.*

It is crucial for an organisation to promote the system.

3.6 Access: *the characteristics of an accessible complaints handling process include information on how, when, and where and to whom to make complaints, being readily accessible to all consumers, simple and accessible arrangements for lodging complaints, consumers should know that their complaints are being treated seriously and when necessary, in strictest confidence.*

***3.7 Assistance**: Assistance should be available by way of an explanatory brochure, publicity telephone advice, direct communication, interview, or correspondence.*

***3.8 Responsiveness:** A complaint shall be told how long it will take to deal with a complaint in accordance with target time limits for action. Complaints shall be kept informed of progress by telephone advice, correspondence, or interview.*

***3.9 Charges:** If a consumer has a complaint about a product or a service, the complaints handling process should be provided free of charge (subject to statutory requirements). If the complaints handling process is not free to consumers, and they are deterred from making complaints, the provider may not receive relevant feedback.*

***3.10 Remedies** The organisation should develop policies on the provision of remedies which reflect what is fair and reasonable in the circumstances, legal obligations, and good industry practice.*

Such policies include:

(a) refund

(b) financial assistance

(c) other assistance

(d) compensation

(e) apology;

issues to be considered include:

i. addressing all aspects of the complaint;

ii. following up where appropriate; and

iii. whether it is appropriate to offer remedies to others who may have suffered on the same way as the complainant but did not make a formal complaint.

3.13 *Accountability*: *All organisations should have an appropriate culture of accountability which includes (a) each level accepting responsibility for effective*

complaints handling, and (b) managers having responsibility for effective complaints handling procedure, including:

i. *setting performance criteria;*

ii. *performance monitoring and evaluation;*

iii. *management reports on complaints handling performance;*

iv. *reporting on complaints handling;*

v. *a proactive approach to consumers and staff feedback; and*

vi. *regular independent auditing of the complaints handling process.*

February 2004 Independent Code Compliance Monitoring Committee Association's Constitution

In February 2004, the banks [redacted] decided to take responsibilities for monitoring compliance with the code and for the Code Compliance Monitoring Committee (CCMC). This was a crucial document according to the Taskforce on Industry Self-Regulation. However, it took several years for the bank's individual, small businesses, and farmers to discover the CCMC was not independent. The CCMC Association's Constitution was kept secret for the next 13 years. It would [secretly] be administered and governed by the bank's managing directors: The people who set-up and adopted the [redacted] banking codes in 2003 and 2004, which remain in place today.

The Constitution states:

> *The objectives of the CCMC Association are to establish, and to make provision for the operation, of the CCMC. The CCMC Association may determine further objectives for itself from time to time.*
>
> *Association Member must be Code Subscriber: Only a Code Subscriber may be an Association Member.*
>
> *Voting: Each Association Member shall have I vote only on all questions arising at a meeting of the CCMC Association.*

Clause 8. Complaints about Code breaches

8.1 Consideration of complaints about Code breaches

The CCMC must consider any complaint alleging that an Association Member has breached the Code, except that the CCMC must not consider a complaint:

(a) To the extent that the complaint relates to an Association Member's commercial judgement in decisions about lending or security. However, the CCMC may consider a complaint alleging a breach of the Code arising from maladministration by the Association Member in arriving at a commercial judgement. "Maladministration" refers to an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the Association Member and the person making the complaint;

(b) if the CCMC is, or becomes, aware that the complaint:

(i) is being or will be heard (whether as a standalone matter or as part of any process or proceeding) by another Forum, and the Forum may make a final determination as to whether a breach of the Code has occurred. In such a case the CCMC must not consider the relevant complaint until the relevant Forum has determined, or declined to determine (for whatever reason), whether a breach of the Code has occurred. If the Forum determines whether a breach of the Code has occurred, the CCMC must adopt the Forum's finding; or

(ii) was heard (whether as a standalone matter or as part of any process or proceeding) by another Forum, and the Forum has determined whether a breach of the Code has occurred. In such a case the CCMC must adopt the finding of the relevant Forum as to whether a breach of the Code has occurred;

(c) if the CCMC thinks there is a more appropriate Forum to deal with the complaint. Without limiting this exception, CCMC may form the view that there is a more appropriate Forum to deal with the complaint where the complaint

alleges in whole or in part that an Association Member has breached any legislative provision;

(d) which the CCMC has referred to the Association Member concerned, unless:

(i) the Association Member has responded to the complaint; or

(ii) 45 days have elapsed, whichever is the earlier;

(e) if the CCMC considers that the complaint is frivolous or vexatious; or

(f) if the complaint is based on the same events and facts as a previous complaint by the complainant to the CCMC, unless there is new information;

(g) if the events to which the complaint relates occurred:

(i) before the Association Member to which the complaint relates became a Code Subscriber;

(ii) in relation to an entity which was not a Code Subscriber at the time of the events to which the complaint relates and was subsequently acquired by a Code Subscriber; or

(h) the complainant was aware of the events to which the complaint relates or would have become aware of them if they had used reasonable diligence, ***more than 1 year before the complainant first notified the CCMC in writing.***

8.2 Consideration of complaints

The CCMC must, within a reasonable time of receiving a complaint, consider that complaint in accordance with this Constitution and any operating procedures determined by the CCMC in accordance with clause 16.

When the 2004 Code was published it was virtually identical to the 2003 Code except that clause 34 provided evidence that the monitors were not independent. The 2004 Code would be monitored by the Code Compliance Monitoring Committee's Association, who were the. managing directors of leading banks. They were not independent and did not meet Stephen Martin Committees, the Taskforce on Industry's self-regulations and the AS

4269-1995 Standard's rules. It has taken 20 years for bank's customers to discover ASIC Regulatory Guide 165 (2001) was omitted from clause 35.1(b) of these codes [redacted]

CCMC's 2003 and 2004 Code rules and functions

The functions of the CCMC are:

(a) to monitor compliance under the Code by Association Members;

(b) to investigate, and to decide on, any allegation from any person that an Association Member has breached the Code (but the CCMC must not resolve, or make any determination on, any other matter); and

(c) to monitor any other aspects of the Code that are referred to the CCMC by the ABA.

4.3 Independence of CCMC

The CCMC Association and each Association Member shall not:

(a) except as expressly provided in this Constitution, intervene in the CCMC's activities; or

(b) denigrate the CCMC.

Clause 5 CCMC Members

5.1 Number of CCMC Members

The CCMC must be comprised of 3 persons appointed in accordance with clauses 5.2 to 5.4 below.

5.2 CCMC Member appointed by Association Members.

Subject to clause 5.5, 1 CCMC Member must be a person:

(a) with relevant experience at a senior level in retail banking in Australia; and

(b) appointed by resolution of the CCMC Association, which must be given to the CCMC Chair not less than 7 days before the appointment is to take effect.

5.3 CCMC Member appointed by consumer and small business representatives

Subject to clause 5.5, 1 CCMC Member must be a person:

(a) with relevant experience and knowledge as a customer' and a small businesses' representative; and

(b) appointed by written instrument signed by each of the Consumers' Directors of the BFSO, a copy of which must be given to the Association Chair and the CCMC Chair not less than 7 days before the appointment is to take effect.

5.4 CCMC Chair

A CCMC Member, who shall hold office as CCMC Chair, must be a person:

(a) with experience in industry, commerce, public administration, or government service; and

(b) appointed jointly by resolution of the Directors of the BFSO and resolution of the CCMC Association, notice of which must be given to the Association Chair not less than 7 days before the appointment is to take effect.

5.5 Founding CCMC Members

As at the date of adoption of this Constitution, the CCMC Members (being the Founding CCMC Members) are:

(a) Ian Bruce Gilbert, who shall be deemed to have been appointed as a CCMC Member in accordance with clause 5.2;

(b) David Tennant, who shall be deemed to have been appointed as a CCMC Member in accordance with clause 5.3; and

(c) Anthony Stuart Blunn, who shall be deemed to have been appointed as the CCMC Member holding the office of CCMC Chair in accordance with clause 5.4.

August 2003 and May 2004: Code of Banking Practice rules

During John Howard's period of Prime Minister, banks continuously stated that complaints will be dealt with free of charge. This was an untruthful statement. [redacted]

[redacted]

The Modified 2004 Code of Banking Practice states:

We will continuously work towards improving the standards of practice and service in the banking industry.

Clause 2 'Our key commitments to you'

2.1(b)(i) We will promote better informed decisions about [the] banking services by providing effective disclosure of information.

2.1(d) *We will provide information to you in plain language*

2.2 We will act fairly and reasonably towards you in a consistent and ethical manner.

Clause 3 'Compliance with the laws':

3.1 We will comply with all relevant laws relating to banking services [defined as financial services and products]*, including those concerning:*

(a) consumer credit products;

(b) other financial products and services;

3.2 If this Code imposes an obligation on us, in addition to obligations applying under a relevant law, we will also comply with this Code except were doing so would lead to a breach of a law (for example, a privacy law).

Clause 7 'Staff training and competency':

We will ensure our staff (and our authorised representatives) will be trained so that they:

(a) can competently and efficiently discharge their functions and provide the banking services they are authorised to provide; and

(b) have an adequate knowledge of the provisions of this Code.

Clause 25 'Provision of credit':

Clause 25.1:

Before we offer or give you a credit facility (or increase an existing credit facility), we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay it.

Clause 25.2:

With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us.

Clause 34(b)(ii) 'Monitoring and sanctions':

*The CCMC's functions will be: (i) to monitor our compliance under this Code; (ii) investigate, and **decide** on, any allegation from any person that we have breached this Code, but the CCMC will not resolve, or make any determination on, any other matter.*

Clause 35 'Internal Dispute Resolution':

35.1 We will have an internal process for handling disputes with you. This process will:

*(a) be **free of charge**;*

*(b) **meet the standards set out in Australian Standard AS4269-1995 or any other industry dispute standard or guideline which ASIC declares to apply to this Code;***

(c) adhere to the timeframes specified in this clause 35; and

(d) require us to provide written reasons for our decision on a dispute.

On 14 September 2004, ABA Fact Sheet regarding Code of Banking Practice states:

Purpose

The Code of Banking Practice establishes the banking industry's key commitments and obligations to its individual and small business customers on standards of practice, disclosure, and principles of conduct for their banking services.

The Code is a good example of industry self-regulation and of the banking industry's response in meeting the interests of customers in a dynamic and changing retail banking services market.

The Code is not legislation but when your bank adopts the Code, it becomes a binding agreement between you and your bank. In some respect the Code provides for situations not covered by the law and in others goes further than the law in providing rights and obligations.

The ABA has established the Code Compliance Monitoring Committee (CCMC) which will monitor compliance and have the power to publicly name a bank which has been found guilty of a serious or systemic breach of the Code.

Main Inclusions and Revisions to the Code

The most recent edition of the Code, released in 2004, saw a number of substantial changes to previous versions of the Code. These are summarised below.

Small Business:

The Code's provisions now apply to small business for the first time. Generally, a small business is one employing less than 100 full time (or equivalent) people if it is a goods manufacturing business or in any other case, less than 20 full-time (or equivalent) people.

Hardship:

If you agree, your bank will try to help you overcome your difficulties with your credit facility with the bank and could, for example, work with you to develop a repayment plan. This may include extending the term of the loan or changing your repayment schedule if that is suitable. The Consumer Credit Code allows for variations to credit contracts where the borrower is suffering hardship. If your bank thinks that these provisions apply to your circumstances, it will inform you.

Low income or disadvantaged:

If you tell the bank about your circumstances, or if when dealing with you, bank staff become aware you are receiving Centrelink or similar payments, they will give you information about accounts that might be suitable for you. You can also ask for this information.

Transparency:

Your bank will give terms and conditions to you either before or as soon as practicable after, you take up an ongoing banking service. You can also ask for a copy of the terms and conditions at any time. On fees, these will be included in or with the terms and conditions given to you and you will also be notified about any changes to fees and any new charges.

Helping the customer to choose:

The Code commits banks to ensure their staff are trained to competently and efficiently discharge their authorised functions to help the customer choose banking products and services.

The Frequently Asked Questions on the Revised Code of Banking Practice 2004 of 18 October 2004 states:

The Code of Banking Practice Is the banking industry's customer charter on good banking practice. The revised Code of Banking Practice will come into effect when your bank adopts it.

These 'Frequently Asked Questions' (FAQs) will help explain what the Code will mean to you - your rights and responsibilities.

The Code establishes the banking industry's key commitments and obligations to customers on standards of practice, disclosure, and principles of conduct for their banking services. When your bank adopts the Code, it will become a binding agreement between you and your bank.

Is the Code law?

The Code is not legislation, however, banks that adopt the Code are contractually bound by their obligations under the Code.

What rights does the Code give me?

The Code gives you important rights and confirms existing rights about matters such as:

- *Disclosure of fees and charges and other terms and conditions;*
- *Changes to terms and conditions and fees and charges*
- *Disclosure of general information about banking services*
- *Copies of documents*
- *Complaints handling*

Also, the Code gives guarantors important disclosure and other rights

How can I enforce my rights under the Code?

You must first wait until your bank announces that it has adopted the Code. then if you think your bank has breached the Code, there are several steps you can take.

A good first step is to raise the issue with your bank. Your bank has an internal complaint handling service to assist you. If your bank is not immediately resolved and the internal complaint handling service cannot resolve it, the Banking and Financial Service Ombudsman (BFSO) may be able to help.

A Code Compliance Monitoring Committee (CCMC) has been set up to investigate possible breaches of the Code. Anyone can refer a possible breach of the Code to this committee.

What can the CCMC do?

The CCMC investigates complaints that banks are not meeting their obligations under the Code. usually, an investigation starts when a consumer writes to the CCMC with a complaint about a bank. The matter is investigated and may be referred to the bank for the bank's response to the alleged breach. The final decision on a breach of the Code is made by the CCMC in a written Determination to the complainant and the bank.

If the CCMC established that a bank has breached its obligations under the Code, it may ask the bank to take remedial action, or give undertakings as to its future conduct. If the bank has already recognised the breach and addressed it, the CCMC may not require the bank to take any further action.

The Code gives the CCMC the power to name a bank in connection with a breach of the Code if the bank has been guilty of a serious or systemic breach, has not promptly remedied a breach as requested by the CCMC, has breached an undertaking given to the CCMC or has not taken steps to prevent a breach recurring after being warned that it may be named by the CCMC.

In those circumstances, the bank, and the grounds for naming the bank would be published in the CCMC's annual report. The CCMC also can conduct its own inquiries and monitor any other aspects of the Code that are referred to the CCMC by the ABA.

What key commitments does my bank give me?

On adopting the Code, your bank will:

- *Continuously work towards improving its standards of practice and services*
- *Promote better informed decisions about its banking services; for example, helping you with advice about its banking services;*
- *Provide general information about rights and obligations under the banker/customer relationship;*
- *Provide information in plain language*
- *Act fairly and reasonably towards you in a consistent and ethical manner- your conduct the bank's conduct and the bank services contract will be considered.*

Who is covered by the Code?

An individual or small business that is an actual or prospective customers involved in retail banking transactions. Any small businesses that has less than 20 (full time or equivalent) people is covered, as well as a goods manufacturing business that has less than 100 (full

time or equivalent) people (a business which does not meet either requirements is referred to in these FAQs as a large business).

When will this Code take effect?

The Code will take effect and apply to your bank when your bank adopts the Code.

How will I find out about the terms and conditions of my banking services?

Your bank will give them to you either before or as soon as practical after you take up an ongoing banking service.

Can I ask my bank to give me copies of my documents?

Yes, you can request a copy of any contract between you and your bank relating to a banking service you have or had with the bank, which will include applicable terms and conditions and standards fees and charges.

How does my bank decide if I can get credit?

Your bank must form its own option about your ability to repay a loan and it has credit assessment tools to help with this decision.

The Code says that during this assessment and decision process, the bank must exercise the care and skill of a diligent and prudent banker.

What happens if I am in financial difficulty with my loan?

If you agree, your bank will try to help you overcome your difficulties and could for example, work with you to develop a repayment plan.

What will my bank tell me about its banking services?

The bank is committed to help you with an explanation or advice about its banking services if you ask for it. A properly trained staff member can do this, or he or she will refer you to the appropriate adviser, or recommend you seek or use your own adviser.

The ANZ's Annual Report 2004 states:

ANZ has come a long way in 2004 while at the same time delivering another good financial performance. Importantly we have rewarded our shareholders and shared the benefits with our customers, our people, and the community.

We completed the $4.9 billion acquisition of The National Bank of New Zealand and have made good progress with the integration of our New Zealand businesses. The acquisition has been immediately accretive to cash earnings per share.

There was a $3.6 billion Rights Issue to fund the acquisition. The Rights Issue was oversubscribed and rewarded shareholders who participated.

Our Personal and Corporate divisions performed well following several years of hard work. They have good momentum, delivering improved service for customers and growing market share.

Institutional Division was subdued but we have now established a more sustainable foundation for the Division having increased economic value added through more efficient use of capital and lower risk.

Our New Zealand business performed reasonably in the face of significant competition and the normal uncertainties associated with a major acquisition. Our Pacific business performed well, but Asia was subdued. Esanda, our asset finance business, also performed well, and ING Australia continued to show improvement.

We have largely completed a seven-year program of structural de-risking. As a result ANZ Bank's risk profile has been substantially reduced and is now comparable with other major Australian banks.

We have continued to develop our culture, which we now consider a competitive advantage. We have created a new structure for our specialist businesses, led by an experienced team with a strong track record, to help accelerate growth and build market share.

We have developed innovative programs to strengthen our connection with the community. This includes responses to some of the major social issues involving the

financial services industry such as financial literacy and savings, and programs which help our people engage with the community.

The acquisition of The National Bank of New Zealand has made us the leading bank in New Zealand and the clear number three Australian bank based on market capitalisation.

Our market capitalisation has increased from $27.3 billion in 2003 to $34.6 billion. We have done this while delivering a strong 17% total shareholder return during the year, well above the sector average.

Outcomes like these don't just happen. They come about through the hard work and enthusiasm of our people. Similarly, our future aspirations are only good intentions unless they are accompanied by a focussed and disciplined strategy, hard work and genuine sense of excitement about the future.

Sustainable Performance and Value

We have now established the foundation to lift our sights and be clear that ANZ's aspiration is to become Australasia's leading, most respected and fastest growing major bank. This reflects my strong belief that delivering value to shareholders is not just about building the capacity of the organisation to perform and grow consistently in the short term but ensuring ANZ can stand the test of time and deliver sustainable performance and value over the long term.

The aspiration also reflects my views about what makes successful companies and translates into a clear set of priorities for ANZ.

Companies who combine superior revenue growth with superior efficiency generally produce the highest earnings growth and share price multiples.

[redacted]

[redacted]

[redacted]

This section provides evidence of the extraordinary misinformation provided by [redacted] to small businesses and farmers. The bank has avoided dealing with the deceitful practices nor named the parties who were the rogues in these events at ANZ identified practices that confirmed this was a rogue bank. Information provided to the market by the bank was untruthful [redacted] mislead small businesses and farmers.

2006: AS ISO 10002-2006 Standard: Customer satisfaction – guidelines for complaints handling in organisations (Originated as AS 4269-1995).

This Australian Standard was prepared by Committee OB-009, Complaints Handling. It was approved on behalf of the Council of Standards Australia on 24 February 2006.

This Standard was published on 5 April 2006.

The following are represented on Committee OB-009:

- *Australian Chamber of Commerce and Industry*
- *Australian Competition and Consumer Commission*
- *Australian Law Reform Commission*
- *Australian Securities and Investments Commission*
- *Banking and Financial Services Ombudsman*
- *Consumers' Federation of Australia*
- *Independent Chairman*
- *Insurance Brokers Disputes*
- *Insurance Council of Australia*

Keeping Standards up to date

Australian Standards are living documents that reflect progress in science, technology, and systems. To maintain their currency, all Standards are periodically reviewed, and new editions are published. Between editions, amendments may be issued.

This Standard was prepared by the Standards Australia Committee OB-009, Complaints Handling to supersede AS 4269-1995, Complaints handling.

The objective of this Standard is to provide guidance on complaints handling related to products within an organization, including planning, design, operation, maintenance, and improvement.

As this Standard is reproduced from an international standard, the following applies:

a. *Its number appears on the cover and title page while the international standard number appears only on the cover.*
b. *In the source text 'this International Standard' should read 'this Australian Standard'.*

c. *A full point substitutes for a comma when referring to a decimal marker.*

General

This International Standard provides guidance for the design and implementation of an effective and efficient complaints-handling process for all types of commercial or non-commercial activities, including those related to electronic commerce. It is intended to benefit an organization and its customers, complainants, and other interested parties.

The information obtained through the complaints-handling process can lead to improvements in products and processes and, where the complaints are properly handled, can improve the reputation of the organization, regardless of size, location, and sector. In a global marketplace, the value of an International Standard becomes more evident since it provides confidence in the consistent treatment of complaints.

Relationship with ISO 9001 :2000 and ISO 9004:2000

ISO 9001 specifies requirements for a quality management system that can be used for internal application by organizations, or for certification, or for contractual purposes. The process for complaints handling described in this International Standard can be used as an element of a quality management system.

ISO 9004 provides guidance on continual improvement of performance. The use of ISO 10002 can further enhance performance in the area of complaints handling and increase the satisfaction of customers and other interested parties. It can also facilitate the continual improvement of the quality of products based on feedback from customers and other interested parties.

1. Scope

This International Standard provides guidance on the process of complaints handling related to products within an organization, including planning, design, operation, maintenance, and improvement. The complaints-handling process described is suitable for use as one of the processes of an overall quality management system.

This International Standard addresses the following aspects of complaints handling:

a. *enhancing customer satisfaction by creating a customer-focused environment that is open to feedback (including complaints), resolving any complaints received, and enhancing the organization's ability to improve its product and customer service;*
b. *top management involvement and commitment through adequate acquisition and deployment of resources, including personnel training;*
c. *recognizing and addressing the needs and expectations of complainants;*
d. *providing complainants with an open, effective and easy-to-use complaints process;*
e. *analysing and evaluating complaints in order to improve the product and customer service quality;*
f. *auditing of the complaints-handling process;*
g. *reviewing the effectiveness and efficiency of the complaints-handling process.*

Terms and definitions

For the purposes of this document, the terms and definitions given in ISO 9000 and the following apply.

Complainant: Person, organization, or its representative, making a complaint

Complaint: Expression of dissatisfaction made to an organization, related to its products, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected

Customer: Organization or person that receives a product

Customer satisfaction: Customer's perception of the degree to which the customer's requirements have been fulfilled

Customer service: Interaction of the organization with the customer throughout the life cycle of a product

Feedback: Opinions, comments, and expressions of interest in the products or the complaints-handling process

Interested party: Person or group having an interest in the performance or success of the organization

Objective: Something sought, or aimed for, related to complaints handling

Policy: Overall intentions and direction of the organization related to complaints handling, as formally expressed by top management

Process: Set of interrelated or interacting activities which transforms inputs into outputs

4 Guiding principles

4.1 General

Adherence to the guiding principles set out in 4.2 to 4.10 is recommended for effective handling of complaints.

4.2 Visibility

Information about how and where to complain should be well publicized to customers, personnel and other interested parties.

4.3 Accessibility

A complaints-handling process should be easily accessible to all complainants.

Information should be made available on the details of making and resolving complaints. The complaints-handling process and supporting information should be easy to understand and use. The information should be in clear language. Information and assistance in making a complaint should be made available (see Annex B), in whatever languages or formats that the products were offered or provided in, including alternative formats, such as large print, Braille or audiotape, so that no complainants are disadvantaged.

4.4 Responsiveness

Receipt of each complaint should be acknowledged to the complainant immediately. Complaints should be addressed promptly in accordance with their urgency.

4.5 Objectivity

Each complaint should be addressed in an equitable, objective and unbiased manner through the complaints-handling process

4.6 Charges

Access to the complaints-handling process should be ***free of charge*** *to the complainant.*

4.7 Confidentiality

Personally identifiable information concerning the complainant should be available where needed, but only for the purposes of addressing the complaint within the organization and should be actively protected from disclosure, unless the customer or complainant expressly consents to its disclosure.

4.8 Customer-focused approach

The organization should adopt a customer-focused approach, should be open to feedback including complaints, and should show commitment to resolving complaints by its actions.

4.9 Accountability

The organization should ensure that accountability for and reporting on the actions and decisions of the organization with respect to complaints handling is clearly established.

4.10 Continual improvement

The continual improvement of the complaints-handling process and the quality of products should be a permanent objective of the organization.

5 Complaints-handling frameworks

5.1 Commitment

The organization should be actively committed to effective and efficient complaints handling. It is particularly important that this is shown by, and promoted from, the organization's top management.

A strong commitment to responding to complaints should allow both personnel and customers to contribute to the improvement of the organization's products and processes.

5.2 Policy

Top management should establish an explicit customer-focused complaints-handling policy. The policy should be made available to, and known by, all personnel. The policy should also be made available to customers and other interested parties. The policy should be supported by procedures and objectives for each function and personnel role included in the process.

When establishing the policy and objectives for the complaints-handling process, the following factors should be taken into account:

- *any relevant statutory and regulatory requirements;*
- *financial, operational and organizational requirements;*
- *the input of customers, personnel, and other interested parties*

The policies related to quality and complaints handling should be aligned.

5.3 Responsibility and authority

5.3.1 Top management should be responsible for the following:

a. *ensuring that the complaints-handling process and objectives are established within the organization;*
b. *ensuring that the complaints-handling process is planned, designed, implemented, maintained and continually improved in accordance with the complaints-handling policy of the organization;*
c. *identifying and allocating the management resources needed for an effective and an efficient complaints-handling process;*
d. *ensuring the promotion of awareness of the complaints-handling process and the need for a customer focus throughout the organization;*
e. *ensuring that information about the complaints-handling process is communicated to customers, complainants, and, where applicable, other parties directly concerned in an easily accessible manner;*

f. appointing a complaints-handling management representative and clearly defining his or her responsibilities and authority in addition to the responsibilities and authority set out in 5.3.2;

g. ensuring that there is a process for rapid and effective notification to top management of any significant complaints;

h. periodically reviewing the complaints-handling process to ensure that it is effectively and efficiently maintained and continually improved.

5.3.2 The complaints-handling management representative should be responsible for the following:

a. establishing a process of performance monitoring, evaluation, and reporting;

b. reporting to top management on the complaints-handling process, with recommendation for improvement;

c. maintaining the effective and efficient operation of the complaints-handling process including the recruitment and training of appropriate personnel, technology requirements, documentation, setting and meeting target time limits and other requirements, and process reviews.

5.3.3 Other managers involved in the complaints-handling process should, as applicable within their area of responsibility, be responsible for the following:

a. ensuring that the complaints-handling process is implemented;

b. liaising with the complaints-handling management representative;

c. ensuring the promotion of awareness of the complaints-handling process and of the need for a customer focus;

d. ensuring that information about the complaints-handling process is easily accessible;

e. reporting on actions and decisions with respect to complaints handling;

f. ensuring that monitoring of the complaints-handling process is undertaken and recorded;

g. *ensuring that action is taken to correct a problem, prevent it happening in the future, and that the event is recorded;*
h. *ensuring that complaints-handling data are available for the top management review.*

5.3.4 All personnel in contact with customers and complainants should

- *be trained in complaints handling,*
- *comply with any complaints-handling reporting requirements determined by the organization,*
- *treat customers in a courteous manner and promptly respond to their complaints or direct them to the appropriate individual, and*
- *show good interpersonal and good communication skills.*

5.3.5 All personnel should

- *be aware of their roles, responsibilities, and authorities in respect of complaints,*
- *be aware of what procedures to follow and what information to give to complainants, and*
- *report complaints which have a significant impact on the organization.*

6 Planning and design

6.1 General

The organization should plan and design an effective and efficient complaints-handling process in order to increase customer loyalty and satisfaction, and also to improve the quality of the products provided.

6.2 Objectives

Top management should ensure that the complaints-handling objectives are established for relevant functions and levels within the organization. These objectives should be measurable and consistent with the complaints-handling policy. These objectives should be set at regular intervals as detailed performance criteria.

6.3 Activities

Top management should ensure that the planning of the complaints-handling process is carried out in order to maintain and increase customer satisfaction. The complaints-handling process may be linked to and aligned with other processes of the quality management system of the organization.

6.4 Resources

In order to ensure that the complaints-handling process operates effectively and efficiently, top management should assess the needs for resources and provide them. These include resources such as personnel, training, procedures, documentation, specialist support, materials and equipment, computer hardware and software, and finances.

7 Operation of complaints-handling process

7.1 Communication

Information concerning the complaints-handling process, such as brochures, pamphlets, or electronic-based information, should be made readily available to customers, complainants and other interested parties. Such information should be provided in clear language and so far as is reasonable, in formats accessible to all, so that no complainants are disadvantaged. The following are examples of such information:

- *where complaints can be made;*
- *how complaints can be made;*
- *information to be provided by the complainant (see Annex B);*
- *the process for handling complaints;*
- *time periods associated with various stages in the process;*
- *the complainant's options for remedy, including external means (see 7.9); how the complainant can obtain feedback on the status of the complaint.*

7.2 Receipt of complaint

Upon reporting of the initial complaint, the complaint should be recorded with supporting information and a unique identifier code. The record of the initial complaint should identify

the remedy sought by the complainant and any other information necessary for the effective handling of the complaint including the following:

- *a description of the complaint and relevant supporting data;*
- *the requested remedy;*
- *the products or related organization practices complained about;*
- *the due date for a response;*
- *data on people, department, branch, organization, and market segment; immediate action taken (if any).*

7.3 Tracking of complaint

The complaint should be tracked from initial receipt through the entire process until the complainant is satisfied or the final decision is made. An up-to-date status should be made available to the complainant upon request and at regular intervals, at least at the time of pre-set deadlines.

7.4 Acknowledgement of complaint

Receipt of each complaint should be acknowledged to the complainant immediately (for example via post, phone, or e-mail).

7.5 Initial assessment of complaint

After receipt, each complaint should be initially assessed in terms of criteria such as severity, safety implication, complexity, impact, and the need and possibility of immediate action.

7.6 Investigation of complaints

Every reasonable effort should be made to investigate all the relevant circumstances and information surrounding a complaint. The level of investigation should be commensurate with the seriousness, frequency of occurrence and severity of the complaint.

7.7 Response to complaints

Following an appropriate investigation, the organization should offer a response (see Annex E), for example correct the problem and prevent it happening in the future. If the complaint cannot be immediately resolved, then it should be dealt with in a manner intended to lead to its effective resolution as soon as possible (see Annex F).

7.8 Communicating the decision

The decision or any action taken regarding the complaint, which is relevant to the complainant or to the personnel involved, should be communicated to them as soon as the decision or action is taken.

7.9 Closing the complaint

If the complainant accepts the proposed decision or action, then the decision or action should be carried out and recorded.

If the complainant rejects the proposed decision or action, then the complaint should remain open. This should be recorded, and the complainant should be informed of alternative forms of internal and external recourse available.

8 Maintenance and improvement

8.1 Collection of information

The organization should record the performance of its complaints-handling process. The organization should establish and implement procedures for recording complaints and responses and for using these records and managing them, while protecting any personal information and ensuring the confidentiality of complainants. This should include the following:

a. *specifying steps for identifying, gathering, classifying, maintaining, storing and disposing of records;*
b. *recording its handling of a complaint and maintaining these records, taking utmost care to preserve such items as electronic files and magnetic recording media, since records in these media can be lost as a result of mishandling or obsolescence;*

c. *keeping records of the type of training and instruction that individuals involved in the complaints-handling process have received;*
d. *specifying the organization's criteria for responding to requests for record presentation and record submissions made by a complainant or his or her agent; this may include time limits, what kind of information will be provided, to whom, or in what format;*
e. *specifying how and when statistical non-personally identifiable complaints data are disclosed to the public.*

8.2 Analysis and evaluation of complaints

All complaints should be classified and then analysed to identify systematic, recurring and single incident problems and trends, and to help eliminate the underlying causes of complaints.

8.3 Satisfaction with the complaints-handling process

There should be regular action taken to determine the levels of satisfaction of complainants with the complaints-handling process. This may take the form of random surveys of complainants and other techniques.

NOTE! One method of improving satisfaction with the complaints-handling process is to simulate a contact with a complainant and the organization.

8.4 Monitoring of the complaints-handling process

Continual monitoring of the complaints-handling process, the resources required (including personnel) and the data to be collected should be undertaken.

The performance of the complaints-handling process should be measured against predetermined criteria (see Annex G).

8.5 Auditing of the complaints-handling process

The organization should regularly perform or provide for audits in order to evaluate the performance of the complaints-handling process. The audit should provide information on

- *process conformity to complaints-handling procedures, and*
- *process suitability to achieve complaints-handling objectives.*

The complaints-handling audit may be conducted as part of the quality management system audit, for example in accordance with ISO 19011. The audit results should be considered in the management review to identify problems and introduce improvements in the complaints-handling process. The audit should be carried out by competent individuals independent of the activity being audited. Further guidance on auditing is provided in Annex H.

8.6 Management review of the complaints-handling process

8.6.1 Top management of the organization should review the complaints-handling process on a regular basis in order

- *to ensure its continuing suitability, adequacy, effectiveness, and efficiency,*
- *to identify and address instances of nonconformity with health, safety, environmental, customer, regulatory and other legal requirements,*
- *to identify and correct product deficiencies,*
- *to identify and correct process deficiencies,*
- *to assess opportunities for improvement and the need for changes to the complaints handling process and products offered, and*
- *to evaluate potential changes to the complaints-handling policy and objectives.*

8.6.2 The input to management review should include information on

- *internal factors such as changes in the policy, objectives, organizational structure, resources available, and products offered or provided,*
- *external factors such as changes in legislation, competitive practices or technological innovations,*
- *the overall performance of the complaints-handling process, including customer satisfaction surveys and the results of the continual monitoring of the process,*
- *the results of audits,*
- *the status of corrective and preventive actions,*

- *follow up actions from previous management reviews, and*
- *recommendations for improvement.*

8.6.3 The output from the management review should include

- *decisions and actions related to improvement of the effectiveness and efficiency of the complaints-handling process,*
- *proposals on product improvement, and*
- *decisions and actions related to identified resource needs (e.g. training programmes).*

Records from management review should be maintained and used to identify opportunities for improvement

8.7 Continual improvement

The organization should continually improve the effectiveness and efficiency of the complaints-handling process. As a result, the organization can continually improve the quality of its products. This can be achieved through corrective and preventive actions and innovative improvements. The organization should take action to eliminate the causes of existing and potential problems leading to complaints in order to prevent recurrence and occurrence, respectively. The organization should

- *explore, identify, and apply best practices in complaints handling, foster a customer-focused approach within the organization,*
- *encourage innovation in complaints-handling development, and*
- *recognize exemplary complaints-handling behaviour.*

Annex A (informative)

Guidance for small businesses

This International Standard is designed for organizations of all sizes. However it is recognized that many smaller businesses will have limited resources to dedicate to setting up and maintaining a complaints-handling process. This annex highlights key areas where

they may focus their attention to achieve maximum effectiveness and efficiency from a simple process.

The steps below identify key areas, with suggestions for action in each.

- *Be open to complaints: have a simple sign on show, or a paragraph on company invoices, saying (see 4.2), for example:*
- *"Your satisfaction is important to us, please tell us if you are not satisfied -we'd like to put it right".*
- *Collect and record complaints (see Annex Band Annex D).*
- *Acknowledge your receipt of the complaint to the complainant if it is not received in person (a phone call or e-mail is sufficient) (see 7.4).*
- *Assess the complaint for validity, possible impact and who is the best person to deal with it (see 7.5).*
- *Resolve as soon as practically possible, or further investigate the complaint and then decide about what to do about it, and act promptly (see 7.7).*
- *Give information to the customer about what you intend to do about the complaint and evaluate the customer's response. Is it likely that the action will satisfy the customer? If yes, then move rapidly to take the action the customer reasonably expects, bearing in mind the best practices within your industry (see 7.8).*
- *When all possible has been done in your view to resolve the complaint, tell the customer and record the outcome. If the complaint is still not resolved to the customer's satisfaction, explain your decision and offer any possible alternative actions (see 7.9).*
- *Review complaints regularly-a brief periodical review and a more intensive annual review - to establish if there are any trends, or obvious things you could change or put right to stop complaints occurring, improve customer service, or make customers more satisfied! (See Annex B and complaints tracking in item 7 of Annex D).*

The above guidance is designed for easy implementation. It may be valuable to visit other similar businesses, perhaps not doing exactly the same, and see how they deal with customers' complaints. Valuable tips and techniques to apply may often be found.

Annex C

(informative)

Objectivity

The principles for objectivity in the complaints-handling process include the following.

a. ***Openness:*** *well publicized, accessible, and understood by those involved in a complaint. The process should be clear and well publicized so that both personnel and complainants can follow them.*
b. ***Impartiality:*** *avoiding any bias in dealing with the complainant, the person complained against or the organization. The process should be designed to protect the person complained against from any biased treatment. Emphasis should be placed on solving the problem and not on assigning blame. If a complaint is made about personnel, the investigation should be carried out independently.*
c. ***Confidentiality:*** *the process should be designed to protect the complainant's and customer's identity, as far as is reasonably possible. This aspect is very important to avoid deterring possible complaints from people who may be afraid that giving details could lead to inconvenience or discrimination.*
d. ***Accessibility:*** *the organization should allow the complainant access to the complaints-handling process at any reasonable point or time. Information about the complaints process should be readily available in clear language and in formats accessible to all complainants. When a complaint affects different supply chain participants, a plan to coordinate a joint response should be made. The process should allow any information arising from the complaints to be known by any suppliers of the organization that are concerned by the complaint so that they are able to make improvements.*

e. ***Completeness**: finding out the relevant facts, talking to people from both sides involved in the complaint to establish a common ground and verify explanations, whenever possible.*

f. ***Equitability:** giving equal treatment to all people.*

g. ***Sensitivity:** each case should be considered on its merits, paying due care to individual differences and needs.*

C.2 Objectivity for personnel

Complaints-handling procedures should ensure that those complained against are treated objectively. This implies

- *informing them immediately and completely on any complaint about their performance,*
- *giving them the opportunity to explain the circumstances and allowing them appropriate support, and*
- *keeping them informed of the progress in the investigation of the complaint and the result.*

It is vital that those against whom a complaint has been made are given full details of the complaint before they are interviewed. However, confidentiality should be observed.

Personnel should be reassured that they are supported by the process. Personnel should be encouraged to learn from the complaints-handling experience and to develop a better understanding of the complainant perspectives.

C.3 Separating complaints-handling procedures from disciplinary procedures

Complaints-handling procedures should be separated from disciplinary procedures.

C.5 Objectivity monitoring

Organizations should monitor the responses to complaints to ensure complaints are handled objectively. Measures could include

- *a regular monitoring (e.g. monthly) of resolved complaint cases selected at random, and*

- *surveys of complainants, asking them if they were treated in an objective manner.*

Annex E

(informative)

Responses

E.1 The organization's policy on the provision of responses may include

- *refunds,*
- *replacement,*
- *repair/rework,*
- *substitutes,*
- *technical assistance,*
- *information,*
- *referral,*
- *financial assistance,*
- *other assistance,*
- *compensation,*
- *apology,*
- *goodwill gift or token, and*
- *indication of changes in products, process, policy or procedure arising from complaints.*

E.2 Issues to be considered may include

- *addressing all aspects of the complaint,*
- *following up where appropriate,*
- *whether it is appropriate to offer remedies to others who may have suffered in the same way as the complainant but did not make a formal complaint,*
- *level of authority for the various responses, and*
- *dissemination of the information to the relevant personnel.*

Annex G (Informative)

Continual monitoring

G.1 General

This annex is a generic guide for effective and efficient continual monitoring of the complaints-handling process. The approach adopted should be appropriate to the type and size of the organization.

G.2 Management responsibility

It is vital to ensure that those responsible for monitoring and reporting on the performance of the complaints-handling process and for taking corrective actions are competent for this role.

The following are some of the types of responsibilities that can be considered.

a. *Top management should*
- *define the monitoring objectives,*
- *define the monitoring responsibilities,*
- *conduct reviews of the monitoring process and ensure that improvements are implemented.*

b. *the complaints-handling management representative should*
- *establish a process of performance monitoring, evaluation, and reporting, and*
- *report to top management on the performance revealed during the complaints handling process reviews, so that all necessary improvements can be made.*

c. *other managers involved in the complaints in the organization should ensure that*
- *adequate monitoring of the complaints-handling process is undertaken and recorded within their area of responsibility,*
- *corrective action is taken and recorded within their area of responsibility, and*
- *adequate complaints-handling data are available for the top management review of the monitoring process within their area of responsibility.*

G.3 Performance measurement and monitoring

G.3.1 General

The organization should assess and monitor the performance of the complaints-handling process using a set of predetermined criteria.

Organizational processes and products differ widely, as do the performance-monitoring criteria appropriate to them. Organizations should develop performance-monitoring criteria relevant to their particular circumstances. Examples are given in G.3.2.

G.3.2 Performance-monitoring criteria

Examples of criteria that may be considered and included when monitoring the performance of the complaints-handling process include the following:

- *whether a complaints-handling policy and objectives has been established, maintained and made appropriately available;*
- *personnel perception of the top management commitment to complaints handling;*
- *whether responsibilities for complaints handling have been appropriately assigned;*
- *whether personnel in contact with customers are authorized to resolve complaints on the spot;*
- *whether discretionary limits concerning responses have been set for personnel in contact with customers;*
- *whether personnel specialized in complaints handling have been appointed;*
- *the proportion of personnel trained in complaints handling who are in contact with customers;*
- *the effectiveness and efficiency of complaints-handling training;*
- *the number of suggestions from personnel to improve complaints handling;*
- *attitude of personnel to complaints handling;*
- *frequency of complaints-handling audits or management reviews;*
- *time taken to implement recommendations from complaints-handling audits or management reviews;*
- *time taken to respond to complainants;*
- *degree of complainant satisfaction;*

- *effectiveness and efficiency of the required corrective and preventive action processes, when appropriate.*

G.3.3 Monitoring data

The monitoring of data is important since it provides a direct indicator of complaints-handling performance. Monitoring data may include the number or proportions of

- *complaints received,*
- *complaints resolved at the point at which they are made,*
- *complaints incorrectly prioritized,*
- *complaints acknowledged after agreed time,*
- *complaints resolved after agreed time,*
- *complaints referred to external methods of resolution (see 7.9),*
- *repeat complaints or recurrent problems that have not been complained about, and improvements in procedures due to complaints.*

Careful attention should be exercised in data interpretation because

- *objective data such as response times may show how well the process is working but may not provide information about complainant satisfaction, and*
- *an increase in the number of complaints after the introduction of a new complaints-handling process may reflect an effective process rather than a poor product.*

Annex H (Informative)

Audit

The organization should continually improve the effectiveness and efficiency of its complaints handling process. For this reason, process performance and outcomes should be regularly monitored to identify and remove causes of existing and potential problems, as well as to uncover any opportunities for improvement.

When examining the performance of the complaints-handling process, the audit evaluates the extent to which the process conforms to the stated criteria, as well as the suitability of the process to achieve objectives.

On 3 December 2007, Kevin Rudd was appointed Prime Minister and should have reviewed the banking rules which required banks to comply with the contemporary codes and meet the AS 4269-1995 Standard. Rudd had access to Martin Committee's documents.

CCMC's Bulletins

The CCMC's Bulletin No.4 – August 2006 states:

Clause 9 Inquiry

In June and July, the Members and CEO conducted a limited survey to test bank compliance with clause 9 of the Code, which requires the Code to be:

1. *On display in branches;*
2. *Available on request;*
3. *On display on the bank's website; and*
4. *Sent by electronic communication or mail on request.*

A total of 103 bank branches were visited in Melbourne, Sydney, Canberra (and region) and Adelaide. While the sample sizes, particularly of the smaller regional banks were small, the exercise provides a snapshot of compliance with clause 9. ***It was disappointing to find that only slightly more than half the branches surveyed complied with the requirement to display the Code.***

The mixed results indicate that this an area in which the Committee needs to undertake a more formal review.

Results were classified into three groups:

1. *Code on display* — *61 branches*
2. *Code not on display but available on request* — ***30 branches***
3. *Code not available* — ***12 branches***

The CCMC's Bulletin No.7 – May 2007 states:

Bank Forum 2007

The Australian Bankers Association held its annual Bank Forum on the Code of Banking Practice (the Code) on April 24, in Sydney. The Forum focussed on the theme of financial hardship. Approximately 20 representatives from subscribing banks across Australia participated in discussion prompted by case studies presented by Committee members Russell Rechner and David Tennant. The case studies were based on complaints received by the Committee and associated determinations relating to debt collection and financial hardship. The Committee discussed with bank representatives its approach to making determinations in these areas and general issues relevant to the Code.

Code obligations relating to financial difficulty

As outlined above, the Committee took the opportunity at the recent Bank Forum to advise banks of its approach to monitoring compliance with Clause 25.2 of the Code. Feedback from the Forum suggested that it would be useful for the Committee to set out aspects of that approach in this bulletin.

Limb 1:

"With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan.

Limb 2:

If, at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them".

The Committee has investigated a number of complaints in which it has determined that banks have breached Clause 25.2. In the Committee's view, Clause 25.2 will apply if a bank has been put on notice of a customer's financial difficulties. The Committee has found that it is not necessary for a customer to have explicitly stated

that he/she is "in financial difficulty" for Clause 25.2 obligations to be triggered. Rather, the Committee looks to all the circumstances of the case and will find the bank on notice if the circumstances support it.

The second limb of Clause 25.2 requires a bank to inform a customer of the hardship variation provisions of the Uniform Consumer Credit Code (UCCC), if they could apply to them. Failure to do so is the most common breach of Clause 25.2 seen by the Committee.

The Committee has recently determined however, that such a reference is insufficient to meet the obligations imposed by the second limb of Clause 25.2. Rather, if the Bank considers the contract to be covered by the UCCC, the Bank should make this clear to the customer and provide the customer with information about the provisions and how to seek a variation.

The attached flow chart sets out the action the Committee expects from banks in relation to the two limbs of Clause 25.2

Clause 14 Inquiry

In March, the Committee completed its inquiry into compliance with Clause 14 of the Code of Banking Practice, relating to account suitability. The results of the Inquiry were generally positive, with 10 out of 13 subscribing banks having some form of basic bank account seeking to meet the needs of low income or disadvantaged customers.

Banking Code of Practice Clause 25. 2

Awareness of financial difficulty

Customer does not have to state that they are in financial difficulty

Depends on the circumstances and bank knowledge of those circumstances.

If circumstances are such to suggest customer access superannuation payments, indicates customer in financial difficulty.

Limb 1 – All Contracts:

Obligation to assist customer to overcome difficulties

• applies to small business and all credit facilities

Provide Assistance: Bank must be proactive in providing assistance.

(Unlimited options eg. moratoriums or extended payment periods).

Limb 2 – If UCCC contract:

- *Explain hardship variation provisions and how to go about seeking a variation with the bank*
- *Give genuine consideration to hardship variation*
- *If hardship variation is rejected by the bank, give customer reasons for rejection and advise of right to apply for a variation in tribunal*

The CCMC Bulletin No.8 – August 2007 states:

Clause 35 – Internal Dispute Resolution

The Committee has recently received a small number of complaints where a bank has engaged external lawyers to institute debt recovery proceedings and, during this process, lawyers acting for the customer have made a complaint relating to the Bank's failure to comply with Clause 25.2 of the Code. In accordance with legal practice regulations, the customer's lawyer is unable to deal with the bank directly and must communicate through its appointed lawyers. The result has been increased legal costs passed onto the customer because internal dispute resolution procedures have not been applied to the unresolved complaint (a dispute as defined under Clause 40 the Code).

In recent determinations, the Committee has put the view that:

• Where a bank receives a complaint either directly or through its agent, which is not resolved immediately, the bank must act in accordance with Clause 35 of the Code. This includes applying the bank's internal dispute resolution processes to the complaint, providing the names and contact number of the person handling the

complaint, adhering to the timeframes set out in Clause 35 and providing a response.

• It is not necessarily inconsistent with Clause 35 of the Code for a bank to engage external lawyers to resolve disputes. If a bank chooses to have its external lawyers manage such a dispute, the following minimum requirements apply in order to comply with Clause 35 of the Code:

• The lawyers must comply with all conditions under Clause 35;

• From the date notified of the complaint no legal costs may be charged to the Customer relating to the resolution of the complaint/dispute;

• The bank must accept any decisions made by its lawyers regarding the resolution of the dispute and accept any consequences resulting from its lawyers' actions; and

• The bank or its lawyers must tell the Customer or the Customer's agent that the lawyers will be handling the dispute resolution and that they are obliged to comply with Clause 35 of the Code.

Jan McClelland Code of Banking Practice review of 11 March 2008

On 11 March 2008, Kirsten Trott CCMC Chief Executive filed a review to Ms Jan McClelland, Code's reviewer. The Committee members noted in this submission that their authority set up under clause 34 of the code to monitor bank compliance was undermined by the Bankers' unpublished constitution which imposed qualifications and restrictions on them. The Committee stated its *'firm view is that the constitution is problematic'.*

Background

The Code Compliance Monitoring Committee (the Committee) is the body set up under the authority of Clause 34 of the Code of Banking Practice 2004 (the Code) to:

• Monitor subscribing bank compliance under the Code.

• Investigate, and to make determinations on any allegation from any person that a subscribing bank has breached the Code (but the Committee will not resolve or make a determination on any other matter).

• Monitor any other aspects of the Code referred to it by the Australian Bankers Association (ABA).

The Committee fulfils its role by conducting themed inquiries into bank compliance and requiring banks to submit annual compliance statements, in addition to its investigation of complaints that the Code has been breached. The Committee has proceeded on the basis that the monitoring and investigation functions apply to all the provisions of the Code. With regard to the last function listed above, it is unclear what aspects of the Code are not embraced by the preceding functions. Its meaning has never been tested by any reference from the ABA. If the intention of this provision was to allow the extension of the Code by addition of new elements, the formulation would appear ineffective.

The previously existing Code (the 1993 Code) made no provision for the independent monitoring of compliance by subscribing banks. During that review there was strong support amongst all stakeholders for the creation of an independent body to oversee compliance with the proposed new Code. The result was the establishment of the CCMC Committee.

Whilst the composition, function and authority of the Committee are provided for in the Code, the Committee was established under the constitution of the Code Compliance Monitoring Committee Association (CCMCA), which sets out powers and obligations for the Committee. On the face of it, that constitution imposes some qualification and restrictions on the actions of the Committee. In part, it does that by identifying the ways in which the Committee will carry out its role. These restrictions are explained further in Annexure B.

Governance

The CCMC Committee is aware that the review of the Code has been extended to encompass governance issues. The Committee believes such a review is long overdue. The current arrangements, whilst workable, are inadequate. Arguably the single most significant aspect of the new Code was the provision for the establishment of the CCMC Committee and hence its governance is directly relevant to the Code review.

For the sake of clarity, the Committee does not support any merging of the roles of (or blurring of the distinction between) compliance monitoring and dispute resolution. The Committee's view is that it is performing its current functions efficiently and effectively however the body needs to be re-established to revalidate that it is able to perform its current functions as at present. The Committee considers the current sharing of administrative resources with the BFSO works well and should be maintained.

The Committee considers that the existing constitution should be revoked for two reasons. Firstly, because the structure suggests that the CCMC Committee is less than independent of subscribing banks. Secondly some provisions of the constitution vest unnecessary power in the Chairmen of the Banking and Financial Services Ombudsman (BFSO) and the CCMCA.

Code Awareness

Through its bulletins and meetings with stakeholders, the Committee has sought to raise awareness of the Code and of the issues resulting from the difference between external dispute resolution (the role of the BFSO) and compliance monitoring. Awareness of these differing roles is related to the whole issue of promotion of the Code more generally, which by virtue of Clause 8 of the Code is the responsibility of the ABA.

It is notable that whilst 13 banks, including the five major retail banks, have subscribed to the Code there are several banks, albeit limited in market share, with retail customers in Australia which have not subscribed. The Committee experience

would indicate that overall awareness of the Code remains low amongst bank customers.

Information sharing

Despite the differences between the compliance monitoring function and the dispute resolution function provided by the BFSO, both the Committee and BFSO play a role in improving standards of banking practice.

It is the Committee's view that the self-regulatory scheme would be better served if the BFSO referred issues relating to the Code to the Committee for determination. If, however it is considered necessary for the BFSO to make findings of breach in relation to the Code, the Code should enable the Committee to have access to BFSO findings on the Code including the name of the Bank, which was found to have breached the Code.

The Committee would not necessarily need to know the identity of the Customer. Also, once a determination had been made by the BFSO, the Code should refer the matter to the Committee to recommend remedial action and perform ongoing monitoring of the bank's compliance in that area.

Bank's obligations in the Code

Issues relating to the general application of the Code which the Committee considers could be usefully reviewed are:

The weight to be given to the general commitment, to continuously work toward improving the standards of practice and service in the banking industry (Clause 2.1) in interpreting the Code.

The CCMC Committee accepts that its role is to measure compliance against the specific requirements of the Code. It has taken the view that consistent with the provisions of Clause 2.1, the Committee's remit includes for it to identify what it sees as best practice in giving effect to the provisions of the Code. That view is not consistently shared within the sector.

- *The effect of the substance of Clause 2.2.*

The Committee has had cases where it has been satisfied that a bank has not acted fairly and reasonably having regard to the conduct of both parties and the contract.

- *The absence of any requirement in the Code that banks should observe the terms and conditions of their contract with their customers.*

The Committee acknowledges that this matter relates to the legal rights of the parties under contract law. However at least in so far as it raises systemic issues, it would seem to be a matter that should be covered by the Code.

- *The suggestion by some banks that they have an option to choose which provisions of the Code they will observe whilst maintaining a position that they will subscribe the Code.*

The Committee has taken the view that that is not an option. Banks must either accept the obligations of the Code as a whole or they cannot be regarded, or hold themselves out, as subscribing banks. The view of the Committee is that this position should be formally adopted in the Code and that to do otherwise would be contrary to the clear intent of the Code and administratively unworkable.

Conclusion

The Committee considers that whilst the Code is working well and existing governance and organisation structures are workable, there is room for improvement. The Committee looks forward to discussions about how the Code can be improved, both in relation to bank's obligations to its customers and greater issues affecting the self regulatory scheme, such as the Committee's governance and the distinctions and complementarities between its role and that of the BFSO.

Annexure B

The Committee's firm view is that the constitution is problematic. The Committee has never met with the members of the CCMCA, its chair or the BFSO chair and to the Committee's knowledge, the CCMCA has only met once to approve the

constitution and agree the appointment of the Committee chair. The Committee notes that to the best of its knowledge, the constitution has never been made public despite its apparently intended impact of the provisions of the Code, which was itself subject of very wide public consultation.

The constitution provides the BFSO Chair and the CCMCA Chair with oversight powers.

Annexure C:

Discussion Paper

External compliance monitoring and dispute resolution:

Essential and complementary, but distinct, functions under the Code of Banking Practice

Introduction:

Over the last decade or so Australia, in common with many other developed economies, has been experimenting with a move away from market regulation through direct government intervention, towards greater reliance on industry based self regulation.

In 1997, the then Prime Minister told business that "the Government is keen for industry to take ownership and responsibility for developing effective and efficient self-regulatory mechanisms where this is appropriate".

The Government identified voluntary codes of conduct, as the "main tool used to achieve effective self regulation" on the basis that they "achieve greater and lasting improvements in business practices by using negotiation and consultation rather than prescriptive legislation and enforcement".

This paper looks at the development of one model of self-regulation, the 2004 Code of Banking Practice (the 2004 Code). Particular attention is paid to the functions that underpin the credibility of the 2004 Code, specifically external compliance monitoring and dispute resolution. The paper will explore the distinction between

these functions and the potential significance of structural separation of the bodies which perform them.

Background:

The antecedent of the 2004 Code was the Code of Banking Practice 1993 (the 1993 Code). In the review which preceded the introduction of the 2004 Code the independent reviewer appointed by the Australian Bankers' Association (" ABA"), Mr Richard Viney, consulted widely on the effectiveness of the 1993 Code. The review established that the 1993 Code was "not highly regarded by consumer advocates". More generally it was seen as "unduly narrowly conceived" with one bank commenting that it was "all but irrelevant"

A number of submissions were highly critical of the lack of any provisions for the effective monitoring and administration of the 1993 Code. This was not surprising given that in the time since the 1993 Code was adopted, the Government had issued guidelines on industry codes of conduct which recommended that the codes should provide for some form of administration body.

The Issues Paper for the review of the 1993 Code canvassed three different options to meet the need for transparency and accountability in administration and monitoring of the Code:

1. ASIC - As the regulator, it had an existing role in monitoring compliance with the original Code. It was suggested this could be expanded to include audits where there may be evidence of non-compliance.

2. Industry, possibly in the form of the council of the Australian Banking Industry Ombudsman (" ABIO") (now the Banking and Financial Services Ombudsman - "BFSO"). However Banks had strong views that the ABIO, as a quasi-judicial body should not be involved in " ... auditing the practices of banks whose decisions it is required to critically examine in the course of dispute resolution".

3 Independent third parties such as auditors or a body such as the United Kingdom's Banking Code Standards Board. Banks were generally not supportive of a new monitoring entity being set up for this purpose

Ultimately, the ABA and consumer advocates put a persuasive case for an independent monitoring body which was capable of imposing sanctions for Code breaches. The final report of the review identifies this issue as crucial to the efficacy of the Code, pointing out that the original Code's lack of credibility was due to the absence of effective monitoring and sanctions.

The inclusion of Key Commitments in the Code of Banking Practice reflected a real and accountable commitment on the part of industry to raising standards of practice and providing benefits to consumers. This was a bold step by Industry seeking the trust and confidence of consumers, reinforced by the fact that the Code formed part of the Bank's contract with the customer. These points may be part of the reason why, when the Issues Paper to the Code Review was released in March 2001, the then Minister for Financial Services, Joe Hockey, described the Code as " .. effectively a bill of rights for bank

Significantly, the 2004 Code also established a body, the Code Compliance Monitoring Committee ("the Committee"), to provide " .. an independent, transparent and efficient process for monitoring banks' compliance with the Code"

The Committee, which was established in April 2004, is constituted by three persons and is serviced by a small secretariat. Consistent with the National Fair Trading guideline on codes of conduct, and in accordance with the provisions of the 2004 C, the Committee includes a consumer and small business representative, a member with banking experience and an independent chairperson. It is fully funded by the subscribing banks.

Equipped with both industry and consumer input when performing the functions of monitoring and sanctioning subscribing banks' compliance with the Code, the Committee:

- *Requires banks to complete, on an annual basis, a comprehensive statement addressing all aspects of Code compliance;*
- *Undertakes compliance monitoring exercises such as shadow shopping and compliance visits;*
- *Engages in dialogue with subscribing banks on their obligations under the Code;*
- *Assists banks to interpret and meet the requirements of the Codes;*
- *Monitors and enforces compliance with the Codes and takes disciplinary action for material breaches, and*
- *Investigates and determines allegations that the 2004 Code has been breached.*
- *The 2004 Code is administered by the ABA. It is the ABA and not the Committee which has responsibility for:*
- *Ensuring sufficient coverage of the Code among industry participants;*
- *Educating subscribers and the public about the Code;*
- *Promoting the Code; and*
- *Managing the process for review of the Code.*

The significance of an independent code compliance monitoring function Professor David Llewellyn argues that in financial transactions there is a higher consideration for the consumer beyond the basic characteristics of the product or service. Consumers look for trust and confidence in the products and services as well as in the institutions supplying them. Professor Llewellyn argues that the embedding of trust and confidence needs to become part of the business strategy of financial services providers.

Signatory banks have seized the opportunity to build the trust and confidence of customers by participating in the Code of Banking Practice. However, customers must find the Code, like any voluntary self-regulatory regime, credible for trust and confidence to be established. ABA Chief Executive Officer, David Bell recently stated

"Independent compliance monitoring is an important feature of a Code if the Code is to be credible and seen as of value by customers"

Against a background of changing public perceptions, voluntary self regulation such as the Code of Banking Practice must establish meaningful standards which are properly and effectively administered in order to build and maintain public trust and confidence. The challenge to the sector, and to the agencies involved, is to ensure that self regulation continues to meet developing public expectations.

Annexure D:

Recommendations regarding Bank's obligations under the Code

The Code Compliance Monitoring Committee's Overview to its submission (Annexure A) outlined that in the Committee's view:

- *the Code has been working well in practice since its introduction in 2004; subscribing banks have generally demonstrated their commitment to meeting their obligations under the Code;*
- *the Code is not severable, and banks cannot chose which parts of the Code to comply with;*
- *the Committee's role in relation to the Key Commitments of the Code should be confirmed, and*
- *the review should consider the absence of any reference in the Code to a bank breaching its terms and conditions.*

A. ISSUES FOR INCLUSION IN THE CODE

Communications between bank and customer

In recent years, cases before the Committee have evidenced communication between banks, their customers, and representatives. Examples include:

- *Failure to respond to customer correspondence at all or in a timely or effective manner,*
- *Difficulties faced by customers of different cultural backgrounds, and*

- *Disclosure of relevant banking information in a way that is difficult to understand or to find.*

C: MONITORING ISSUES

Compliance with laws

Clause 3 of the Code obliges banks to comply with all relevant laws relating to banking services. Whilst the Committee appreciates the spirit in which this Clause was intended, it has had difficulties monitoring bank compliance with this Clause of the Code. To effectively monitor compliance with Clause 3, the Committee would need to identify all relevant laws relating to banking services and determine whether a Bank was complying with those laws. The Committee does not feel it is competent to make findings in relation to whether a bank is or is not compliant with general law.

Bringing a complaint under the Code

The Code refers to the Committee's role in Clause 34 in the context of the establishment of the Committee. Now that the Committee has been established for some years, its role should be expressed in a way that is helpful to consumers. Customers should be aware of their right to bring a complaint to the Committee and the Committee's contact details should be included in the Code. In the Committee's view, Customers should also be given a reference, such as the Committee's or the ABA' s website, where they can find out information about the Code and a list of who subscribes to it.

On 31 July 2009, ABA released a media stating:

The council of the ABA has elected Davis Liddy, Chief Executive of Bank of Queensland, as the new Deputy Chairman of the Industry organisation.

Chairman of the ABA Ralph Norris said, 'We know that Davis will play an important role in the industry discussions on regulation. Banking is constantly and rapidly evolving and changes in practices and regulation across the world can also affect Australia.'

'We need to continue to ensure that regulatory developments which are designed to fix problems overseas are not just duplicated in Australia. After all, our banks have fared well in this global crisis.

Mr Davis said 'I have enjoyed working with the ABA as it has played an important role leading public debate in Australia and worked with the Government and community to produce sound public policy outcomes. There is still more work to be done and I am confident that the ABA will maintain this momentum under the incoming Deputy Chairman David Liddy.'

Other ABA's statements

On 20 August 2009, ABA released a further media statement:

Chief Executive – ABA

The Chairman of ABA, Ralph Norris, today announced that David Bell, will be stepping down as Chief Executive of the ABA.

'Bell has been CEO for close to 9 years and has decided that he would like to move another role. However, I am pleased that David Bell has indicated that he will continue as CEO during the search for his replacement, so that there can be an orderly transition – his contracted period concludes in July 2010. The ABA has initiated a search for a successor for David.'

'On behalf of the Council of the ABA, I would like to thank David for his service as CEO during a very challenging time both for the industry and the Association. David and his ABA tram have delivered a tremendous amount of support and value to the member banks during the term of his leadership,' Mr Norris said.

David thanked Mr Norris, the ABA Council, and the ABA team for their very committed support during his time as CEO.

'The backing I have had from successive ABA Chairmen, their Deputies, the Council, and banks over the last 9 years, has been unstinting. Australian banks are in a very strong position today because of the excellent leadership of bank executives and the hard work

of bank staff. During the global financial crisis, our Australian industry has been held out as a prime example of a well-run and regulated banking sector.'

'While I have announced that I am stepping down, there still remains a lot of work for the ABA to do making sure that the numerous regulatory proposals and Parliamentary Committee reviews are dealt with in the best possible way. I will continue working at full speed on these issues,' Mr Bell said.

On 10 September 2009, ABA released another media report, stating:

The ABA says the banking sector has accepted the vast majority of recommendations made by the Independent Reviewer to update the Code of Banking Practice.

The Code is the banking industry's customer charter on best banking practice standards. The Code sets out the banking industry's key commitments and obligations to customers on standards of practice, disclosure, and principles of conduct for their banking services for personal and small business bank customers.

It is important to note that not all credit or financial service providers adhere to a Code or an equivalent self-regulatory standard.

David Bell, Chief Executive of the ABA, said the Code is regularly updated and this second independent review of the banking industry's self-regulatory Code was undertaken by Jan McClelland who delivered her recommendations at the end of last year.

Mr Bell said, 'This review was completed against the backdrop of an active Commonwealth legislative program which has overtaken some of the Reviewer's recommendations. For example, there will be an inclusion of a general commitment on responsible lending in the Code, but the final position will need to consider the Federal Government's laws on consumer credit.'

'Also, steps taken by the retail member banks have overtaken some of the Reviewer's recommendations such as banks announcing extensions of their hardship provisions for borrowers who are experiencing financial difficulties. This shows that the banking sector remains responsive to their customers' needs.'

The retail banks' response to the recommendations leaves no doubt that the banking industry can adapt to changes that provide increased protection and fair outcomes.'

Submission of Council of Small Business Organisation of Australia (COSBOA) on 5 December 2010

On 24 June 2010, Julia Gillard was Australia's Prime Minister and during the next 3 years, she and the previous Prime Minister Kevin Rudd had swapped positions. On 5 December 2010, Council of Small Business Organisation of Australia (COSBOA) published a summary of its position on banking practices, but none of the recommendations were adopted by the Labor governments.

COSBOA's review provided an outline of the commitments made by the banks, including ANZ. Part 2 of the submission titled 'Promises Delivered', comments on the revised 2003 Code and the modified 2004 Code, stating:

This report examines, and makes recommendations in respect of, the extent to which customers of Australian banks are assured of fair treatment and full disclosure of facts that are relevant to their transactions.

In its 1991 report the Martin Committee concluded that the banks should be required to establish a formal system of self-regulation based on a government approved Code of Banking Practice. It further cited the high cost of resolving disputes, in the courts, between banks and their customers; and stressed the importance of an effective, low cost, complaints resolution procedure.

The first such Code of Practice was established in 1993 but not adopted until 1996. It was substantially revised in 2003, and further modified in 2004. Despite a review in 2005 and further reviews in 2008, the 2004 code is essentially still in force.

A detailed history is included in the main body of this report.

1. *The 1993 Code was written by the Australian Bankers' Association ('ABA') but failed to include recommendations from the Martin Committee that the banks did not like. The*

2003 and 2004 (current) Code are also ABA documents which do not consider the government's principles and suggestions.

2. *The key body that implements the codes application and rules is the Code Compliance Monitoring Committee ('the CCMC'). However, an undisclosed body exists called the Code Compliance Monitoring Committee Association ('the CCMC Association') which drafted its own constitution that has the effect of limiting the activities of the CCMC to the disadvantage of customers.*
3. *Despite appearances to the contrary, this report suggests that the code is not enforceable at law and does not constitute the elements of the contracts (written agreements) between the banks and customers.*
4. *The constitution defines narrowly the circumstances in which the CCMC reviews banks compliance with the code. As a result, very few unsatisfied complaints come to the attention of the CCMC or are ever investigated.*
5. *Several reviews by independent or semi-independent persons have recommended changes to impose greater transparency and / or increased government regulation. However, these have not been implemented, and incorporation of original principles of the voluntary self-regulated code or low-cost dispute resolution procedures appears to have been seriously considered.*
6. *Although voluntary codes and self-regulation could work effectively, this report suggests this has not happened since 2003. The introduction of misleading words and the constitution meant banks can filter complaints, thereby limiting the authority, independence, and power of the CCMC at their discretion.*

RECOMMENDATION

There is significant evidence suggesting that the ABA and hence the banks and bankers, have acted to retain control over the compliance procedures that would require them to deal fairly and openly with customers, including all small businesses. There are also several specific incidents which would not appear to have been handled in accordance with the spirit of the code as originally recommended by Stephen Martin's Committee, or in accordance with the banks' customers, and in the public interest.

This report recommends the Senate or the Federal Government Treasurer commission an inquiry into the issues raised herein. This government report would have specific intent of implementing legislation and procedures that would add a truly independent element to the governance and principles involving the banks' behaviour when dealing with customers. If the review found banks or bankers used the constitution or other practices to the disadvantage of customers, the government report might recommend corrective action.

In 1991, Stephen Martin recommended banks appoint independent monitors to ensure complaints handling is a 'cheap, speedy, fair, and accessible alternative to traditional Courts'. These principles were partly disbanded by the government, regulators, and banks in 2003, and totally dispended by the same government, regulators, and banks from 20 February 2004 with the secret CCMC's constitution was introduced. It is unclear whether banks ever intended the CCMC to be independent or the code a contract. If they did, then the unpublished constitution meant the government, regulators and banks acted [redacted] *when inviting customers to sign loan contracts.* [redacted]

This review should allow the Council of Small Businesses, State Fair-Trading bodies, Law Societies, and the State Police to consider their options. If the Martin Committee's principles are retained, then the defects should be referred to a Senate Inquiry or Treasury for an independent review to make good the shortcomings facing customers and introduced by the CCMC's secret constitution in 20 February 2004.

The further review could determine whether the government, regulators, and banks:

1. *misled the public by publishing, adopting, and promoting principles in the 2004 Code that was untruthful and misleading,*
2. *withdrew the CCMC's powers to investigate and report on banks complying with the internal dispute resolution procedures,*

3. *appoint a CCMC with less powers and ensure they investigate 'any' complaint by 'any' person regarding code compliance,*
4. *accept the CCMC's lack of independence and fairness in carrying out code compliance duties if they have misled customers,*
5. *allowed the ABA to act as a 'cartel-like' body to vary code principles and withdraw significant customer protections; and*
6. *breach 'fit and proper' duties prior to and following the Code reviewer being asked on 11 March 2008 to review submissions.*

This report might assist by being a catalyst for governments, regulators, and legislators to revisit the Stephen Martin Committee's principles and consider leading banks motives, including whether they sought to obtain financial advantage or by causing customers' disadvantage by requiring them to use the Courts.

[redacted]

This review demonstrates that 'one way or another', individuals, small businesses and farmers have been misled. There are a considerable number of parties willing to promote themselves as champions of small businesses and farmers yet [redacted] *practices by banks* [redacted] *have been overlooked. This review comments on events since 1991 and aims to encourage feedback by parties that have been associated with the leading banks, legislators, regulators, and customer advocacy groups during this period.*

Fairness of the Overarching Principle

The idea of fairness in banking for consumers struck a chord with the Martin Committee and formed the overarching principles to the recommendations. According to Martin, the introduction of a code of banking practice in Australia was 'a way of remedying many of the unfair practices prevalent in banking

Specifically, transparency would be fostered as a 'code would provide a single source of information for a customer to refer to' and 'more significantly any code will include provisions designed to ensure that customers are adequately informed of the full details of the products they are about to use.

High cost of Litigation / Delaying Tactics - Abuse of Process

There were 'significant power imbalances' between a customer and a bank in these ways:

- *The banks control nearly all relevant information and documentation;*
- *Banks have access to specialist advice and legal assistance and resources to pursue disputes to the end, whereas customers, particularly poorer customers, do not;*
- *Banks have inherent faith in their internal operating systems and bankers may be reluctant to admit failures in those systems;*
- *In many cases the bank's interest in resisting any claim outweighs that of an individual customer in pressing it, in that the bank is protecting its system whereas the customer is seeking redress on a one-off basis;*
- *In terms of will and financial resources, there is often little incentive for banks to settle a dispute, even if the bank would be likely to lose any eventual case because banks know they can outlast most customers; and*
- *In matters which are litigated the bank, as a repeat player, is in a position to select a particular matter to run to a hearing in order to obtain a favourable precedent.*

The Martin Committee expressed concern for individuals and small businesses and gave particular attention to issues related to the 'adequacy of means of redress available to them in cases of dispute with their bank.

The Committee examined the principal remedy of court litigation and its inherent difficulties, such as the cost of litigation, powerful position of the banks in the litigation process, unnecessarily protracted proceedings, inability to continue legal action and failure to ensure adequate discovery or belated discovery.

The Martin Committee expressed the 'need for cheap, speedy, fair and accessible alternatives to the traditional court system if customers are to receive justice in their dealings with the banks.'

The Martin Committee was drawn to the idea of a code of banking practice enforceable as a contract on account of the retention by the courts of their authority to enforce implied contractual terms. The Committee appreciated the importance of fairer terms for consumers out of fear that 'the contractual terms of the banking relationship raised issues of public policy not effectively dealt with by negotiation between substantially unequal parties.' The Martin Committee cited Lord Scarman, who had stated in a related decision of the House of Lords that, 'The business of banking is the business not of the customer, but of the bank.'

The Committee also sought to address the ambiguity and lack of transparency of traditional banking law and the need for an effective mechanism to replace the court's role in ensuring standards of fairness in newer products and areas of uncertainty. In relation to the codification of common law, the Martin Committee appreciated how 'banking law continues to play an effective role in mediating the relationship between banker and customer.'

The ABA considered it may be timely to codify important aspects of banking law and practice. If the law was to be codified in the sense of introducing legislation, the ABA expresses the view that Commonwealth legislation administered by a Commonwealth agency would be most appropriate.

The ABA was among those who favoured the codification of the relevant common law while the Banking Ombudsman, Attorney-General's Department, Chairman of the Trade Practices Commission, National Australia Bank, and Metway Bank were among those who favoured the development of a code of banking practice.

The Attorney-General's Department gave the pre-condition that an effective code of banking practice be 'very vigorously administered.' When the major banks were questioned about the concept of a code of banking practice with industry disclosure principles they were not opposed, but they preferred that it be self-regulatory.

The Martin Report of 1991 was therefore the first serious attempt by a contemporary government to comprehensively review the banking sector and develop standards of practice and customers' protection, fairness and bankers' principles that were also being evaluated by governments and banks in the wider global community.

> *The review also noted the Government's response to the Martin Committee's report, which stated:*
>
> > *"Consumer groups and individual customers frequently complain about shortcomings of banks... [customers] believe they are at a disadvantage because of their relative financial weakness and the size and power of banks. There needs to be an acceptable balance of interests, and an appropriate code would help to achieve this..."*

In the Wallis' report, several serious business conduct issues specifically related to small business finance focused entirely on the conduct of banking and finance institutions. Amongst these serious conduct issues, a lack of disclosure of loan terms and conditions, and banks obstructive behaviour with regard to dispute resolution stood out. For example, complaints received from small businesses in relation to their dealings with powerful firms shared the following common features:

(a) *Inadequate disclosure of relevant and important commercial information which the weaker party should be aware of before entering the transaction; and*

(b) *Inadequate and unclear disclosure of important terms of the contract particularly those which are weighed against the weaker party, especially when the terms which can operate against the interests of the weaker party are not brought to the attention of that party or their full import is not spelt out to that party.*

While such conduct could potentially be illegal under both legislation and common law, as either unconscionable or misleading and deceptive, it was often difficult to enforce these best standards through such legislative provisions. This is partly because the law is restrictive in its interpretation and application of principles.

Banks take advantage of weak party's ability to protect interests

In terms of unconscionable conduct, the mere presence of an inequality is not conclusive of illegal conduct, rather inequality must be such that the weaker party 'suffers from an inability to protect its interests if the stronger party is sufficiently aware of the inability and takes advantage of the weaker party'

While a court must be satisfied merely on the balance of probabilities (rather than the much higher criminal standard of beyond reasonable doubt), it requires proving a hypothetical alternative future: i.e. that damage would not have occurred had the stronger party not acted in the way that they did. On the other hand, deceptive and misleading conduct would require the victim to prove to the court on the balance of probabilities that the offending party intended or was aware of the falsity and/or misleading nature of the representation that they were making to the other party. Both offences are therefore very difficult to prove in terms of evidentiary availability and litigation may prove extremely costly.

Moreover, the individual, rather than the public, meets the costs whilst the entire public will benefit from the enforcement of such fair trading provisions.

Government response

Treasurer Peter Costello, in a statement made on 2 September 1997 observed that 'the Wallis Inquiry found Australia's financial sector performance to be close to the world

average rather than among the world's best.' In response, the government chose to introduce a package of legislation establishing several regulatory bodies in an attempt to enforce new industry codes and monitor compliance with legislative obligations.

In doing this, the key recommendations of the Wallis Committee and the Fair-Trading Report were not reflected in the regulatory scheme that was established. Rather, they set in motion the creation of regulatory authorities with little to no real powers over the conduct of big business in the banking sector. By seeking to keep separate the regulation of consumer protection and that of prudential supervision, the Wallis Report's comprehensive recommendations could not be contemplated. Rather, the ASIC, APRA and the RBA were envisaged together to uphold a scheme of co-regulation of the financial sector, where ASIC and APRA would monitor and enforced compliance with the code as well as various consumer protection and prudential law. Due to fundamental flaws with their establishing Acts, and a lack of resources and political will, they have been left, however, with no real enforcement powers within their own jurisdiction.

APRA ACT 1998 and Amendment Act 2003

(a) General Powers

APRA's responsibilities relate to the prudential supervisions of life insurance businesses. The APRA Act sets out the framework for APRA's operation, as well as establishing its powers and functions. The Act established APRA's three main purposes to be: (i) to regulate bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards; (ii) to administer the financial claims schemes provided for in the Banking Act 1959 (Cth) and the Insurance Act 1973 (Cth), and; (iii) to develop the administrative practices and procedures to be applied in performing the regulatory role and administration.

The government sought to replace the various agencies charged with the prudential supervision of the financial system within a single regulatory authority. Within APRA's jurisdiction would be:

- *Banks and other deposit-taking institutions;*
- *Life and general insurance companies, and;*
- *Superannuation funds and retirement income accounts.*

As such, APRA was intended to be an independent regulator like the Reserve Bank, but subject to a policy determination power of the Treasurer in the event of an irreconcilable disagreement with the Government of the day. It was emphasised in the Parliament that, by having a single regulator 'at arm's length', in the same way as the Reserve Bank operates autonomously of the government's decision-making in relation to its jurisdiction, consumers would be provided with stability and independent supervision. It is clear, however, that the final APRA Act did not protect the level of independence envisaged.

ASIC ACTS 1998 AND 2001

(a) General Powers

ASIC's responsibilities relate to market integrity and consumer protection. It was established upon recommendation of the Wallis Committee under the guiding principles of competition and consistent regulatory treatment within the industry. It has, as its intended function, 'monitoring and promoting market integrity and consumer protection in relation to the Australian financial system' and the Australian payments system, as well as the operation and compliance of industry standards and codes of practice.

In the area of banking and finance, it is therefore intended to supplement APRA's prudential role by considering the impact on consumers when prudential systems in these institutions are absent or neglected. ASIC is empowered with a broad range of investigative powers to undertake as its role essentially 'whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions'

including the power to compulsorily obtain books and records, examine people, and require people to give reasonable assistance to it in connection with an investigation or prosecution.

The ASIC was established by the Australian Securities and Investments Commission Act 1989 (Cth) with its functions and powers articulated in the ASIC Act 2001 (Cth). Many of its functions and powers are referred by the Corporations Act 2001 (Cth) and Corporations Regulations 2001 (Cth).

It seems ASIC has not taken up its role with any apparent zeal. Despite being statutorily bound to enforce codes of practice in the banking and finance sector, it has consistently characterised the operation of the code as non-enforceable. Initially, at a conference in November 2001, ASIC Deputy Chair Ms Jillian Segal discussed how ASIC sees itself as a regulator at a time of industry self-regulation:

Following the Wallis report in 1997, we have seen many changes to the Australian regulatory landscape. These not only include the establishment of ASIC and APRA, but the many changes to the Corporations Law (now known as the Corporations Act). In some cases, particularly in the area of fundraising, the shift has been away from prescription to relying on disclosure. In other areas, such as the Managed Investments regime, an emphasis has been placed on compliance systems. In one sense, these changes represent shifts to greater self-regulation within a framework oversighted by the regulator.

ASIC then announced that it had stopped monitoring industry compliance as a result of the later code of Banking Practice 2003 and its establishment of an independent monitoring committee. In its Regulatory Guide 183, ASIC differentiated between mandatory industry codes and voluntary ones. An internal policy developed that it need not approve voluntary industry codes like the code of Banking Practice.

Amendments to the Trade Practice Act 1974

In August 2000, a Treasury Taskforce on Industry Self-Regulation reported on 'recent developments in Australia ... whereby industry self-regulatory schemes have been

incorporated into regulatory frameworks.' The Taskforce was commissioned by the then Minister for Financial Services and Regulation, Mr Joe Hockey, in order to provide information to government, industry and consumers regarding best practice in industry self-regulation.

The objectives of the taskforce were to reduce the regulatory burden on business, identify best practice and improve market outcomes for consumers. The paper stated that 'the Commonwealth is presently in the process of developing and implementing regulatory regimes in the financial services sector ... [allowing] for development of industry codes and complaint handling schemes' and that the government recognised that there would be situations where 'industry self-regulatory schemes may need to be underpinned in legislation...'

(a) Issue: Bankers Dispute Resolution 101: 'See you in Court – take it or leave it'

One of the major issues raised was the unfair conduct by banks when handling disputes, in which banks exploited their ability to engage the best and most expensive legal advisers to prolong cases as small business is commonly unable to match a major bank's financial resources. According to the Report, the general perception existed that the prevalent attitude of banking and financial institutions towards dispute resolution was: "We'll see you in Court - take it or leave it".

The prevalence of such an attitude caused the Australians for Banking Justice Association to call for the establishment of an independent body to hear, judge and determine claims of commercial customers. Despite these concerns, substantiated by examples of real experiences, the ABA insisted in their submission that existing legislative protections were adequate and opposed reform, including the common law equitable doctrines of economic duress and undue influence, and the TPA 1974 (Cth) provisions relating to unconscionable conduct, and misleading and deceptive conduct.

The relevant Federal Government Minister has the authority under the Trade Practices Act 1974 to consider initiating a proposal for prescription of any industry code of conduct if:

- *The code would remedy an identified market failure or promote a social policy objective;*
- *The code would be the most effective means for remedying that market failure or promoting that policy objective;*
- *The benefits of the code to the community as a whole outweigh any costs;*
- *There are significant and irremediable deficiencies in any existing self-regulatory regime;*
- *A systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes; and*
- *A range of self-regulatory options and light-handed quasi-regulatory options has been examined and demonstrated to be ineffective.*

Firstly, the principal body that is responsible for ensuring the effective operation of the various codes is the ASIC. It can approve codes, sets standards for Internal Dispute Resolution (IDR), sets standards for and approve External Dispute Resolution (EDR) processes and bodies, which must be utilised in the event of an IDR failure, investigate complaints that have not been resolved within the EDR schemes, and, if a breach of these schemes is found, distribute penalties under the Corporations Act.

ASIC Unwilling to use powers

Unfortunately, ASIC's willingness to exercise its powers has at times been questionable, and the lack of transparency in their decision-making means that consumers are provided with minimal guidance on how to utilise such provisions to their benefit. For example, the ASIC Act (Cth) prohibits unconscionable conduct as a measure of consumer protection in relation to financial services. With regard to these provisions, Federal Member for New England Tony Windsor asked the Minister answerable for ASIC:

(1) What action is the Australian Securities and Investments Commission taking to enforce the ASIC Act in respect of the revelations to the Parliamentary Committee on Corporations and Financial Services that a solicitor for the bank made false

representations to a Parliamentary Hearing and a customer about the disputed balance of, and debits to, the customer's bank account?

(2) Will he explain the Government's and ASIC's policy on ASIC intervention in cases such as that described in part (1) and can he say whether ASIC leaves it to customers to take private legal action even when ASIC is aware that a bank has engaged in false and misleading conduct.

(3) Can he explain the obligations that banks have to act in accordance with their industry code and, if a dispute arises, whether banks must offer dispute resolution to their customers under the code of Banking Practice before taking legal action.

(4) Has ASIC received evidence that banks have not been providing dispute resolution to customers before taking legal action against customers despite their obligation under the code of Banking Practice to do so?

(5) Why has ASIC not acted against any bank for failing to adhere to the code of Banking Practice for not providing dispute resolution to customers as banks are obliged to do under the code?

The response was as follows:

ASIC is unable to find any reference in the Hansard of the Parliamentary Committee on Corporations and Financial Services to the purported revelations … a relevant answer is unable to be provided.

The Towards Fair Trading Report stated that 'the Commonwealth, States and Territories have legislative provisions capable of underpinning industry codes of practice'. This essentially assumes that, where self-regulation has failed, there are available to the public effective legal mechanisms that will discourage banking and financial institutions from breaking the law, and thereby provide an incentive for them to pursue a non-litigious resolution with their customers. Given the considerable resources at the disposal of these institutions, this is an unreasonable assumption.

It is not surprising in this context that where a system of co-regulation becomes one of self-regulation through default of government regulators, consumers will be disadvantaged no matter how many additional legislative protections they are afforded.

Toward the end of the review process the consumer organisations and ASIC expressed their preference for an 'independent, well-resourced code-monitoring agency with a capacity to impose a range of effective sanctions for code breaches.' code reviewer Viney similarly wanted 'effective monitoring and sanctions.'

In its Final Response submission, the ABA recommendations led to the establishment of a code Compliance Monitoring Committee (CCMC) as the monitoring body, with only a 'naming sanction for repeat offenders.'

The criteria the ABA wanted for the CCMC were:

1. *A committee, the code Compliance Monitoring Committee, would be set up within the Australian Banking Industry Ombudsman scheme. Agreement of the ABIO to do this would be necessary.*
2. *The function, powers, and composition of the CCMC would be spelt out in the code. These could change if the code were changed.*
3. *The CCMC would operate quite separately from the Ombudsman's dispute resolution function so as not to adversely affect that function.*
4. *The CCMC would be a committee of three:*

- *One person having had relevant experience at a senior level in retail banking, appointed by the code-subscribing banks;*
- *One person having relevant experience and knowledge as the representative of the general body of bank customers, appointed by the ABIO, and;*
- *One person having had experience in industry, commerce, public administration or government service, appointed jointly by the ABIO and the code-subscribing banks.*

5. *The CCMC would employ a small secretariat to service the CCMC.*

6. *All decisions about banks' compliance with the code would be the responsibility of the CCMC.*
7. *To ensure the CCMC operated diligently, within power, efficiently and effectively, the CCMC would be required to commission an independent annual audit of its activities and for that audit report to be lodged with ASIC for publication. Agreement of ASIC to perform this role would be required.*
8. *Banks would continue to prepare their own annual compliance reports and to lodge them with the CCMC.*
9. *The CCMC's functions and powers would be to:*

- *monitor code compliance by comparing banks' annual reporting of compliance with the CCMC's own experience gained through 'shadow shopping' and the incidence of complaints from customers about banks' non-compliance;*
- *receive complaints about breaches of the code and refer them to the banks concerned for response and remedial action where necessary;*
- *report annually on the level of compliance; and*
- *report in its annual report un-remedied, serious, and systemic breaches by a bank with discretionary power to name the non-complying bank.*

In his Final Report, reviewer Viney ended up with a general recommendation for a 'monitoring mechanism and sanctions having the criteria detailed in the proposal set out in the ABA's Final Response.'

After undertaking the review, the principles that underpinned the view that self-regulation works best were identified:

1. *There must be consultation between industry, consumers, and government,*
2. *There is broader coverage within an industry,*
3. *There is effective procedure for resolving disputes with proper sanctions for, businesses that breached the scheme, and*
4. *The scheme needs to be regularly reviewed by an independent body.*

When the revised Code was published and adopted, ABA noted that John McFarlane (Chief Executive, ANZ Bank) had replaced David Murray as its Chair on 17 June 2003 and that Gail Kelly (Chief Executive, St George Bank) was Deputy Chair. During this period David Bell was a non-banks member of the ABA and its Chief Executive Officer.

The 2003 Code provided for the Committee's function to monitor subscribing banks' compliance with the practices set out in the Code and investigated breaches. The Code stated the CCMC Committee would ***'monitor subscribing banks' compliance' and 'investigate and to decide on any*** *(emphasis added) allegation from any person that a Code subscribing bank breached the Code...' This was however not possible due to the use of wriggle-words which limited the subscribing banks' duties and the Committee's powers.*

[redacted] *It was clear, a few months later that the Banker's Code Compliance Monitoring Committee's Association (the CCMC Association), a new body of the Code subscribing bankers, was intending to further vary the high-principles and practices in the Code.*

Revised Code declarations

It was clear that [redacted] *wanted it to be widely known by the public that after the revised Code was published on 1 August 2003, the high standards in the Code meant that:*

A bank must be sure it is ready to comply with its obligations under the revised Code before it adopts it because the Code is an enforceable contract (emphasis added) between the bank and the customer."

The Code is a voluntary Code in the sense that a bank has a choice whether to adopt it. Once a bank has adopted the Code, it binds the bank contractually to the customer. So, if a bank breaches the Code, it has breached its contract to the customer (emphasis added).

The revised Code builds significantly on the earlier edition (1993) and among the new provisions: small business is included for the first time.

This Code meets and beats similar Codes in other countries such as the UK, Canada, New Zealand, and Hong Kong. The ABA's Code... stands out both in scope and the specific customer benefits it provides."

Banks will submit to independent monitoring (emphasis added) of compliance and if a bank has systemically or seriously breached the Code it is liable to be publicly named."

Each bank will lodge an annual report with the Committee on its compliance with the Code (emphasis added) in much the same way as banks have done under the original 1993 Code in reporting annually on compliance to ASIC.

David Bell, Chief Executive of the ABA and Jillian Segal, Chair of the BFSO in a joint decision of the two organisations announced the appointment of Mr Tony Blunn, AO, as Chairman of the independent Code Compliance Monitoring Committee for monitoring banks' compliance with the Code.

The CCMC Committee will have a very important role, especially when it comes to taking action against a bank... the Code is contractually binding, so a regulator might even consider action of its own (emphasis added).

The Committee will be able to receive complaints from anyone who thinks that a bank has breached the Code. It has the power to investigate that complaint and decide whether a breach has occurred.

Mr Blunn emphasised the independence of the committee which he believed had an important role in the broader structure of the governance arrangements of the banking sector (emphasis added).

The messages being published [redacted] *intended the legislators and public to believe that the Code is an enforceable contract; the banks would submit to being independently monitored. The CCMC Committee, being independent, might take an action against rogue banks or bankers and that each bank will lodge an annual Code compliance report with the Committee. All worthy principles - assuming the Committee was in fact independent, and the Code was an enforceable contract - which later appears not to be the case.*

Modified 2004 Code:

On 14 May 2004, [redacted], amended the revised 2003 Code and published their modified 2004 Code. At that time, [redacted] congratulated themselves on having a world-class, voluntary, self-regulated Code of banking practice. According to the ABA, the Code sets high standards of conduct for subscribing banks in their dealings with their individual and small business customers. The ABA emphasised that the role of the CCMC was provided for in the Code:

The Code makes provisions for an ***independent Code Compliance Monitoring Committee*** *(emphasis added) to investigate and monitor complaints about Code breaches. All the ABA members who subscribe to the Code have agreed that the Committee may be empowered to conduct its own enquiries into a bank's compliance with the Code. Any person may make a complaint to the Committee about a breach of the Code.*

The banks that adopted the modified 2004 Code had already agreed to be monitored by the independent CCMC Committee. Their customers were assured [redacted] that 'the Committee has been set up as an independent body with consumer, small business, and banking industry representatives.

The [redacted] guaranteed the public that the modified 2004 Code grants and confirms existing rights to customers including: disclosure of fees and charges as well as changes to terms, fees, and charges; privacy and confidentiality; and ***complaints handling*** *(emphasis added), among others.*

In fact, the bank parties were at pains to promote a new modified contract bound by ethics, good faith, high-principles, and honesty but with no mention of the wriggle-words the bankers apparently could rely on the skirt their IDR duties and limit the powers of their independent Committee to name them. Becoming increasingly confident, they also failed to mention their CCMC Association's unpublished 20 February 2004 CCMC Constitution.

The ABA emphasised the fact that one of the most important commitments that banks undertook in adopting the modified Code is to ***act fairly and reasonably towards customers in a consistent and ethical manner*** *(emphasis added).* [redacted]

[redacted]

Shortly after the modified 2004 Code was published, the ABA was incorporated. [redacted] *The ABA reported that: 'banks in Australia value the communities within which they operate and are committed to giving something back to those communities.'*

According to the ABA, this is evidenced by the fact that many banks acknowledge their corporate responsibility and have adopted programs and practices that demonstrate their commitment to social and environmental performance, as well as [their] financial performance.'

The ABA added that their support of policies being brought forward by the Financial Services Reform Act shows the subscribing banks' commitment to ***promoting consumer protection*** *[emphasis added] by implementing a harmonised and wide-ranging licensing,*

disclosure and conduct regulatory framework for financial products, markets, and financial services providers.

Modified Code Declarations

When [redacted] *published the modified 2004 Code and 12 subscribing banks adopted it, customers were told by the banker's that the Code was a contract.* [redacted]

Was it really a contract?

[redacted] *laws that were intended to prevent banks or the Bankers, acting contrary or dishonestly, to be investigated and named by the Committee. Therefore, changed terms of the contract had the effect of changing the high principles in the Code when the public were opening new bank accounts or signing Facility Offers after the 20 February 2004 constitution was introduced.*

This was dealt with in this report's introduction however many customers would have relied on the high principles published in the Code (now severely compromised) and the reported independent powers of the Committee to any (emphasis added) complaint by any person.

[redacted] *Following the introduction of the 20 February constitution, and the modified 2004 Code being published, the ABA and bank* [redacted] *declared:*

a) The Code is a contract:

The 2004 Code is contractually binding on subscribing banks." When your bank adopts the Code, it becomes a binding agreement between you and your bank... [and] will come into

effect when your bank adopts it. [It] establishes the banking industry's key commitments and obligations to its individual and small business customers on standards of practice.

On adopting the 2004 Code, your bank will continuously work towards improving its standards of practice and service... provide general information about rights and obligations under the banker/ customer relationship; provide information in plain language; act fairly and reasonably towards you in a consistent and ethical manner - your conduct, the bank's conduct and the banking services contract will be considered.

b) The 2004 Code protects guarantors:

In May 2004, some changes were made to the Code's guarantee provisions and the Code was re-published incorporating these and some related changes. [When] your bank announces that it has adopted the 2004 Code... if you think your bank has breached the Code... a first step is to raise the issue with your bank.

The 2004 Code also provides for ***high standards of disclosure for prospective guarantors before they agree to guarantee someone else's debt to the bank*** *(emphasis added) ... banks will provide important and relevant information for prospective guarantors before they commit to guaranteeing someone else's debt. The modifications will fine tune the 2004 Code to ensure that prospective guarantors receive appropriate and relevant disclosure.*

Before taking a guarantee from you, your bank must provide a prominent notice to you to seek independent legal and financial advice on the effect of the guarantee (emphasis added). This legal advice, however, would be provided without customers' lawyers being provided access to the bankers' unpublished 20 February 2004 CCMC Constitution.

c) The CCMC Committee will investigate any Code breach:

Your bank has an internal complaint handling service to assist you... [The CCMC Committee] has been set up to investigate possible breaches of the Code. Anyone can refer a possible breach of the Code to this committee. It investigates complaints that ***subscribing banks are not meeting their obligations under the Code*** *(emphasis added).*

The final decision on a breach of the 2004 Code is made by the committee in a written determination to the complainant and the bank.

The ABA established the … CCMC Committee who will monitor compliance and have the power to publicly name a bank which has been found ***guilty of a serious or systemic breach of the Code*** *(emphasis added). The Code gives customers rights that the bank must observe.*

These rights cover … complaints handling [and]… makes provision for an independent Committee to investigate and monitor complaints about Code breaches… any person may make a complaint to the [committee] about a breach of the Code.

Each subscribing bank will lodge an Annual Report with the CCMC Committee on its compliance with the Code.

d) Bankers' practice corporate responsibility:

Banks are going on record with major public commitments to ***improve reporting and consultation about their social obligations*** *(emphasis added) … banks are producing Social Accountability Charters, not as a peripheral event but as a core practice. These set out what stakeholders can expect across marketplace practices, employee practices, occupational health and safety, environmental practices and so on…*

Overall, the banking industry is doing a lot for empowering people with the appropriate financial skills, knowledge and information that will ensure they are better placed to make informed decisions about their money and avoid being misled on financial matters.

At the heart of a customer's relationship with a bank is trust. It is difficult to gain and maintain trust if people are confused… [about] the terms on which the relationship is based. Empowering people with the appropriate financial skills, knowledge and information will ensure they are better placed to make informed decisions about their money. It is important so that customers are not misled on financial matters…the Code commits banks to ensure their staff are trained to competently and efficiently discharge their authorised functions to help the customer choose banking products and services.

The banking industry in Australia is widely recognised for its leadership in the area of corporate responsibility. The ABA said accomplishing goals related to corporate responsibility is best achieved through voluntary adoption of business practices that reflect flexible and strategic decision-making by the Board of Directors.

e) The desire for fair dealing requires transparency:

Transparency, the desire for fair dealing, responsible treatment of stakeholders, and positive links into the community get reflected in banks' everyday activities and corporate responsibility practices. ***Your bank will give terms and conditions to you either before or as soon as practicable after, you take up an ongoing banking service*** *(emphasis added).*

The revised 2003 Code is a world-class self-regulatory Code. It sets very high standards of conduct for banks in their dealings with... customers. The modifications will fine tune the 2004 Code to ensure that prospective guarantors receive appropriate and relevant disclosure... the Code is designed to foster good relationships between banks and their customers including guarantors and this is based on good standards of conduct.

The ABA says Federal Government's proposed refinements to the financial services reform provisions of the Corporations Act 2001... will provide better outcomes for customers. The proposals will mean that disclosure of information for consumers will be better aligned to consumer needs.

Following the publication of the modified 2004 Code, subscribing bank [redacted] *decided to not publish their CCMC Association's constitution* [redacted]

[redacted]

The bank parties, [redacted], having affirmed their commitment to the Code and its guiding principles, proceeded to expand the network to a second generation of bank employees to promote the high standards in the modified 2004 Code. The bank [redacted] also made a commitment to ensure that their staff were trained so that they could 'competently and efficiently discharge their functions under the Code, first having 'adequate knowledge of the provision of the Code'.

The high principles and values in the 2004 Code were set out in 80 clauses and 250 sub-clauses, covering 6 sections: "Introduction; Key Principles and Obligations; Disclosures: The Principles of Conduct: Dispute Resolution and Monitoring and Applications and Definitions.".

The banks' statements promoting their high-principles and wide-ranging standards in the 2004 Code was published by the ABA. [redacted]

The bank states that its standards are regularly communicated to staff reinforcing the need for the highest standards of honesty and loyalty, and its governance principles.

The bank is strongly committed to maintaining an ethical workplace, complying with all legal and ethical responsibilities and reporting instances of fraud, corrupt conduct and mal-administration or substantial waste.

Shortly after the 2003 Code was published, the bank's established and appointed the CCMC Committee on 1 April 2004 and from the commencement of the restructuring

period, it was evident that self-regulation relied on independent monitoring for enforcement.

The CCMC was designed and reported to be an independent monitoring body and its enforcement mechanisms were widely promoted to create a community perception that the banks would honour their commitments in the code. After the CCMC was established, ASIC limited its role enforcing self-regulated voluntary industry codes.

Whilst the government was motivated to modify its policies and the oversight role of its regulator, ASIC, there was widespread belief that the CCMC was capable of handling its role independently of banks and without the need for government interference. This had the effect of distancing ASIC from safeguards provided by the code and left the CCMC to act as sole guardian for consumer protection.

The evolution of the modern codes that were introduced in 2003 and 2004 following the Viney report, made it clear to all the stakeholders that the success of the CCMC and its Committee rested on its institutional integrity, honesty and independence, and the willingness of the subscribing banks to cooperate and comply with their duties in the code.

FEMAG consisted of highly competent and esteemed academics with expertise in public policy and administration who sought to contribute to community welfare, 'especially the least advantaged, by assisting in optimal application of the market mechanism and good governance'. Its members have proficiency and global experience in the design and implementation of consumer protection, competition policy, regulation, and accountability of sustainable systems.

The FEMAG review in 2005 was undertaken by:

- ***Robin Brown BA, M Public Policy (ANU)** - Director, Secretary-General and Consultant in Consumer Affairs, Council Member, Australian Consumers' Association, Member, International Network of Civil Society Organisations on Competition, and code Authority of the Australian Direct Marketing Association; formerly Chair and CEO of the Australian Federation of Consumer Organisations, Member, Australian Life Insurance Industry Complaints Tribunal*

- ***Bill Dee BA (ANU) LLB (Adelaide University)*** *– President, Society of Consumer Affairs Professionals in Business (Australia), Member, Standards Australia International Committee on business governance standards and convenor of its working group on fraud and corruption control, internal whistleblowing systems, organisational codes of conduct and Corporate Social Responsibility; formerly Executive, ACCC and responsible for development of legal compliance programs, codes of conduct and self-regulation.*
- ***Howard Hollow - Executive Director; formerly Senior Officer, ACCC****, Project Manager, Consumer Assistance Facilitation Project Philippines*
- ***John Wood - Council Member, Australian Consumers' Association, Chair****, Consumer Advisory Panel, ASIC; formerly Deputy National Ombudsman in Australia, Director, Australian Federal Bureau of Consumer Affairs, President, Society of Consumer Affairs Professionals in Business, Editorial Board of the International Journal of Consumer Policy.*

The Committee evidently commissioned the most highly qualified organisation to carry out the CCMC's first review at the end of its first year of operation. The information that FEMAG had to rely on however was limited and many of its recommendations may have been based on the aspirations of the Committee rather than historical evidence of its effective performance.

The CCMC 2004-2005 Annual Report sets out the results achieved from its inception on 1 April 2004 until 31 March 2005, at the end of its first year of operation. It is headed 'The code of Banking Practice' and the cover notes that it 'sets standards of good banking practice and requires banks to continuously work towards improving the standards of practice and service in the banking industry'. The report is also aspirational and states the Committee's role is to:

- *Monitor subscribing banks' compliance with the code; and*
- *Investigate complaints that the code has been breached; and fulfils its role by:*
- *Accepting, investigating and making determinations on any allegation by any person (emphasis added) that the code has been breached;*

- *Requiring banks to complete a comprehensive statement addressing all aspects of compliance annually;*
- *Undertaking compliance monitoring exercises including compliance visits;*
- *Liaising with other schemes that have regard to the code such as BFSO;*
- *Engaging in dialogue with banks on their obligations under the code;*
- *Encouraging stakeholders such as consumer advocates to keep the Committee informed on systemic code issues, and working with banks and others to understand the code and address misunderstanding and uncertainty;*
- *Require banks work continuously towards improving their standards of practice;*
- *Promote better informed decision about their banking services;*
- *Promote information about rights and obligations that arise out of the banker/ customer relationship and contract;*
- *Require banks to act fairly and reasonably in a consistent and ethical manner as set out in clause 2.2 of the code.*

CCMC's 2004 complaints handling flowchart

The complaints handling flowchart introduced by the CCMC sets out twelve steps which were:

1. *A complaint sent to the CCMC is received and assessed by the Executive Officer;*
2. *If the CCMC Committee cannot look at the matter raised, for example where it predates the code, the customer is advised, and the case is closed;*
3. *If the Committee can look at the matter, the complaint is referred to the bank;*
4. *The bank is asked to respond to the complaint;*
5. *The complaint and the bank's response are reviewed by the Executive Officer;*
6. *The complaint is referred to the members of the Committee for review;*
7. *The Committee meets to consider the complaint;*

8. *Notice of Proposed Determination is issued to the complainant and the bank;*
9. *Any submissions in response to the notice are reviewed by the Committee;*
10. *Determination is issued to the complainant and the bank;*
11. *The Committee liaises with the bank in respect of any remedial action required;*
12. *The case is closed.*

In carrying out its review of the CCMC's activities during its first year, FEMAG would have considered how effectively the above steps were implemented by its Committee and Executive Officer. The 2004-05 Annual Report notes that the Committee investigated and decided 'in one case' (emphasis added) only whilst the other 18 complaints remained open or were considered inappropriate due to:

- *5 complaints predated the banks' adoption of the code (no reference was made as to whether this refers to the 1996, 2003 or the 2004 code).*
- *2 complaints were simple queries that did not require determination.*
- *1 complaint had insufficient information to make a determination.*
- *1 complaint was about a financial service provider, not a bank.*
- *At the end of the year, 9 complaints remained open.*

As there was only one complaint investigated in accordance with the CCMC's flowchart, and because the Committee determined that no breach occurred, the further aspirations of the CCMC and the FEMAG Report had to rely on remedies and sanctions which had not been tested. The 2004-05 Annual Report notes that 'where there is a breach of the code, the Committee can (emphasis added) require a bank to take remedial action or give an undertaking as to future conduct. A bank can (emphasis added) be publicly named if it fails to take the action prescribed by the Committee, or where the breach is of a serious or systemic nature.' As such, these principles were not applied during 2004-05.

In reporting its views with respect to how effective the CCMC practices were being implemented, FEMAG would rightly consider the force of the Committee's aspirations and

its stated independence to ensure the future application of the high principles were paramount. Having regard to the CCMC's resources, operating procedures, interpretation of its role under the code and its relationship with other industry bodies, FEMAG tackled issues relevant to the institutional integrity and effectiveness of the newly formed consumer protection systems.

While the review mentioned issues related to the Association's constitution (that it was unable to explore), it concluded that the CCMC was performing largely (emphasis added) in accordance with its aspirations. FEMAG stated, however, the potential existed for significant failures to arise due to flaws in the code and the restrictive and opaque nature of the Association's constitution.

The CCMC Association's Constitution

In hindsight, it seems difficult to appreciate how the aspirations of the Committee might be compromised by the constitution in the early days of the CCMC. FEMAG were mindful of the contradictions between the principles of the code and the Association's constitution however it seems neither the Committee nor FEMAG anticipated problems that undermined the high principles set out by the Martin Committee in 1991. These were discussed earlier in this report and stem from the notion that individuals and small businesses require an alternate forum for resolving complaints and disputes with banks other than having to use the courts.

As discussed earlier, this was summed up by Sir Ninian Stephen: '[t]he Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court.' This underpinned the principles embodied in the 2004 code that were affirmed by FEMAG.

Its report identified that 'for a reporting system to work effectively [it needs]... strong, sustained leadership supporting a culture of open disclosure, transparency and effective response to performance problems.

CCMC's objective – 'to achieve highest compliance by banks'

***Though not stated in the code, FEMAG suggested the CCMC's objective is to achieve the highest possible compliance with the code by signatory banks**. To achieve this end, the code gives the CCMC two broad functions (reiterated in the Association constitution):*

a. *general monitoring which involves planning and administering programs for the monitoring of banks' compliance with the code; and*
b. *investigating and determining code breach allegations and publicly naming banks for serious or systemic non-compliance with the CCMC's requests.*

7. *The Committee's need for independence, transparency, and fairness*

FEMAG supported the Martin Committee's underlying principles in the first code which were set out by the ABA and supported by stakeholders. With respect to independence, FEMAG noted in 2004-05 that:

Although it does not use the word 'independent', arguably the code implies that the CCMC is to be able to operate as an independent agency without influence from the banks and other parties and this seems a necessary threshold condition for pursuit of the above objective.

The FEMAG Report was the first to make public the issue of the Association's unpublished constitution. During 2004-05, the principles of the code and protection that it provided individuals and small businesses were such that conflict of interest and abuse of the system were not foreseen. The report however provided a small window into how the banks parties later used the constitution to restrict the independence of the Committee and the operation of the CCMC.

The muddled organisational structure that was in place following the establishment of the CCMC which was bound by an unpublished constitution required the code subscribing banks, with the support of the BFSO, to appoint the first Committee. This paradox could undermine the principle of independence as the bank parties and the BFSO were privy to the Association's constitution however it seems possible, if not probable, that the Committee and FEMAG failed to fully consider the potential limitations that the constitution might impose on the CCMC.

For the principles set out in the code to be effective, FEMAG emphasised the need for effective self-reporting by subscribing banks.

Self-reporting of [code] breaches as they occur would be a useful extension of this. This would be similar to self-reporting by financial institutions under the FSR legislation... [and] immediate self-reporting against the code would certainly be a powerful demonstration of commitment to the code by signatory banks. ... [and] stakeholders suggested that currently there is a culture of defensiveness when potential code breaches are brought to the attention of some signatory banks (We don't agree with you. We don't think that there is breach'). Clearly community perception of commitment to self-regulation is enhanced if the banks, in their relationship with the CCMC, are not adversarial or defensive, but rather co-operative and transparent; where disclosure about breaches and their rectification is the norm.

CCMC and its relationship with stakeholders

FEMAG invitations for submissions and/or interviews were sent to the following:

1. *Tony Blunn AO, Code Compliance Monitoring Committee Chair*
2. *Russell Rechner, code Compliance Monitoring Committee Member.*
3. *David Tennant, code Compliance Monitoring Committee Member*
4. *Barbara Schade, Executive Officer, Code Compliance Monitoring Committee*
5. *Ian Gilbert, ABA*
6. *Colin Neave, Ombudsman, and senior staff of the BFSO*
7. *Peter Kell, CEO, Australian Consumers' Association*
8. *Jan Pentland, President Australian Financial Counselling and Credit Reform Association (AFCCRA)*
9. *Roger Knight, Former Head of Compliance, British Banking Standards Board*
10. *Carolyn Bond, Consumer Credit Legal Service*
11. *Marylyn Webster, Good Shepherd*
12. *Karen Cox and Katherine Lane, Consumer Credit Legal Centre*
13. *Australia and New Zealand Banking Group Limited (ANZ)*

14. *Westpac Bank*
15. *St George Bank*
16. *National Australia Bank (NAB)*

Other invitations were provided to:

1. *Australian Chamber of Commerce and Industry*
2. *ASIC*
3. *Brotherhood of St Laurence*
4. *Commonwealth Treasury*
5. *Consumer Credit Legal Service Victoria*
6. *Consumers Federation of Australia*
7. *COSBOA*
8. *Victorian Financial Counsellors Association*

Written submissions were also received from the following stakeholders:

1. *Australia and New Zealand Banking Group Limited*
2. *Australian Bankers' Association*
3. *Commonwealth Bank of Australia*
4. *Banking and Financial Services Ombudsman*
5. *Consumer Credit Legal Centre NSW*
6. *Government fair trading agencies in: NSW; WA; SA and Victoria*

Whilst most of the first and third groups above had some knowledge of the Association's constitution, there is no evidence that prior to the publication of the FEMAG report, the second group did. From meetings with these stakeholders and from its own research, FEMAG produced its October 2005 report.

FEMAG also formed a view that the CCMC should be more proactive rather than reactive in making itself available and accessible to its stakeholders. To emphasise this point, its report stated that 'only a few stakeholders have had any interaction with the CCMC, and this interaction has been quite limited.' The report provided recommendations for improved practice:

- *For CCMC to circulate quarterly email updates to its stakeholders and conduct forums with them regularly,*
- *For CCMC to expand its stakeholder base to include COSBOA, the Small Business Coalition and State / Territory small business commissioners,*
- *For CCMC to inform ASIC, ACCC and other State and Territory fair trading / consumer protection agencies on compliance issues on an as needed basis and in conjunction with email updates.*

These recommendations are supported by the few complaints by banks customers that were referred to the CCMC in 2004-05. This demonstrates that, at this early stage, there was a need for the Committee to improve its accessibility and transparency to its publics and stakeholders. FEMAG stated that 'the public profile of the CCMC thus far is quite low and a banking representative made the comment... that the lack of a public profile by the CCMC limits its effectiveness.'

4. Effectiveness of the Committee's compliance monitoring

The Committee is required to publish an annual survey, which it commenced publishing in June 2004. This survey is a two-part process largely based on the UK Banking code Standards Board's standards. The review commented that the CCMC's survey could be improved by including more meaningful information such as how many complaints were referred to the BFSO, how many involved possible code breaches and how many actual breaches were found. When assessing the effectiveness of the CCMC's compliance with monitoring activities and techniques, FEMAG stated there is a need for:

Benchmarks key performance indicators (KPIs) against which these matters should be measured. [These] KPIs need to be developed from objectives. In paragraph 8 [of its report it] makes suggestions on objectives the Committee might consider adopting.

Monitoring by the CCMC to date has been done by two means: an annual compliance statement that has to be completed by the banks and the handling of complaints lodged with the Committee.

In its report, FEMAG recommended the following KPIs, to:

- *provide independent and objective verification of compliance with the code*
- *ensure banks implement controls for code compliance; and for the KPIs to*
- *provide the public with a degree of confidence that the self-regulatory scheme is working.*

These recommendations should have been implemented when the Committee was appointed. Any framework which relies on self-regulation can potentially lack direction and enforceability without clear objectives being established. Regular reporting of the CCMC's performance against its KPIs to its publics and stakeholders and to regulatory bodies such as ASIC, ACCC and Fair-Trade agencies is needed to ensure that self-regulation is working and is independent, transparent and fair, not controlled or constrained by a few vested interests.

KEY ISSUES SIDE-LINED

Banking plays an important part in the economic well-being of all Australians and whilst it is subject to a number of legislative requirements, the code presented an opportunity for the banking industry to demonstrate its commitment to a self-regulatory approach in its relationship with its customers.

In addition to the above issues raised, the FEMAG Report identified key issues that were beyond the scope of its review. This is unfortunate, given that the issues raised were relevant to the task at hand.

It is possible that FEMAG either did not have the financial resources to pursue its inquiry to significant depths or that it was constrained in terms of access to materials that might have assisted its review.

1. Restrictions on Investigative Powers

FEMAG states there is an overlap in the roles of the CCMC and the BFSO and therefore continuing co-operation is necessary. FEMAG noted that the lack of public profile limits the CCMC's effectiveness however it 'should not seek to achieve a similar profile from the

public at large to that achieved by the BFSO.' In commenting on the difference in profile, FEMAG commented that:

as far as the CCMC is concerned, provided that when a person obtains information about the BFSO from its website or otherwise, they can readily access effective information that allows them to decide whether they should raise a matter with the CCMC. It may, in fact, be appropriate for the BFSO to encourage a consumer who makes a complaint to consider whether their complaint might involve a breach of the code and if so to make a simultaneous complaint to the CCMC to ensure that a possible breach of the code does come to the attention of the CCMC. It is not possible under the current arrangements for the BFSO to refer the matter to the CCMC because of the privacy rights of a BFSO complainant without obtaining consent from the complainant.

According to FEMAG, the CCMC's investigative powers are set out in the code. In its report however, it was not suggested that these investigative powers were inadequate due to restrictions imposed by the Association's constitution. It seems that the review avoided drawing adverse conclusions by distinguishing between evidence of factual non-implementation of the high principles of the code, and evidence of structural flaws that may give rise to future failures.

The review did acknowledge, however, that there are instances when the CCMC may be constrained from performing its duties due to provisions in the Association's constitution. As discussed earlier, clause 34 of the code makes it clear that the stakeholders have a right to believe that the Committee has the power to investigate all complaints other than those that are resolved by the subscribing banks to the satisfaction of customers.

This statement appears to give wide berth to categories of complaints the CCMC can investigate. Yet, according to the review, paragraph 8.1(b) of the constitution restricts the Committee from investigating complaints where it is or may be determined in another forum. FEMAG reports that in the constitution, term 'forum' has been defined widely as 'any court, tribunal, arbitrator, mediator, independent conciliation body, complaint/ dispute resolution body, complaint/ dispute resolution scheme … or Ombudsman, in any

jurisdiction'. This paragraph provides banks an opt-out provision detracting from high principles banks introduced in response to the Martin Committee recommendations that were incorporated in the first code, published by the banks in 1996.

While the report noted that this opt-out provision competes with paragraph 34(i) of the code, it raises potential limitations 'for action by the CCMC where there may be serious or systemic non-compliance and it may the case that in some instances the CCMC is better able to take action to deal with systemic matters than either the BFSO or ASIC.'

Prior to the Martin Report and the publication of the first code by the banking industry, banks could rely on their significant resources to use and potentially abuse the courts to dispose of complaints and cover up serious misconduct that affected individuals and small businesses. This was investigated in-depth by Martin because his committee believed that the use, or threats, by rogue banks and senior bankers with access to vast resources meant that they could potentially misuse the courts when dealing with complaints by individuals and small businesses that could not defend themselves or seek redress should banks seek to cover up serious and systematic breaches.

By adopting the 11 May 2004 code and remaining silent on the Association's 20 February 2004 constitution, it would appear banks successfully effected a coup d'etat on the already feeble self-regulatory system. Because the opt-out provision excludes the investigatory powers of the Committee where an alternate forum has jurisdiction, the paragraph 8.1(b) of the constitution allows banks and senior bankers to transfer any serious complaints or disputes that they do not want the Committee to investigate to the courts or any other alternative forum where they enjoy an unmatched advantage.

2. Restrictions on Resources

Whilst the above matters confounded the Committee three years later, when they reported their views to McClelland, during 2004-05 FEMAG stated that the CCMC required 'additional resources if it's full potential [was] to be realised.' FEMAG was concerned that the Committee might not have sufficient resources to successfully discharge all of its functions set out in the code. It states that the CCMC:

was obliged to deal with a number of allegations of breaches of the code very early in its life… and these… required the commitment of a substantial proportion of the CCMC's limited resources… in order to inform itself of issues in code compliance and to allow it to develop procedures for this side of its work from real experience. In the code itself, the function of monitoring of compliance is paragraph 34 (b)(i) for the investigation and determination of code breach allegations in paragraph 34(b)(ii).

The FEMAG Report reinforces the notion that the Committee is reliant on funding that is obtained from banks to carry out is two main function of monitoring bank compliance and investigating and making determinations on customer complaints. In setting out its report, it noted that:

case management was very good, but the lack of resources available to the CCMC in this area was a matter of concern and that additional resources were needed to ensure a continuing capacity to manage cases and obtain the greatest benefit from results in terms of code compliance in general. [And that the Committee requires additional funding to meet] banks separately [and to fund its] activities aimed at increasing the effectiveness of the Committee and, through this, its credibility [which] requires increased resources and … commitment from the signatory banks.

We consider that the CCMC Committee needs personnel to undertake… strategic thinking, business planning and drafting budgets, liaison with banks and other stakeholders at a senior level, writing bulletins and high-level policy papers and drafting determinations; managing general monitoring activities; managing cases of code breach allegations; special inquiries and office administration.

3. Regulators – ASIC, ACCC and state and territory fair trading agencies

FEMAG states that:

ASIC is naturally aware of the operations of the Committee, but submissions from State and Territory fair-trading/consumer protection agencies tell us that they are lacking in information about the Committee and its role and activities. This is of some concern since

they are responsible for administration of credit regulation. [FEMAG comments] that ASIC, ACCC, State and Territory fair-trading/consumer protection agencies be informed of code compliance issues [and should] … receive email bulletins and dedicated quarterly reports even if these are to advise that there are no significant compliance issues current and that they be invited to the recommended forums.

FEMAG notes that clause 13.3 of the Association's constitution empowers the chairs of the Association and the BFSO to jointly determine the budget of the CCMC. This could be seen as potentially allowing the subscribing banks to limit the resources and thus the effectiveness of the CCMC although the code does oblige the banks 'to ensure that the CCMC has sufficient resources to carry out its functions satisfactorily and efficiently'. To improve the resource control situation and give greater confidence that adequate resources were being provided, a more defined and accountable planning and budget process could be valuable.

Regardless of whether the vulnerability of the Committee has been exploited, this admission indicates the dynamics that may come into play which are largely invisible.

4. Restrictions on Public Sanctioning

In the FEMAG Report, Appendix 2, in the section headed 'Matters Beyond the Scope of This Review' it notes that:

the constitution constrains the CCMC and each member from making public statements on behalf of the CCMC other than in the Annual Report without the prior approval of both BFSO and Association chairs. This could… preclude members of the CCMC speaking publicly at conferences or industry forums where they are seeking to raise the profile of the Committee and improve relationships with the banks or other stakeholders.

Besides qualifying [constraining] the CCMC's independence, it implies a lack of trust in the Committee. There may well be matters the CCMC should make public from time to time other than in its Annual Report and the code does not prevent it from doing so.

It is of paramount public interest that the public perceives the CCMC as both a responsible and accountable independent body regulating the banking industry.

Requiring the Committee to obtain approval of the bank parties which appointed them, the BFSO and Association Chairs, before it can issue any public statements must be seen by stakeholders to severely undermine the perception of impendence.

At issue is also the timeliness with which information is made publicly available. By requiring prior approval, the bank parties can silence their critics and according to the review 'it could be some 12 months before a bank found to be in systemic breach could be named'.

The conduct of banks, being fiduciary institutions, is often measured against the highest standards of care. It is contrary to public interest that a bank in breach of its own code be afforded protection from the scrutiny of the public eye.

5. Indemnity and exerting influence over Committee members

FEMAG responds to the need for 'full indemnity' (emphasis added) to be provided by the Association's members to the Committee however it may be reciting comments made to it by the bank parties. The Association's members will have considered the most appropriate structure when they received the Viney Report in 2001 and preferred unincorporated associations to manage the Association's and the CCMC's affairs.

FEMAG comments on the effect of this decision without commenting on the banks' motives and states:

> *paragraph 14.1 and 14.2 of the constitution provides for a 'full indemnity by the Association, or its members, of CCMC members against liabilities arising out of their actions as CCMC members (emphasis added).' However, the Association being unincorporated, the status of Committee members being unclear and doubts about access to liability insurance cover suggest that Committee members might not be adequately protected in all circumstances.*

FEMAG concluded stating that 'consideration be given to establishing the CCMC as a legal entity in its own right.' This suggestion diverts attention from the core issues of responsibility and accountability. If the Committee is carrying out a public function, there

should be a high level of accountability that arises from its members should their actions or conduct cause damage.

To indemnify the CCMC Committee against such responsibilities appears to weaken the obligation they have to the public to monitor the high standards set out in the code and to conduct themselves with integrity regarding their duties.

It needs to be asked what the bank parties' motives were when the Association drafted its constitution on 20 February 2004 which limited the independence and powers of the Committee. Instead, the bank parties introduced the opt-out provision which potentially safeguarded the banks' managers and officers if they acted dishonestly or contravened the code. It is unlikely that either the individual and small businesses or FEMAG would have suspected that the banks' failure to incorporate the CCMC as a limited liability company meant that they could justify indemnifying the Committee for damages which might flow from the CCMC's failure to comply with clause 34 of the code.

Certainly, had that been the case, FEMAG would have raised this in their 21 recommendations provided to the CCMC in their October 2005 report.

6. Merging of the bank parties; CCMC and BFSO

The FEMAG report analysed the advantages and disadvantages of forming a single dispute resolution and code compliance body through the amalgamation of the CCMC with the BFSO. It preferred amalgamation, as it concluded that this would establish a stronger link and foster cooperation between the two.

The issue of Committee's autonomy and accountability should have been prioritised before any suggestion of amalgamation with an associated industry body. Independence is critical to the Committee in carrying out its role of compliance monitoring and for self-regulation to function effectively.

The ABA commissioned Jan McClelland in late 2007 to carry out a review under clause 5 of the code. In its media release dated 21 December 2007, the ABA stated:

The code sets out the banking industry's key commitments and obligations to customers on standards of practice, disclosure, and principles of conduct in relation to banking services. … McClelland outlined the process which will be followed in the review:

1. *Consultations will be held with interested stakeholders [including]… banks, consumer groups, other interest groups, regulatory bodies, and other interested stakeholders;*
2. *Then an Issues Paper will be produced which outlines draft recommendations on changes to the code;*
3. *Further consultation will occur on the Issues Paper with interested stakeholders;*
4. *A report with recommendations about what changes are considered necessary and reasonable for the code will be completed mid-year, 2008.*

McClelland is reported to be an experienced reviewer as she has previously headed Government Reviews in NSW into the Consumer, Trader and Tenancy Tribunal, NSW Government Recruitment, Mine Safety, Police Education, Road Safety Education, Business Planning and Corporate Governance, and Shared Services, Asset Management and Procurement. … [and] was the former NSW Director-General Education and Training and Managing Director of the NSW TAFE Commission… In 2005, Ms McClelland was Chair of the Australian Consumers Association now known as CHOICE.

There were a series of 'Key Considerations' that the ABA required McClelland to review, and these included:

- *In conducting the review, the reviewer is to have particular regard to the provisions of clause 5 of the Code*
- *Clause 2.1 (a) of the code concerning banks continuously working towards improvement in standards of practice and service in the banking industry (emphasis added);*
- *The provisions of comparable industry codes and other self-regulatory arrangements including the Electronic Funds Transfer code of Conduct;*

- *Changes which have occurred in the legal and regulatory environment since the last review of CBP;*
- *Consistency with other self-regulatory initiatives and formal regulation;*
- *The principle of certainty of contract between bank and customer (emphasis added);*
- *The requirement of banks to act in accordance with prudential standards necessary to preserve the stability and integrity of the Australian banking system (emphasis added).*

McClelland's scope of review required her to report with recommendations on:

- *Generally, how the code has operated since its last review and the perception of the code among community, consumer, industry, regulatory and political interests;*
- *Means for addressing any interpretation or comprehension difficulties by banks or customers in relation to the provisions of the code;*
- *Means for addressing compliance difficulties, including significant competitive disadvantages, that banks have in conforming with the code (emphasis added);*
- *The structural, organisational and operational aspects of the relationship between internal complaints handling, external dispute resolution and monitoring of banks' compliance with the code (emphasis added)*

The inclusion of Key Commitments in the 2004 code seemed to reflect a real and accountable commitment on the part of bank parties to raise standards of practice by seeking the trust and confidence of consumers. In many ways, FEMAG indicated that this trust could be abused as a result of the Association's constitution and its effect on the Committee's inability to carry out its code duties.

Hence, the task to be undertaken by McClelland was considerable and this chapter will raise awareness of ambiguities and flaws in the current monitoring and dispute resolution practices that have evolved as a result of the competing provisions of the Association's constitution and the code.

Obstacles Implementing the 2004 Code

1. Poor Communication between Banks and Customers

In the submissions provided to the McClelland Review, the Committee evidenced poor communication between the banks, their customers and their customers' representatives as a major impediment to implementation of the code. Examples of poor communication included failures to respond to customers' correspondence in a timely and effective manner, and failures to disclose relevant banking information in an accessible form.

2. Inadequate Use of Dispute Resolution Mechanisms

McClelland Review submissions reveal that many banks and financial institutions had trouble distinguishing between the compliance-monitoring role of the Committee and the dispute resolution function of the BFSO/ FOS.

The code vests monitoring and investigatory powers to the CCMC to make determinations of compliance however individual resolution of disputes (for example, compensation for overcharging fees), if not handled to the customer's satisfaction by banks' internal dispute resolution (IDR) mechanism, should be referred to the BFSO's external dispute resolution (EDR) function. Both the BFSO and the Committee can also determine whether there are systemic breaches of the code and refer unresolved concerns to ASIC.

There have been suggestions that in some cases, complaints that should have been guided through the bank's IDR were alleged by banks to not be a breach of a banking service as defined in clause 40 of the code, thereby providing an avenue for banks to intentionally remove most code complaints from the Committee's jurisdiction. The lack of a definition in the code for the word 'complaint' and the application by subscribing banks of their CCMC Association's constitution may be responsible for this confusion.

3. Failure to Report Breaches

Concerns were raised that 'banks rarely, if ever, admit to a breach of the code; they simply make a commercial decision not to pursue the matter' when resolving disputes through either IDR or EDR mechanisms, even when customers are awarded compensation. During the McClelland Review, Nicola Howell noted:

There is no requirement for the bank to acknowledge that a problem occurred; or to implement systems to rectify the problem.

As will be demonstrated, the lack of clarity in regard to code breaches and the fact that the Committee's investigatory powers are undermined by the existence of the Association's constitution restricts the Committee's ability to exercise its powers under the code, yet would seem responsible, in part, for any structural inadequacies.

C. Code & Constitution Bedfellows

The Modified 2004 code neither provided for the Association's unpublished constitution nor an association of banks and financial institutions that govern the Committee's operations which is claimed by the banks to be in response to the CCMC's unincorporated status. The Association is understood to have approved the constitution and agreed on the appointment of its Chair.

On 11 March 2008, the Committee's submission to McClelland made it clear that the Association and its constitution posed a major impediment to the institutional integrity of the Committee. The Committee described the inconsistencies between the code and constitution as rendering their duties set out in the code 'unworkable' (emphasis added).

The Committee insisted that current arrangements were inadequate and claimed that the review was long overdue. Significantly, they asserted that it interfered with their ability to enforce the code and effectively monitor compliance. The constitution restricted the interpretation and implementation of the high principles set out in the code.

1. Monitoring and Enforcement Powers

a) The Committee's Monitoring Powers

The Committee regarded themselves as being bound by obligations that were inconsistent with their independent investigatory powers with respect to monitoring complaints referred to them by subscribing banks' customers. Whilst the CCMC was established to monitor breaches of the code, the Committee was unable to act independently of the bank parties' collective wills. Firstly, the Committee was unable to make public statements

without the approval of the banks. Secondly, as the Committee was funded by the subscribing banks, they were subject to financial oversight powers by representatives of the banking and financial institutions.

The constitution provides for chairs of the Association and the BFSO, parties responsible for drafting and/ or relying on the constitution, to have oversight powers with regard to the Committee that included:

- *The obligation to seek prior approval of any public statements by the Committee and its members from the BFSO and CCMCA Chairs; and*
- *The power for the BFSO and CCMCA Chairs to determine the funding, budget, and remuneration for the Committee.*

According to the Committee itself, this is inappropriate and inconsistent with its role as an independent monitor (emphasis added). It was the Committee's view that the constitution should be replaced with a charter from subscribing banks that confirms the importance and centrality of the code and leaves the Committee as an unincorporated entity.

The Committee considers that the existing constitution should be revoked for two reasons. Firstly, because the structure suggests that the Committee is less than independent of subscribing banks. Secondly, some provisions of the constitution vest unnecessary power in the Chairmen of the Banking and Financial Services Ombudsman (BFSO) and the CCMCA.

In order for the Committee to be publicly accountable and accessible it must be able to engage freely with stakeholders and to communicate broadly about the code and its role. These restrictions concerned the Committee members that they may not be independent of either subscribing banks or the BFSO.

b) The Committee's Enforcement Powers

Previously, subscribing banks were required to report code breaches to the Committee under clause 3.1. Following staunch opposition by the ABA in the McClelland Issues Paper, this clause was removed.

The lack of a statutory duty for subscribing banks to report their own breaches of law therefore requires the CCMC Committee to monitor serious breaches allegations through investigative powers under the code. Other than the practical issue of transferring this responsibility to the CCMC, a non-judicial, under-resourced regulatory body, it forced the Committee to potentially deal with concerns of law when the Association's constitution limited their powers.

Paragraphs 8.1(b) and (c) of the Association's constitution restricts the Committee from investigating complaints:

- *to the extent that the complaint relates to a subscribing bank's commercial judgment in decisions about lending or security; or*
- *if the Committee considers that the complaint is frivolous or vexatious; or*
- *if the complainant was aware of the events to which the complaint relates or would have become aware of them had they used reasonable diligence, and the complaint was raised by the notifying the CCMC in writing within one year.*

The constitution also limits the Committee's powers to sanction banks in breach of its provisions under the code. Clause 34(i) of the code states that the banks:

Empower the Committee to name [banks] in connection with a breach of the code or in the CCMC's report, where it can be shown that [banks] have:

i. been guilty of serious or systemic non-compliance;
ii. ignored the CCMC's request to remedy a breach or failed to do so within reasonable time;
iii. breached an undertaking given to the CCMC; or
iv. not taken steps to prevent a breach reoccurring.

Clause 11 of the constitution however limits the Committee's enforcement powers to name banks in the CCMC Annual Report. The Committee makes the point that:

Clause 11 of the constitution purports to limit the manner in which the Committee can use its power to name a bank, following a finding of serious or systemic non-compliance with the code.

2. Interpretation of the code by bank parties

a) Provision of Internal Dispute Resolution (IDR)

The constitution effectively excludes customers from having their complaints investigated through the IDR provisions set out in clause 35 of the code. Clause 35.1 imposes an obligation on the banks to investigate disputes internally and for this process to comply with either Australian Standards of Internal Dispute Resolution or any other guideline that ASIC approves. It states, 'we will have an internal process for handling disputes with you.'

Clause 35.1(b) states that the IDR process for handling disputes will 'meet the standards set out in the Australian Standard AS4269-1995 or any other industry dispute standard or guideline which ASIC declares to apply to this code'.

In order to satisfy ASIC's IDR requirements, subscribing banks must comply with the Corporations Regulations 2001 (Cth) reg.7.6.02, namely, the complaints handling standard developed by the International Organisation for Standardisation, the AS ISO 10002-2006.

On the other hand, paragraph 8.1 of the constitution states that:

The CCMC must consider any complaint alleging that an Association member has breached the code, except that the CCMC must not consider a complaint:

(a) if the CCMC is, or becomes, aware that the complaint:

i. *is being or will be heard (whether as a standalone matter or as part of any process or proceeding) by another Forum, and the Forum may (emphasis added) make a final determination as to whether a breach of the code has occurred. In such case the CCMC must not consider the relevant complaint (emphasis added) until the relevant Forum has determined or declined to determine (for whatever reason) whether the breach of the code has occurred. If the Forum determines whether a breach of the code has occurred, the CCMC must adopt the Forum's finding; or*

ii. *was heard… by another Forum, and the Forum has determined whether a breach of the code has occurred. In such a case the CCMC must adopt the finding of the relevant Forum as to whether a breach of the code has occurred.*

Forum is defined very widely to mean 'any court, tribunal, arbitrator, mediator, etc… in any jurisdiction'. The consequence of these provisions means that subscribing banks have an option to choose the forum they prefer a complaint to be dealt with. This opt-out provision has been in place prior to the 2004 code being published and adopted by the subscribing banks.

Individual and small business customers would not have considered this was appropriate if they knew its application curtails the powers and independence of the Committee. In fact, the opt-out provision contravenes the intention and recommendations of the Martin Committee when it set out the high principles intended for the code in 1991.

Likewise, the fact that these provisions provided the banks an option to circumvent the principles of the code, would suggest that the opt-out provision is in breach of clause 2.2 of the code. Clause 2.2 requires the code-subscribing banks to act 'fairly and reasonably towards [customers] in a consistent and ethical manner.'

The constitution imposes restrictions on the Committee in relation to their ability to exercise their monitoring and investigatory powers. It limits the utility of the code to safeguard individuals and small businesses when the Association's constitution is not available for the very clients the code is intended to protect.

3. Lack of Transparency

[redacted] *the constitution could be applied when they published the modified 2004 code.* [redacted] *the constitution could be used to constrain the CCMC Committee from carrying out their duties. Further, it is apparent that* [redacted] *in all likelihood, supported the opt-out provision. This provision meant paragraph 8.1 of the constitution could always be used by banks to retain the lopsided relationship and remove the utility of the code intended to remedy when published in 1993.*

It is therefore legally significant that paragraph 8.1 of the constitution, [redacted] *dated 20 February 2004 affect and undermine the purpose and high principles of the code. It is also significant that the constitution is not publicly available and has been kept from bank customers for the past six years. Adding to the lack of transparency, the Association is not registered, does not host a website, or list its contact details through any public directory.*

The CCMC Committee's website is restricted to listing the code and procedures. In the Committee's submission to McClelland, they stated being concerned: 'the constitution, which affects [the] code's interpretation and administration, is not a public document and has not been made available to community and customer advocacy groups (emphasis added).' The lack of transparency starkly contrasts with principles of 'effective disclosure of information' under clause 2.1(b) of the code.

The constitution is mischievous as it is intended to constrain the operation of the 2004 Code, which forms part of the terms and conditions between banks and their small business customers. This is referred to in 'PART F: APPLICATION AND DEFINITIONS. It states in clause 39.1 that on or after the commencement date of banks adopting the code, subscribing banks will be bound by this code in respect of:

i. *any banking service that we provide to you; and*
ii. *any guarantee we obtain from you (emphasis added)*

When making this commitment, none of the subscribing banks chose to refer to the CCMC Association's constitution. Further, it may be found by APRA later that banks that withheld information regarding the [secret] constitution could be guilty of misleading and deceptive conduct.

BURYING ISSUES: McClelland's 2008 Review

The restricted application of the code resulting from restrictions imposed by the Association's constitution was brought to the attention of the McClelland Review in 2004.

The CCMC stated that subscribing banks must either accept the obligations of the code as a whole; or they could not realistically be regarded as bound by it (emphasis added).

Reform has been frustrated by a unwillingness of industry representative bodies, and possibly regulatory bodies, and code reviewers, to investigate and properly address these issues. Hence, greater authority and purpose within the improved regulatory structure is needed.

Given the partisan concerns of many private stakeholders involved in such consultations, a code review may not be the ideal avenue through which such issues can be raised and genuine reform initiated.

1. The McClelland Issues Paper

a. The Issues Paper Submissions

Submissions were presented to McClelland prior to the release of the Issues Paper in May 2008 from:

i. *Code Compliance Monitoring Committee (the CCMC Committee)*
ii. *ACCC*
iii. *Finance Sector Union of Australia (FSU)*
iv. *Australian Bankers Association*
v. *Financial and Consumer Rights Council Inc*
vi. *Financial Counsellors Association of Queensland Inc*
vii. *NSW Office of Fair Trading*

i. The CCMC Committee - 11 March 2008

In their 11 March 2008 submissions, the Committee set out its concerns regarding the existence of the Association's constitution that limited their powers, independence, and authority.

The CCMC Committee stated:

Whilst the composition, function and authority of the Committee are provided for in the code, the Committee was established under the [Association's] constitution… which sets out powers and obligations for the Committee. On the face of it, that constitution imposes

some qualification and restrictions on the actions of the Committee. In part, it does that by identifying the ways in which the Committee will carry out its role.

Concerns raised by FEMAG in 2005 were further amplified by the Committee in their 2008 submissions. By any standards, the seriousness of the concerns do not appear to have been properly investigated and appropriately dealt with by McClelland.

(ii) The ACCC – 9 April 2008

The ACCC proposed a number of changes in response to perceived weaknesses in the 2004 code. It noted that to avoid ambiguities as to its meaning and relevance, the code should contain a statement that clearly identifies its objectives, written in a way that allows the performance of signatories to be evaluated against it. Also, the ACCC recommended that the code stipulate stronger sanctions for non-compliance where it is commercially significant (emphasis added).

Sanctions should reflect the nature, seriousness and frequency of the breach and might include warnings, corrective advertising, fines, and expulsion from the code and/or the ABA.

The ACCC stated that the code should incorporate greater accountability, such as giving power to the Committee to name signatories for breach of code regardless of how egregious that breach is. What the ACCC considered appropriate following the FEMAG Review is difficult to interpret from statements set out in their submissions.

(iii) Financial Securities Union (FSU) - 22 April 2008

The FSU at this time represented 50,000 employees from the banking and financial sector. In their submission, they stated that they 'support the need for effective policy and regulatory instruments to protect consumers' and that they concurred with the Committee's 11 March 2008 submissions, specifically regarding the ambiguous scope of power available to the CCMC Committee under the dispute resolution, enforcement, and compliance mechanisms.

The FSU also stated the code was not widely understood by stakeholders, let alone the public and it suggested the ABA should fulfill its obligations. While the FSU supported the CCMC Committee's submissions to McClelland, they may 'not' (emphasis added) have considered the serious lack of probity the constitution had introduced.

If they had, it's likely the FSU would have questioned the sizable bonuses paid to the CEO and increasing shareholder dividends when the FSU members were inadvertently promoting high standards in the problematic code.

In support of this remark, a FSU member commented irritably that he was trained by the bank to make promises (emphasis added) ***that were totally untrue then told to lie to customers about code standards and protection that probably don't exist***.

FEMAG and the FSU seem to have accepted the high principles and aspirations set out in the 2004 Code and failed to consider that banks might ever circumvent the CCMC Committee's powers by invoking the opt-out provision in paragraph 8.1 and other potential limitations imposed by the CCMC Association's unpublished constitution.

Moreover, the FSU have reason to be disturbed by the subscribing banks' conduct as their members were trained by the banks to advise customers that they "have adequate knowledge of the provisions of the code", when in fact they had no knowledge that their bank's CEO drafted a constitution that limited the Committee's powers.

(iv) ABA - 30 April 2008

It is important to consider the recommendations by the ABA and chief executives of banks considering what it failed to address rather than the less important matters that it had raised. They suggested the CCMC Association's constitution be amended to define more clearly the CCMC's role in overseeing and promoting best banking practices.

This statement seemed self-serving since the ABA had published the 2004 Code and is now a corporation managed by a board made up of the CEOs of banks that potentially derive a benefit from the CCMC Association's constitution. Confusion stems from the fact that these parties also manage the affairs of the bankers' association and they could have amended

this Code in 2004 to define the CCMC's role any time since the publication of the constitution in February 2004.

The ABA said that because the Committee's operating procedures were already subject to pre-consultation measures with the BFSO and ABA under Clause 34(h) of the code, efficiency goals may be met by simply integrating compliance monitoring with the BFSO dispute resolution service. As noted earlier, the ABA recommended clause 3.1 of the code be deleted when this clause required that where signatories contravene the law, the Committee must investigate. Hence, the proposed changes to this provision are confusing and would also appear to be self-serving.

The ABA further suggested that the Committee's reporting obligations be restricted to defined categories such as systemic/ significant breach in order to cope with the numbers and complexity of the complaints. Again, subscribing banks appear to be acting without regard to their commitment to high standards set out in the code and their duty to customers. Clause 2.1(a) of the code requires banks to 'continuously work towards improving the standards of practice and service in the banking industry.'

b. Response: The Issues Paper

Whilst McClelland acknowledged the constitution and Committee's concerns, her Issues Paper seemed short on investigating the concerns raised in their submissions. It suggests the underlying principles in clause 5.1 that required the ABA to commission 'an independent and transparent review (emphasis added) were compromised by her failure to explain and report the negative effects of the 'problematic' code that concerned the Committee.

Neither did McClelland comment on any potential lack of independence and/or conflict of interest arising from an arrangement between code subscribing banks and the FOS when they jointly appointed all the Committee members since the modified code was published and that all the members were bound by the constitution.

McClelland's recommendations in the Issues Paper were that:

1. *The relationship between the CCMC and FOS be clarified in the context of a merger between the FOS, FICS and IOS.*
2. *All alleged breaches of the code be referred to the FOS in the first instance for determination as to whether they should be referred to a FOS case manager or the CCMC for consideration and as to whether there had or had not been a breach of the code.*
3. *The composition of the CCMC includes:*
    a. *A consumer representative appointed by the consumer representative on the FOS Board;*
    b. *An industry representative appointed by the subscriber banks through the ABA;*
    c. *And independent Chair jointly appointed by the consumer representatives on the FOS Board and the ABA on behalf of subscriber banks.*
4. *The role of the code Compliance Monitoring Committee requires it to:*
    a. *Monitor code compliance through referrals, reports and data received from FOS;*
    b. *Make determinations on allegations that a bank has breached the code, which are referred to the CCMC by FOS;*
    c. *Conduct enquiries into systemic issues in relation to the code that are identified by FOS and the CCMC;*
    d. *Conduct its own enquiries into banks' compliance with the code;*
    e. *Determine sanctions in accordance with the current code provisions;*
    f. *Prepare an annual report on compliance with the code;*
    g. *Contribute to joint publications between the CCMC and FOS on code issues; and*
    h. *Promote awareness of the code with banks through the provision of feedback on emerging code compliance issues.*

5. *The charter, constitution, terms of reference and operating protocols of the CCMC incorporate principles of procedural fairness and provide guidance on the factors that should be considered in determining a matter.*
6. *Consideration should be given to broadening sanctions available to the CCMC such as a warning, requirement to rectify of an issue within a specified time and conduct of a compliance audit, so that sanctions imposed are commensurate with the extent and severity of the breach.*

This report makes no comment on the submissions presented to McClelland by the Financial and Consumer Rights Council Inc; Financial Counsellors Association of Queensland Inc and NSW Office of Fair Trading as it is unlikely any of these parties understood the potential limitations imposed by the Association's constitution on powers, independence, and authority of the Committee.

It is also noted that McClelland's recommendations in her Issues Paper are not consistent with the seriousness of concerns raised by the Committee in their 11 March 2008 submissions. McClelland's response to their submissions seems, at best, non-specific and at worse, an attempt by the banks to maintain the questionable relationship and conflict of interest between them and the parties that appointed the CCMC Committee, as they had to protect banks' customers' as set out in 2004 Code.

2. McClelland's Final Review

a. Submissions in Response to the Issues Paper

In response to the Issues Paper, 24 further submissions were sent to McClelland that are set out in the 2007-08 Review of the code of Banking Practice website. Half of these submissions were received from parties who apparently had no access to the FEMAG Report in 2005 or the Association's constitution. This report will look behind comments made by parties who would likely have considered the FEMAG Report and had an understanding or access to the Association's constitution.

(i) CARE Financial Counselling Service Inc – 24 June 2008

Care Financial Counselling Service Inc (CARE) is a corporation established to assist people on a low to moderate income who are experiencing financial difficulties.

On 24 June 2008 Carmel Franklin, acting director of CARE wrote to McClelland and expressed a view that the corporation intended to contribute to the joint submission by Nicola Howell on behalf of Consumer Advocates.

Carmel Franklin previously presented views of Australian Financial Counselling and Credit Reform Association and Care Financial Counselling Service to McClelland. Franklin was supportive of the code providing the industry confirmed its obligations in the code. Franklin also stated that CARE was strongly opposed any watering down of protection afforded by banks to their guarantors.

CARE states that it 'supports the views that there must be a clear distinction between external dispute resolution and code compliance and monitoring:

We see the current recommendations in the Issues Paper to be a significant step backwards, that if implemented would undermine the quality and credibility of any monitoring process.

CARE Director, David Tennant, was a CCMC member during this period, and was appointed under clause 34(a)(1) of the code as the consumer representative on 1 April 2004. He remained in that position until after McClelland published her Final Report on 16 December 2008 and was then replaced by Nicola Howell, QUT University in January 2009.

Tennant presented the CARE's report and Carmel Franklin, Client Service Coordinator'. When presented to McClelland, it was part of a Nicola Howell's report. At the same time, CARE, Tennant, and Franklin had avoided important matters raised in submissions presented by the CCMC on 11 March 2008 to Jan McClelland.

CARE's submission was presented to McClelland, and, in the CCMC's 30 June 2008 Annual Report, it noted the Board Members were:

- *Elizabeth Grant, Chairperson*
- *Timothy Johnstone, Secretary*

- *Ruth Mackay, Treasurer*
- *Malise Arnstein, Committee Member*
- *Ian McAuley, Committee Member*
- *Nick Seddon, Committee Member*
- *Kris Sloane, Committee Member*

(ii) The CCMC (the Committee) – 29 July 2008

On 29 July 2008, Tony Blunn AO expressed disappointment that many points raised in the CCMC's submissions were not considered in McClelland's Issues Paper. According to Blunn, 'Where Committee views are referred to, treatment does not reflect the weight of experience that supported them.' Blunn noted that 'relatively few of the submissions listed in Appendix B of the code Review Issues Paper are publicly available on the website' and that 'a number of sources referred to in the issues paper remain undisclosed.'

Blunn concluded that this is not a common practice, unless non-disclosure has been specifically requested. Shortly after the McClelland final report on 16 December 2008, Tony Blunn AO resigned from his position as CCMC Chair in January 2009.

(iii) Nicola Howell - Consumer Advocate – July 2008

Nicola Howell is a well-known and widely regarded academic. Howell's Joint Consumer submission was funded by the Consumer Advisory Panel of ASIC. While she has gained a strong reputation as a consumer advocate in Australia, it could be said that she failed to adequately address the issues of misleading and deceptive conduct arising from signatory banks allowing their promise to adhere to the code – itself part of the terms and conditions of the contract between the institution and their customer – to be restricted by the constitution.

As noted above, the constitution effectively excludes customers from having complaints investigated through the IDR provision in clause 35 of the code if the banks choose to invoke the opt-out provision in paragraph 8.1 and other provisions of the unpublished constitution.

Regardless of their status at law, these convoluted and undisclosed terms tie the hands of an ordinary person and small business when entering into a contract with well-resourced banks by relying on an unpublished constitution to render the Committee impotent. In the joint Howell submission however, little or no emphasis is placed on the ineffectiveness of the code as a result of the Constitution.

Nicola Howell was of the view that the CCMC should be independent of the subscribing banks and of the FOS and acting as an independent code compliance body. It was also suggested that the body responsible for compliance monitoring should be sufficiently resourced and empowered to make its own enquiries and reviews, in addition to responding to complaints. However, this was mentioned the CCMC Association's constitution, but in a positive light:

The constitution (and/ or other governing documents) and the code make it clear that individuals and organizations have the right to make complaints about code breaches directly to the CCMC.

However, despite acknowledging that 'it is vital that consumers have access to a free, independent, and effective dispute resolution service that has a clear mandate and capacity to resolve disputes', the fact that the constitution restricts the Committee's ability to perform its investigatory role with regard to unsatisfactory processing or resolution of such complaints is neglected.

Consumer Advocates' submission also noted that sanctions should be broadened, however Howell failed to acknowledge the limiting nature of the constitution on the Committee's powers under the code. Although Howell has written extensively as a consumer advocate on consumer protection, her joint submission would seem to have failed to properly analyse the unjust practices and limitations imposed on the Committee.

Nicola Howell presented herself to ASIC, the banks and consumer organisations as being an expert on consumer affairs and customer protection. Her submission however could be said to have not fully addressed the serious concerns raised by the CCMC in its 11 March 2008 submissions.

Following the 16 December 2008 Final Report presented to the ABA by McClelland, it is noted that Howell was appointed by the consumer representatives of FOS as the consumer representative on the CCMC Committee. When she was appointed on 14 January 2009, Howell was fully briefed on the questionable principles and damages that might flow from the potentially untruthful code.

At the time of this report, 20 months after her appointment, Howell has apparently made no public statements on the substantive issues raised by the earlier Committee despite being considered an expert in consumer affairs and customer protection and also the independent consumer representative on the Committee.

(iv) CHOICE – 3 October 2008

On 31 July 2008, CHOICE and the Consumer Action Law Centre presented submissions to the McClelland Review. Their submission endorsed Nicola Howell views and dealt specifically with issues regarding banks' penalty fees. CHOICE had been the public face of the not-for-profit Australian Consumers Association and it declares itself to be the number one advocate for consumers in Australia. It is noted however that the CHOICE submission failed to reinforce or champion the concerns raised by the Committee and question the limitations that the constitution imposes on the Committee.

In the 6 March 2006 Charter, it notes that CHOICE 'is an independent non-profit, non-party-political organisation established in 1959 to provide consumers information and advice and to promote and protect their interests.' It claims that they 'exist to unlock the power of the consumers. With around 200,000 subscribers, they provide 'unbiased product reviews, comparisons and consumer action.'

CHOICE sets provisions in its code of ethics, including:

There are certain basic ethical values that underpin their role as directors of CHOICE. Councillors and will therefore:

- *Diligently apply themselves to the business of the Council with the level of skill and care expected of a director under the Corporations Act.*

- *Act at all times with integrity and in the interests of the Association as a whole.*
- *Avoid any situation of conflict of interest so far as is possible and manage any conflict which cannot be avoided.*
- *Not make improper use of information gained through their position as director.*

The other CHOICE officers are well-regarded public figures:

- *Rachel Dixon (Deputy Chair)*
- *Sandra Milligan*
- *Ian Spight*
- *Peter Bray*
- *Frank Muller*
- *Nicole Rich*
- *Charles Berger*
- *Bill Davidson*
- *Nick Stace (CEO)*

Ms Jenni Mack, Chairperson, CHOICE, and consumer advocate with expertise in consumer compensation schemes and good governance is also a director of the FOS and Chairs the ASIC Consumer Advisory Panel and was recently appointed to the Board of the Food Standards Australia and New Zealand. In the mid-nineties, Jenni Mack was Deputy Legal Ombudsman in NSW and NSW Judicial Commission member.

In this role, Mack's overarching responsibility is:

to ensure that the Council properly fulfils its responsibilities... [and] that the Council fully utilises the knowledge and skill available to it. Inside the boardroom... to ensure [the] Council considers the right matters... properly, [and] comes to clear conclusions, and ensures decisions are implemented.

It seems paradoxical that the Chair of such an important organisation as CHOICE with an extensive background in consumer protection and corporate governance would not find

that the submissions presented by the CCMC to McClelland on 11 March 2008 was worthy of further investigation.

[redacted]

(v) BFSO/FOS – 4 August 2008

The FOS replaced the BFSO and commenced its operations on 1 July 2008. Its function was to provide free dispute resolution services (emphasis added) for the financial services industry. The External Dispute Resolution (EDR) service provided by FOS is approved by ASIC and provides an alternative to litigation, with its jurisdiction covering disputes relating to the provision of a 'financial service'.

However, the limitations placed on the dollar value of the disputes they can investigate only meant it was ***incapable of investigating the wide-ranging principles of the code****.*

The FOS submissions to McClelland stated its relationship with the CCMC should be more clearly defined. It suggested that there should be a principal means of addressing consumer complaints outside the IDR process and 'was concerned that there is an overlap between the functions of FOS and the CCMC, to investigation of systemic issues.'

It is unclear whether the FOS is willing to perform a greater role in code compliance monitoring and complaints handling when suggesting the CCMC might limit some of its powers under the code.

The FOS Board on 1 June 2008 comprised:

- *Michael Lavarch (Chairman)*
- *Catriona Lowe (Consumer representative)*
- *David Coorey (Consumer representative)*
- *Jenny Mack (Consumer representative)*
- *Brendan French (Banking representative)*
- *Russell McKimm (Banking representative)*

- *David Squire (Banking representative)*
- *Denis Nelthorpe (Consumer representative)*

Auditor is Deloitte Touche Tohmatsu at 550 Bourke Street Melbourne.

The FOS is governed by an independent board of consumer and financial industry representatives. The Board seeks expertise and advice from Specialist Advisory Committees drawn from FOS members and consumer organisations.

The Board's role is to monitor the performance of the FOS, provide direction to the Ombudsman on policy matters, set the budget and review the Terms of Reference including jurisdictional limits of the Ombudsman. The Board does not get involved in cases which come before the Ombudsman as that would prejudice the independence of the Ombudsman.

The Chair in 2009 was the Hon Michael Lavarch who was also Executive Dean of the Faculty of Law at Queensland University of Technology. He is a former Federal Attorney General and Secretary General of the Law Council of Australia.

In light of the reported independence of the Ombudsman and credentials of the Board and its Chair, the industry representatives should have required McClelland to investigate and make recommendation in respect of the issues raised in the 11 March and 29 July 2008 submissions of the CCMC Committee.

(vi) ABA – 6 August 2008

The affairs of the ABA are managed by its Board which consists of the CEOs of the code subscribing banks. In earlier submission to the Issues Paper, the ABA raised challenges for the banking sector. It acknowledged that the potential weaknesses in the structure and in the governance processes of the Committee, and its relationship with the FOS and subscribing banks was critical to the credibility of the code.

The ABA however maintained that the CCMC could not operate without an overarching structure of governance and suggested that the following principles need to be employed:

a. *The CCMC must be accountable to an entity that is independent from the banks;*
b. *The CMC and FOS must be guaranteed independence from the banks in the performance of their functions;*
c. *The FOS and CCMC guarantee independence, one from the other;*
d. *There must be a free flow of information between the FOS and the CCMC;*
e. *There must be a common entry point into the FOS for consumers and their representatives to access dispute resolution and code compliance monitoring services.*

Given the intertwined relationship between the code subscribing banks, the ABA that published the 2004 code and the FOS who acted with the banks appointing Committee members since 1 April 2004, it has been the responsibility of the ABA members to establish the principles set out in their 6 August 2008 submission since they drafted the Association's constitution.

The ABA submitted that:

- *Both the CCMC and FOS needed to share a reasonable level of information to work effectively;*
- *The Committee must be accountable to an entity that is independent from the banks and provides governance for the CCMC to discharge its powers under the code;*
- *A common entry point is desirable between the CCMC and the FOS and would involve the FOS directing clients to the CCMC when the FOS is unable to resolve matters;*
- *The description in the bank appointed member of the CCMC should be amended to make it clear the member is the representative of the code subscribing banks.*

It appears that in spite of the Committee's concerns, there was no initiative by the ABA to investigate the relationship between the ABA and its directors, the subscribing banks, the FOS and its directors and the Committee. However, what seems clear is that an

investigation into the concerns raised by the CCMC might determine whether the banks control or seek to control consumer representatives who act to safeguard the rights of individuals and small businesses.

(vii) ANZ – 8 August 2008

The ANZ position in 2008 was not clear. It supported the recommendation to accommodate the CCMC within the FOS to avoid multiple complaint gateways, duplication of investigations, and to provide access to data. However, the bank's suggested that the current powers of the CCMC to name non-complying banks are sufficient:

the CCMC has not used this power suggesting that compliance with the [code] has been good and/or this power has been a significant driver for banks to rectify non-compliance with the [code]... ANZ questions whether there was the need for the CCMC to be provided additional powers when its existing powers have not been needed.

This relies on an assumption that the CCMC's investigatory powers are sufficient to monitor code compliance and investigate code breaches. While ANZ had raised definitional issues, particularly regarding the distinction between dispute and complaint (emphasis added) and the ambiguity faced by customers attempting to use these remedies, banks failed to identify the link between the provision in paragraph 8.1 of the CCMC Association's constitution which limits the CCMC's powers to investigate either complaints or code disputes.

On 20 February 2004, John McFarlane, ANZ Chief Executive was also Chair of the ABA when the constitution was reported to have been drafted. In 2008-09, Michael Smith was ANZ's Chief Executive and during this time he was also an officer of the ABA and a member of the body which appointed the CCMC members who were bound by its constitution.

During 2008-09, Charles Goode was Chair of ANZ Bank.

2. Response: The Final McClelland Report

Jan McClelland limited her discussions when referring to the Committee's governance issues to promoting the need for structural changes in the relationship between the Committee and the FOS. McClelland's recommendations were that:

1. *The CCMC be established as a separate independent unit within the FOS reporting directly to and accountable to the FOS Board for the performance of its prescribed functions under the code.*
2. *Separate terms of reference of the CCMC be developed by the Committee in consultation with the ABA, the FOS, ASIC, and consumer interests which should be consistent with the compliance monitoring, investigation and reporting functions of the Committee published on the CCMC, FOS and ABA websites.*
3. *Terms of reference of the Committee make it clear it and FOS have different code compliance monitoring and dispute resolution functions guaranteeing independence of one from the other, as well as being independent from banks.*
4. *The charter, constitution, terms of reference and operating protocols of the FOS Board and of the CCMC and code make it clear that individuals and organisations have the right to make complaints about code breaches directly to the Committee.*
5. *The code makes it clear that the Committee retains its powers under the code to conduct investigations in response to complaints of code breaches from any person or organisation, and to initiate investigations and reviews on its own initiative and to make determinations in relation to those investigations.*
6. *The code also spells out the Committee's functions including to:*
    a. *conduct its own enquiries into banks' compliance with the code;*
    b. *prepare an annual report on compliance with the code;*
    c. *contribute to joint publications between the CCMC and FOS on code interpretation and compliance issues, and;*
    d. *promote awareness of the code with banks through the provision of feedback on code issues.*

7. *The charter, constitution, terms of reference and operating protocols of the FOS and the Committee make it clear that the following arrangements apply in matters that are referred to the FOS or the Committee:*
    a. *Where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue and finds that there has been a code breach, that determination is a final determination as to whether a code breach has been established. FOS must report its determination to the CCMC for further monitoring as appropriate and provide access to its case file on the matter if required by the CCMC.*
    b. *Where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue and finds that there has been no code breach, the determination of FOS is final and the CCMC cannot investigate the matter. FOS must inform the CCMC of its decision and provide access to its case file if required by the CCMC.*
    c. *Where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue, but does not decide on this aspect of the dispute, the FOS must refer the issue to the CCMC and provide access to its case file if required by the CCMC.*
    d. *Except where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue and determines whether there has been a code breach, in all other cases the CCMC shall have sole responsibility to make a determination whether a breach of the code has occurred.*
    e. *If a customer seeks to refer a dispute to the FOS alleging a breach of the code but there is no financial loss, the FOS must advise the customer of the right to take the matter to the CCMC.*
    f. *Where the Committee, in accordance with its prescribed function of code compliance monitoring, determines whether a breach of the code has occurred, that determination is a final determination as between the CCMC and the FOS as to whether a code breach has been established.*

8. *There will be free flow of information between the FOS and the CCMC to enable the FOS and the Committee to perform and discharge their respective functions properly.*
9. *That the FOS and the Committee ensure that the community is aware of the Committee's existence, role and separate function in relation to compliance monitoring and establish a Memorandum of Understanding that sets out their respective roles, agreed protocols for handling code matters, and protocols for the sharing of information.*
10. *FOS and Committee staff be jointly trained on distinctions between dispute resolution and compliance monitoring function and protocols for handling matters including referral of matters from FOS to the Committee and sharing of information in accordance with the MOU between the FOS and Committee.*
11. *That the description in clause 34(a) (i) of the code of the bank-appointed member of the Committee be amended to make it clear that the appointee is a representative of code-subscribing banks.*

On 16 December 2008, McClelland's Final Report failed to address or recommend the issues raised by the CCMC and caused them to publish their concerns with respect to the CCMC Association's constitution in their earlier submissions.

Most submissions referred to McClelland's Issues Paper and Final Report focused on ancillary issues and failed to recognise the connection between the code and the CCMC Association's 20 February 2004 constitution. Despite the experience and commitment by the reviewer, the issues referred to in Part 2 of this report should have been recognised, investigated, and reported on if it was the true intention of the banks to review the efficacy of the 2004 Code.

It is noted that several parties that made submissions to McClelland would have sighted or known about the CCMC Association's [secret] constitution and the consequences that flowed to the standards in the code [redacted]

On the other hand, there were other parties who filed submissions to McClelland who had no knowledge of the [secret] constitution and were unable to realise the substance of the CCMC's 11 March and 29 July 2008 submissions. Parties who were privy to the constitution made no effort to address these recommendations that might support changes that would remedy the institutional integrity of the CCMC and its governance.

It is difficult to know who within ASIC had a duty to review the CCMC's Issues Paper and Final Report that was published by McClelland. These submissions made it perfectly clear that the CCMC Association's Constitution should have been investigated and a determination made by ASIC considering the serious statements made by the CCMC prior to their members resigning without completing the terms of their appointment. This should not be overlooked now by legislators, regulators, and the industry because all protection that was promised to consumers in 1993 was taken away in 2003.

It seems the highly respected policy makers and senior academics with expertise in consumer protection did not believe the code was capable of being enforced by the CCMC, which was less than independent of the banks. It also seems inappropriate that Jan McClelland's Review failed to take advantage of research and recommendations of the 2005 FEMAG Review.

<u>There were a million complaints a year</u>

On 18 September 2013, Tony Abbott was appointed Prime Minister and like Labor, he did not question the failure by the government to ensure that the rules set out in the contemporary codes were followed by banks. CCMC record noted there was one million complaints that year and no action was taken.

The 2013 – 2014 CCMC Annual Report states:

CCMC Purpose: The CCMC's purpose is to ensure compliance with the Code and thereby contribute to the improvement of standards of practice and service by banks.

Its aim is to be a trusted and valued partner, helping the subscribing banks to comply with their Code obligations, ultimately creating a better banking experience.

Principles: The CCMC bases its work on five key principles:

1. Independence in its operations. Governance and decision making.
2. Responsibility in undertaking its functions, for the benefit of both the banking industry's self-regulatory scheme and the broader regulatory environment in which the banks operate.
3. Accountability and transparency in its processes, reporting communications and engagement with stakeholders.
4. Interdependence including the establishment of strategic working partnerships and a string and reputable brand.
5. Accessibility to its Code monitoring and investigations services.

Compliance Monitoring and Breach Reporting: **1.1 million complaints reported by banks, up to 53%. 91% of complaints resolved within 5 days by banks.**

<u>The submission of 19 August 2015 by Tasmanian Small Business Council – Submission 61</u>

In February 2014, the ABA and the banks published an amended code (2013 Code) and it did not [redacted] The government took no action. In August 2015, a second review of the Code was published [redacted] and Tony Abbott's government took no action.

Submission 61 stated:

This paper presents a history of banking regulation in Australia. The author explains how self-regulation has failed to protect customers, allowing banks to introduce practices such as constructive default.

The government has not fully considered the effect of self-regulation, and the damage caused to Australian bank customers has been considerable.

MEMORANDUM TO TASMANIAN SMALL BUSINESS COUNCIL

I thank your organisation for commissioning me to present a further report regarding banking practices in Australia between 2004-2014. This paper titled "Banking in Australia: Unregulated and Unprotected" responds to the Federal Parliamentary Joint Committee on Corporations and Financial Services. It also reports on banking practices that are relevant to the Impairment of Customer Loans Inquiry. The two attached papers are:

1. 14 November 2014: Australian Banking Code

This paper is addressed to the Tasmanian Small Business Council (TSBC) and is based on research carried out by the writer on behalf of your Council. It refers to four documents ("four documents paper") and unconscionable banking practices. It is an extension to "The Australian Bankers Problematic Code" paper of 6 December 2010.

2. 14 August 2015: Banking in Australia

This is an historical account of banking in Australia during a period when banks have been unregulated, and customers unprotected ("banking history paper"). The writer explains how self-regulation has failed to protect small businesses, farmers and individual customers allowing the banks to introduce practices such as constructive default.

TERMS OF REFERENCE

In relation to the Terms of Reference (TOR) the writer explains in these two papers, to the Parliamentary Joint Committee on Corporations and Financial Services, how intricately the banking practices have been devised in order to disguise unconscionable practices from the public.

TOR 1. (a) Practices of banks and other financial institutions using a constructive default *(security revaluation) process to impair loans, where constructive default/security revaluation means the engineering or the creation of an event of default whereby a financial institution deliberately reduces, through valuation, the value of securities held by that institution, thereby raising the loan-to-value ratio resulting in the loan being impaired.*

I refer to the four documents paper. It notes that the banks engineered an arrangement that allowed them to refer disputes of code breaches from the Code Compliance Monitoring Committee (CCMC) to courts. The subscribing banks' access to resources provides them with a considerable advantage when disputes are heard in the courts.

The Code of Banking Practice (Code) was first published in 1993. It intended to provide both customers and banks with an opportunity to resolve disputes fairly. The banks were reluctant to accept the introduction of this practice in the initial code. The decision by banks and government, with involvement by consumer groups, resulted in the Martin Committee, in 1991, recommending the introduction of a Code.

The banks adopted the first code in 1996. Following Richard Viney's review in 2000, this Code was amended. This is noted in the banking history paper (page 3). The Code was revised in 2003 and modified in 2004. When the 2004 Code was introduced by the Australian Bankers Association (ABA), the CCMC was created and its constitution was introduced. The constitution was, however kept from customers until recently.

TOR (b) Role of property valuers in any constructive default (security revaluation) process;

I refer to the four documents paper and in particular Undertakings included in the banks General Standard Terms. It states:

> *Undertakings*
>
> *9. Values, Investigators and Consultants*
>
> *9.1 We may obtain a valuation report of any secured property at any time. You must pay us all costs in connection with the valuation.*
>
> *9.2 If we reasonably believe you are or may be in default or we reasonably believe the circumstances exist which could lead to default, we may appoint a person to investigate whether this belief is accurate … You must pay us all costs in connection with the investigation.*

9.4 Any valuer, investigator or consultant we use is an independent contractor and not an agent or employee. [We] aren't responsible for any representation, action or in action by them.

9.5 Any report we obtain from the valuer, investigator or consultant is for our use only. You cannot sue us, the valuer, investigator or consultant if the report is wrong. You must obtain your own report if you wish to rely on it.

The banks contracts allow them to use whatever resources they consider are necessary to default a loan if, during the period of the loan, the bank makes a decision to withdraw its credit. The facts in relation to this are set out in the four documents paper (pages 7-9).

(c) Practices of banks and other financial institutions in Australia using non-monetary conditions of default to impair the loans of their customers, and the use of punitive clauses such as suspension clauses and offset clauses by these institutions;

The Code provides an opportunity for banks to argue that many of the clauses in it are non-specific. However, as individuals and small businesses will appreciate, a number of the clauses are relevant. The difficulty regarding the latter has been the banks have concealed the constitution of the CCMC from customers.

I refer to the recent decision in National Australia Bank Ltd v Rice [2015] VSC 10, which affirmed that the Code constitutes a contract between the customer and the bank. Breaches of the Code are, therefore, contractual breaches. I draw your attention to clause 25.2 of the Code, which is relevant to this particular term of reference, which states:

"With your agreement, we (the bank) will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan."

Clause 25.2, which states:

"*We (the bank) will act fairly and reasonably towards you in a consistent and ethical manner."*

It is the writer's view that clause 2.2 guides clauses in the Code – like clause 25.2 – which are supported by the 2008 Review of the Code that was commissioned by the Australian Bankers' Association (ABA).

This view is supported by the judgements of Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd [2009] NSWSC 676 at [27], Seeto v Bank of Western Australia Ltd [2010] NSWSC 922 at [38], and ING Bank (Aust) Ltd v Stafford [2010] QSC 289 at [32].

The writer accepts that the terms of clause 2.2 are broad. However, the clause is central to an interpretation of the Code and the specific clauses bank customers should have been able to rely on. It allows customers to believe that they have a right to have any complaint in relation to non-monetary conditions investigated by the banks as part of their contract.

Furthermore, when considering breaches of clause 25.2 in the context of clause 2.2, bank customers should have been able to take into account conduct that constitutes the "help" given to customers to overcome financial difficulties. In the ABA's industry guidelines on Promoting Understanding About Banks' Financial Hardship Programs, it states:

> *'"Financial hardship" is when a customer is willing and has the intention to pay, but is unable to meet their repayments or existing financial obligations, and with formal hardship assistance, a customer's financial situation can be restored… Financial hardship can be due to factors, unforeseen circumstances, or unexpected events, for example… emergency event or natural disaster"*

The guidelines state that "When restoring a customer's financial situation is possible", the bank should work with the customer to come to an arrangement that helps ensure the customer's ongoing financial viability.

(d) Role of insolvency practitioners as part of this process;

It is a wide held view that insolvency practitioners are agents of the banks and are indemnified by the banks. As such, their instructions are generally those of the banks. The conduct and practices of insolvency practitioners was the subject of an earlier senate

inquiry and there is no reason to believe that whilst banks are self-regulated, so too are insolvency practitioners.

(e) Implications of relevant recommendations of the Financial System Inquiry, particularly recommendations 34 and 36 relating to non-monetary conditions of default and the external administration regime respectively;

The writer has presented an earlier paper to TSBC in relation to this. Small businesses, farmers and individual bank customers should be disappointed with the proposed amendments to unfair practices that followed the Financial Systems Inquiry. There is no justification for unfair practices in the banking sector, nor should the legislators or regulators not take responsibility for the lack of governance oversight in the banking and financial sector.

(f) Extent to which borrowers are given an opportunity to rectify any genuine default event and the time period typically provided for them to do so;

The writer believes that borrowers will only be given an opportunity to rectify a loan default in the event that the financier believes this is in the banks best interest. There are a number of situations whereby the borrower should be provided an opportunity to rectify a genuine dispute. However, the decision by the bank to foreclose on small businesses, farmers or individual customers is often made by the senior bankers ridding the company of noise or a decision to reduce the banks exposure to a class of assets.

(g) provision of reasonable written notice to a borrower when a loan is required to be repaid;

Refer to the statement made in point (f) above.

(h) appropriateness of the loan to value ratio as a mechanism to default a loan during the period of the loan; and

The writer believes that the decision to rely on loan-to-value mechanisms is in most cases generic, based on assets with a regional or industry risk rating. It is also based on the wealth that a customer may have in diversified assets and the history in relation to that

customer. Therefore, the loan-to-value ratio is both a general banking decision and a customer's standing.

(i) Conditions and requirements to be met prior to the appointment of an external administrator; and

Refer to the statement made in point (h) above.

2. In undertaking this inquiry, the Committee take evidence on:

a. The incidence and history of:

i.loan impairments; and

ii.the forced sale of property;

b. The effect of the forced sale of property in depressed market conditions and drought;

The writer has referred to these matters in part 1 above. However, the TSBC might attend a meeting with the Parliamentary Joint Committee and comment on cases regarding the financial and social consequences of impairments and forced sales.

c. Comparisons between valuations and sale price;

There are a number of cases whereby valuations relied on by the bank and its customer varies considerably. When a bank forecloses on a loan, and sells an asset, it often does so in circumstances where an asset is sold at a price that does not allow the customer to seek redress. A recent case study published by the Competition Policy Review in 2014 noted the additional costs of a bank selling a farming property, which was sold at $8.7 million. However, attached penalties were in excess of $3 million.

The writer believes this may be one of many cases that banks have been able to accumulate unreasonable costs during the selling period.

d. The adequacy of the legal obligations on lenders and external administrators (including s420A of the Corporations Act 2001) to obtain fair market value for the forced sale of property; and

The writer believes that the access to justice by bank customers when they foreclose on a loan precludes them from taking further action to recover damages under s420A of the Corporations Act 2001

e. *any related matters.*

Banking in Australia: Unregulated and Unprotected

Part I

Presents a brief history of recent developments in regulation in the Australian finance industry. Highlights how demands for greater consumer protections with simultaneous pressure for deregulation of the finance sector led to the rise of self-regulation and the Code of Banking Practice.

Part II

Focuses on the Financial Ombudsman Service, highlighting the private company's inability to provide an effective external dispute resolution mechanism, as proscribed by the Code of Banking Practice.

Part III

Evaluates the Code Compliance Monitoring Committee, the body tasked with monitoring the Code of Banking Practice. Describes this organisation's inability to protect consumers from abuse of power by code-subscribing banks.

Part IV

Covers the unfair provisions in standard form contracts. Describes how these contracts entrench the unequal relationship between banks and their small business, farmer, and individual customers.

Part V

Links the weakness of the Code of Banking Practice, the Code Compliance Monitoring Committee, and the Financial Ombudsman Service with systemic flaws in the self-

regulation regime of Australian banks. It asks whether the practices of leading banks constitute criminal behaviour.

PART I

Roadmap to Deception: The Evolution of the Code of Banking Practice, 1993 to 2015.

Consumer allegations of abuse by the Australian banking sector in the 1980s and 1990s led the Federal Government to implement a system of self-regulation in the Australian financial sector. A product of this system, the Code of Banking Practice was born in 1993. The Code was designed to protect consumers and ensure a competitive but fair banking system in Australia.

However, the Code is today not the mechanism that the government's Campbell and Martin reviews envisioned. [redacted]

This chapter presents the [redacted] *evolution of the Code of Banking Practice in Australia from the period 1993 to present.*

A Recent History of Banking Regulation

The 1981 Australian Financial System Inquiry, titled the 'Campbell Report', found that the Australian government was inappropriately intervening in the financial services industry. The report recommended that the government pull back from intervention in the operation of financial markets, and that it should instead implement high prudential structural standards. This - the report found - would help create a competitive but stable financial system.

In particular, the Report found that the increasing range and complexity of financial products and growth of more aggressive selling practices required stronger and nationally uniform consumer protection mechanisms. The report emphasised the high cost to consumers of seeking redress for breaches of these protections, also recommended the creation of industry-based alternative dispute resolution schemes. The inquiry found that

this would give financial institutions flexibility to operate in a free market whilst protecting individuals and small businesses.

The Martin Committee

The Campbell Report's recommendations on consumer protections were not implemented and as the pace of banking deregulation increased in the following decade, customer allegations of abuse by financial institutions mounted. The Federal Government responded by commissioning the 1991 Martin Committee on Banking and Deregulation. In its report, "Pocket Full of Change", the Martin Committee endorsed the findings of the Campbell Review and recommended the creation of "a code of banking practice, contractually enforceable by bank customers and subject to ongoing monitoring".

The Committee also recognised that the cost of holding banks to account for breaches of consumer protections through the court system was prohibitive to bank customers. In response, the committee recommended the creation of alternative dispute resolution schemes that would enable bank customers to have their disputes arbitrated cheaply, quickly, and fairly outside the court system. The result was the creation of the 1993 Code of Banking Practice, (the Code), which came into effect in 1996 and has been subsequently revised three times, most recently in 2013.

The Code

The Code is described by the Australian Bankers' Association (ABA) as the "banking industry's customer charter on best banking practice standards. The Code compels banks to create alternative dispute resolution schemes and all disputes, the Code outlines, are to be investigated.

The Code was purported to be based on a set of practices agree by banks, consumers, and government with the aim to—as outlined in the Preamble to the Code—would:

> *"Promote good banking practice by formalising standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their customers".*

[redacted]

'Viney Review' 2000

In 1999, then-Minister for Financial Services and Regulation, Joe Hockey, commissioned the Treasury Taskforce on Industry Self-Regulation, to provide feedback to government on what constitutes 'best practice' in industry self-regulation. The taskforce analysed Codes of Conduct within various sectors, including the financial sector, with the intention of reducing regulatory burdens on businesses and thus ultimately improving market outcomes for consumers. The Taskforce criticised the Code of Banking Practice as lacking the necessary monitoring and enforcement mechanisms to ensure compliance.

As a result, in May 2000 the Australian Bankers' Association (ABA) appointed Richard Viney to conduct an independent review of the Code. In conducting the process, Mr Viney sought submissions from governmental and industry bodies, as well as consumer representatives, on suggested changes to the Code, before making his final recommendations to the ABA. These recommendations – outlined in the Final Report, released in 2001 – resulted in the new Code being drafted and launched by the ABA in August 2003.

Revised Code

The code was revised in 2003, with David Bell - the CEO of the ABA - claiming that the 'second generation code' would be:

> *"An effective demonstration to the Government that self-regulation works and is a real alternative to the heavy hand of legislation".*

This revision introduced the Code Compliance Monitoring Committee (CCMC), which monitor the code compliance of subscribing banks. The ABA intended for the CCMC to have:

"A very important role, especially when it comes to taking action against a bank... the code is contractually binding, so a regulator might even consider action of its own".

The 2004 Code provided, in clause 34:

(b) "That the CCMC's functions will be:

(i) To monitor our [the banks'] compliance under this Code;

(ii) To investigate, and to make a determination on, any allegation from any person that we have breached this Code...and

(iii) To monitor any other aspects of this Code that are referred to the CCMC by the ABA".

The Code was again revised in 2013. The Code currently purports to provide the consumer with three regulatory services: a code compliance monitor; an internal dispute resolution mechanism; and an external dispute resolution mechanism.

A Binding Code

The General Standard Terms (Annexure B) - a part of standard banking contracts in Australia - sets out in clause 35:

"The relevant provisions of the Code of Banking Practice apply to this facility agreement if you are an individual or small business".

The Facility Agreement—another part of standard banking contracts—acknowledges that the Code is:

"A legally binding contract is created between you and us".

The original 1993 version of the Code prescribed in clause 1.3 that:

"(banks) will be bound by this Code in respect of any Banking Service that Bank commences to provide to the Customer."

This statement was replaced with a statement of the 'voluntary' nature of the Code in 2003. However, ABA director, David Bell, clarified:

> *"The code is a voluntary code in the sense that a bank has a choice whether to adopt it" … Once a bank has adopted the code, it binds the bank contractually to the customer. So, if a bank breaches the code, it has breached its contract to the customer*

Clause 3 of the 2003 Code itself confirms:

> *"If this Code imposes an obligation on us, in addition to obligations applying under a relevant law, we will also comply with this Code except where doing so would lead to a breach of a law."*

In interpreting the 2003 Code as a binding contract upon banks, ABA director David Bell cautioned:

> *"A bank must be sure it is ready to comply with its obligations under the revised code before it adopts it because the code is an enforceable contract between the bank and the customer".*

Indeed, although the National Australia Bank (NAB) has appealed its ruling, the Supreme Court of Victoria recent confirmed that the Code is a legally binding contract between banks and their customers in National Australia Bank Limited v Rice [2015] VSC 10. While the Code has been accused of using ambiguous and misleading definitions of terms, obscuring the banks' obligations under the Code, it appears clear that the Code is contractually binding between banks and their customers.

PART II

The Financial Ombudsman Service: Unable and Unwilling

The Financial Ombudsman Service (FOS), in its role as regulator, has failed to protect consumers from dishonest bank practices.

This section outlines the lack of independence and transparency of the FOS as well the stringent restrictions placed on its arbitration powers.

The Financial Ombudsman Service

As a binding contract upon Australian banks, the Code compels subscribing banks to make external dispute resolution schemes available to customers in addition to internal dispute resolution schemes. The Financial Ombudsman Service (FOS) was created to provide this external service.

FOS, a private business, is the Australian Securities and Investment Commission-approved independent external dispute resolution scheme tasked with providing a forum to resolve consumer complaints or disputes quicker and cheaper than the formal legal system. In many cases the FOS does this acceptably; however, there are continuing issues surrounding the independence of the FOS and its effectiveness in resolving bank customer disputes.

Role of the Financial Institutions

From its inception, the role that Australian banks play in funding, staffing, and setting the Terms of Reference for the FOS have raised serious questions about the private company's independence. The FOS does not disclose to the public that directors can be employed by the very banks it is tasked to regulate and investigate. Indeed, of the nine current FOS board members, four are, or have been, employed by Australian financial institutions. This situation has led to allegations that Australian banks have an unfair influence over the complaints that are put to the FOS. This ultimately compromises the FOS' objectivity and independence.

The Unaccountable Ombudsman

As a private company, the Financial Ombudsman Service Limited is unaccountable for its decisions. As was ruled in Mickovski v Financial Ombudsman Service Limited & Anor [2012] VSCA 185, FOS decisions cannot be subjected to judicial review. As a result, a complainant is left with no avenue for redress even if the FOS rules incorrectly or unfairly in its' arbitration of a dispute. The FOS is an unaccountable private company funded by Australian financial institutions, lacking transparency and independence. ASIC, which

refers bank complaints to the FOS, has abrogated its regulatory role to a private company funded and staffed by the Australian financial institutions.

Financial Limitations

As outlined in its Terms of Reference, the FOS is restricted to assessing disputes in which the applicant's claim is $500,000 or less, although this amount is increased for a credit facility of up to $2,000,000. As a result, the loans of many small businesses, farmers, and individual customers - especially concerning real estate mortgages and leases—are prevented from accessing the services of the FOS.

In addition, where the FOS does handle a dispute, it is limited to awarding compensation of $309,000 or less. As reflected in the 2014 Economics References Committee's review of ASIC, the monetary limits placed on cases that can be considered and compensation that can be awarded is insufficient. Through the limitations placed on it by the banks, FOS is unable to ensure consumer protections in Australia.

The FOS is prevented from ruling on all but the smallest of cases and its decisions, regardless of their accuracy or fairness, cannot be challenged. The Financial Ombudsman Service Limited fails to protect consumers against the abuse of power by Australian banks. It is regulation of the banks, by the banks, for the banks.

PART III

The Code Compliance Monitors: Toothless Tigers

The CCMC, the second pillar of Australia's financial regulatory system, is severely restricted by a hidden constitution, which both limits its authority to investigate complaints, and ultimately deceives and misleads bank customers.

This section highlights that even in the limited cases in which the CCMC has the authority to act, its authority is so restricted as to be largely ineffectual.

The Code Compliance Monitoring Committee

In 1999, the Treasury-commissioned Self-Regulation Task Force found that the Code of Banking Practice lacked the monitoring and enforcement mechanisms that made give

force to other industry Codes—such as those in the health and broadcasting sectors. This concern was further explored during submissions by both government and industry bodies to the Viney Review in 2000.

In its submission to the Viney Review, the Joint Consumer Submission suggested that an independent external body be tasked with undertaking compliance monitoring. ASIC stated in a similar vein that:

> *"This review should consider establishing an independent regime for investigating contraventions and imposing appropriate sanctions".*

The Australian Bankers' Association expressed their preference for:

> *"An independent, well-resourced code-monitoring agency with a capacity to impose a range of effective sanctions for code breaches"*

The NSW Government agreed, submitting that:

> *"It is important that the monitoring and reporting on the Banking Code of Practice is carried out by an organisation with experience in consumer banking issues, and which is seen to be independent of the banks. ASIC is one such agency. Compliance with the Code should be able to be independently double-checked, and not rely entirely on the bank's self-assessment".*

The Australian Consumers' Association criticised the 1993 version of the Code, stating:

> *"The lack of sanctions in the Banking Code presents a fundamental weakness and raises doubts about the credibility of the Code for both industry participants and consumers… A range of sanctions, underpinned by regulatory mechanisms, is essential for Code credibility".*

In the face of this criticism, the CCMC was formed, appointed and funded by subscribing banks and the banking industry body, the Australian Bankers' Association. The CCMC was intended to investigate and 'name and shame' banks that breached the Code. However, despite promises otherwise, the CCMC does not protect consumers as its ability to investigate and impose sanctions on banks for code breaches is severely limited

A Dismal Record

In 2012, The Australian reported that 2.5 million complaints had been made under the Code of Banking Practice between 2004 and 2012. Of these, only 200 complaints were fully investigated. While it is unlikely that all 2.5 million complaints would have involved legitimate instances of bank breaches, a regulatory system that investigates such a minute fraction of complaints has clearly failed.

The CCMC, in its 2014 annual report, states that in the 2013-2014 financial year, the 18 banks that adopted the Code investigated 1,099,272 disputes, under their internal dispute resolution schemes. Of these disputes, the banks reported to have found that they had breached the Code only 5,762 times. This number is simply too low to warrant the view that the banking regulatory system in Australia adequately protects its customers.

The lack of protection afforded to small businesses and individuals can be further blamed on two main factors; firstly, bank customers are not adequately informed of their right to take complaints to the CCMC, and secondly, the constitution of the CCMC, hidden from the public, seriously restricts the cases which the CCMC can investigate.

An Unknown Monitor

The CCMC, in its 2014 Annual Report, stated:

> *"The small number of allegations received from consumers and small businesses for investigation each year remains a concern".*

Of the 1,093,510 disputes lodged with code-subscribing banks, only 42 were referred to the CCMC. Meanwhile, the CCMC reports that there were only 4,854 visitors to its website in 2013-14. With regard to these figures, it is clear that the CCMC and its compliance functions lack public awareness.

One of the major causes of this is that the Code does not require banks to inform customers of the CCMC's existence, or of their right to lodge breaches of the Code and complaints with the CCMC. As a result, the major banks in Australia only publicise customers' right to

lodge complaints with the CCMC in an extremely minimal way. It is of no surprise, then, that the CCMC does not receive more complaints.

The CCMC's Wicked Constitution

Clause 34(b)(ii) of the Code notes that CCMC's functions are:

> *"To investigate, and to make a determination on, any allegation from any person that we have breached this Code.*

Although this clause seems to require the CCMC to investigate any and all allegations that a bank has breached the Code, the CCMC is also bound by a 'wicked' constitution placed upon it by the ABA in 2004.

This constitution was first made available to the public in until July 2012, and then it was only to a group calling itself the JMA Parties. The constitution is still not readily provided to consumers. Under it, the CCMC's powers to investigate are seriously restricted.

Clause 8.1 of the Constitution restricts the CCMC from investigating a dispute, if:

> *(b) (the CCMC) is, or becomes, aware that the complaint:*
>
> *(i) is being, or will be, heard…by another forum.*

Thus, where a dispute is, or will be, heard in another 'forum', the CCMC no longer has the power—or the responsibility—to consider the complaint.

For the purposes of Clause 8.1, a 'forum' is classified as:

> *"Any court, tribunal, arbitrator, mediator, independent conciliation body, dispute resolution body, complaint resolution scheme (including, for the avoidance of doubt, the BFSO scheme) or statutory Ombudsman, in any jurisdiction.*

This means, that where a bank chooses to escalate a complaint to another 'forum', the consumer is stripped of the right to have the matter referred to the CCMC. Further, as the constitution is not disclosed to the customer, they surrender this right without being informed that this is the case.

Complainants are not given any explanation as to why the CCMC will not investigate a complaint, other than that it has a 'conflict of interest'.

Further Restrictions

Further restrictions placed on the CCMC by its constitution were highlighted in its submission to the independent review of the Code in 2007-08.

Specifically, the CCMC members revealed that its ability to "name and shame" banks who breach the Code is limited, since it must receive approval from the ABA Chair before making any public statements, other than in its annual report. The CCMC also noted it can only name banks which have repeatedly breached the Code and failed to rectify issues raised by the CCMC. This significantly undermines the core role of the CCMC as envisioned by the Martin Review.

The CCMC has also questioned the authority the ABA Chair has over its funding, and the fact that – due to budget constraints – its annual reports have very limited circulation.

In its submission, the CCMC ultimately calls its constitution "problematic" and the governance arrangements "inadequate". However, following publication of the 2007-08 review these opinions outlined in its submission were not addressed, causing the three members of the CCMC to resign shortly after its release.

A Constitutions Becomes a Mandate

In 2013, the 'CCMC Mandate' replaced the constitution. Unlike the constitution, the mandate has been made publicly available. Little appears to have changed however, and the CCMC is still restricted in investigating complaints.

In fact, as outlined in the CCMC's 2014 annual report, the mandate further restricts the CCMC by denying it the authority to investigate those complaints involving initial clauses of the Code. The current version of the Code appears to be an attempt at 'cleaning up' the dishonest period of banking in the light of sustained criticism.

Regulatory Failure

The major Australian banks claim that they are bound by a 'world class' Code, monitored by the CCMC, supported by the FOS, and approved by ASIC. It is evident, however, that the Code of Banking Practices is unclear and ambiguous. The Code Compliance Monitoring Committee is unknown, unused, and ineffective, severely restricted by a hidden constitution and damningly criticised by its own staff. The Financial Ombudsman Service Limited is an unaccountable, bank-reliant, private company that is limited by its Terms of Reference to the detriment of small businesses, farmers, and individual customers.

That ASIC has approved of this arrangement is indicative of the degree to which banking regulation in Australia is a bank-run affair. Banks set the rules of their own game and have the financial resources to outgun any legal efforts made by consumers to bring the banks to account for their abuse of power.

Both the Campbell Review and Martin Committee endorsed deregulation of financial markets on the precondition that consumer protections were put in place to protect individuals and small business.

The Martin Committee stated that government must ensure:

> *"Adequacy of redress available to [consumers] in cases of dispute with their bank"*

However, this has clearly not been the case.

As the now-Federal Attorney-General, the Hon. George Brandis MP, stated:

> *"[U]nless you are a millionaire or a pauper, the cost of going to court to protect your rights is beyond you… the costs of legal representation an court fees mean that ordinary Australians are forced either to abandon their legitimate claims or enter the minefield of self-representation."*

By limiting alternative dispute resolution mechanisms and the power of compliance monitors, the Australian banks have denied individuals, farmers, and small businesses necessary consumer protections. Banking regulation in Australia has failed, despite recommendations made in both the Campbell Review and Martin Committee. Both reviews endorsed stronger alternatives to court action for breaches of the Code. However,

under the present self-regulation system, there is no alternative for the majority of bank customers than to go to court to bring banks to account.

PART IV

Unfair Contracts

Standard form contracts in Australia are unfair: with them banks abuse their disproportionate power with small businesses, farmers, and individual customers unable to seek redress.

This chapter outlines these unfair contract terms.

Retaining Unfair Contracts

Beyond the issues raised by the restrictions placed on the FOS and the CCMC, significant problems exist in the terms set out by standard form banking contracts. These contracts contain numerous areas of concern, outlined in the submissions received by the 2014 Competition Policy Review, commissioned by Treasury. In particular – as has received significant coverage by the media – serious issues exist with regards to 'constructive default', which banks can use to deliberately engineer a customer's default. Banks do this by lowering their assessed value of a security, thereby raising the loan-to-value ratio and impairing the loan.

This concern arises due to the definition of 'default' and the banks' ability to conduct their own property valuations under the General Standard Terms (Annexure B).

Section 9.1 of the General Standard Terms (Annexure B) states that:

> *"We [the bank] may obtain a valuation report of any secured property at any time. You must pay us all costs in connection with the valuation".*

Section 9.4 states:

> *"Any report we obtain from the valuer, investigator or consultant is for our use only…You cannot sue us, the valuer, investigator or consultant if the report is wrong."*

In regard to 'default', the General Standard Terms (Annexure B) states in section 10:

> *"You are in default if: (k) in our opinion, the value of the secured property materially decreases from its value at the date of this facility agreement or it becomes less saleable than its saleability at the date of this facility agreement."*

Where a customer is in default, the General Standard Terms (Annexure B) provides in section 11.1:

> *"(a) we [the bank] no longer need to provide any facility; and*
>
> *(b) the sum of the total amount owing for all facilities is payable on demand."*

As a result, Australian banks are legally allowed to re-value a secured property at the customer's expense. If the valuation shows that the secured property has fallen in value since the loan was agreed, then the bank has the right to default the customer and demand full payment of all amounts owing. This is known as a 'non-monetary default'. As a result, even if a customer has made all repayments on time and in full, a bank has the right to call in its loan if the "saleability" of the held security falls at any time below its initial level. The consumer cannot challenge the default, nor has the right to challenge the valuation on which the bank has relied. This is the case even where the valuation is wrong, as outlined in section 9.4.

Furthermore, where a bank defaults a loan, leading to the forced sale of secured property, numerous cases report property being sold at values far below the valuations. In particular, Australian banks have been accused of selling farms in default during periods of drought, resulting in sale prices that do not reflect the true value of the property.

The 2014 Financial System Inquiry, the Murray Review, raised these issues. Recommendation 34 of the review called on government to extend unfair contract term protections to small businesses, and also "encourages the banking industry to adjust its code of practice to address non-monetary default covenants". The review suggests that the Code be expanded to require banks to give borrowers "reasonable time" to obtain alternative financing if the bank intends to enforce a non-monetary default.

Even with these changes, it is clear that with their standard form contracts, the major Australian banks are abusing their power against customers. Small businesses, farmers, and individual customers are disadvantaged by their unequal relationship with the banks, and do are not protected by contracts with such unfair terms.

PART V – A Complicit Government

Despite the various independent reviews both conducted on behalf of, and submitted to, government on the self-regulated system of banking in Australia, state and federal governments have failed to act on the recommendations made.

This section describes how in failing to address the key problems with self-regulated banking in Australia, the government has been complicit in a range of unconscionable practices.

Failure of Self-Regulation

Whether looking at banking regulation, disclosure, or standard form contracts, the self-regulatory system in Australia for the finance industry has failed. Governments or all political persuasions, both state and federal, have not adequately protected consumers

[redacted]

The Murray Review

In 2014, the Financial Systems Inquiry (the Murray Review) outlined severe problems with the current banking system in Australia. Many of the review's subsequent recommendations concerned inadequacies in the self-regulatory system, recommending the government act to strengthen consumer protections. In particular, 'non-disclosure' and regulatory weakness were key themes of Recommendations 21 and 22.

Non-Disclosure and Banking Regulation

'Non-disclosure' - so states the Murray Review - and the danger arising from consumers committing to contracts "they do not fully understand" are critical issues in Australian banking. Recommendation 21 criticised the existing regulatory framework for relying too

heavily on disclosure by banks and banks providing adequate financial advice to consumers.

The major Australian banks clearly did not fully disclose the nature of the self-regulatory system to customers. The CCMC largely unknown by consumers and is severely restricted in its investigations and censuring powers by a constitution only recently made public after a decade of secrecy. The FOS is purported to be an independent company when it is, in fact, a private company run, staffed, and funded by the major Australian banks. The Code is filled with ambiguous and unclear terms and definitions despite its commitment to 'plain language'. Consumers falsely believe they are protected from banks abusing their power.

In order to increase this accountability, Recommendation 22 of the review suggested the introduction of 'product intervention power', by amending the law to enhance ASIC's 'regulatory toolkit' where there is risk of significant consumer detriment. According to the Murray Review, ASIC lacks lack the 'intervention power' needed "to reduce significant detriment arising from consumers buying financial products they do not understand". To counter this, the inquiry recommended:

> *"Reducing the risk of significant detriment to consumers with a new power to allow for more timely and targeted intervention [by regulators]".*

The inquiry further suggested that government amend the law in order to ensure that regulators can "enforce action against conduct causing consumer detriment" before a "demonstrated or suspected breach of the law" has occurred. Such amendments would give regulators preventive powers under government legislation, as opposed to this intervention power merely being afforded to ASIC following suspected breaches of the Code.

The Murray Review further noted that while the conduct of financial institutions that causes 'significant consumer detriment' may be systemic, ASIC is only able to assess cases on a 'firm-by-firm basis'. This significantly limits the powers of ASIC, as one of the major industry regulators.

The Review further encouraged increased regulator accountability through the creation of a new 'Financial Regulator Assessment Board', designed:

> *"To advise Government annually on how financial regulators have implemented their mandates".*

This formal mechanism would allow government:

> *"To receive annual independent advice on regulator performance and strengthen the accountability framework governing Australia's financial sector regulators".*

In turn, the Review's recommendations would increase the accountability of both the financial institutions and their regulators, thus insuring accountability at a more systemic level.

Government Inaction

These recommendations clearly resonate with the current self-regulatory system of the finance sector. However, despite these recommendations, the government and regulators are yet to adequately require banks to protect the rights of their customers in the manner recommended more than 30 years ago with the Campbell Report. Governments, both federal and state, have failed to protect Australian bank customers.

Indeed, despite the apparent inadequacy of ASIC, the Australian state governments agreed to reduce regulatory powers against banks by transferring the responsibilities of state-based regulators to federal regulators. In NSW this result in the NSW Fair Trading regulator having its authority over the finance industry passed on to ASIC. Whether through a lack of understanding or concern, the Australian State Governments have been complicit in creation of the regulatory system so strongly criticised by the Murray Review.

Extending Unfair Contract Term Provisions

In accordance with the 2014 Murray Review, Federal Treasury recently released its proposed extension to existing unfair contract term provisions to include small businesses as well as individual consumers.

However, the Tasmanian Small Business Council (TSBC), in its submission in relation to the proposed extension, writes:

> *"The proposed changes, in the view of the Small Business Council and TSBC, are insufficient to address the issues that have arisen from the misuse of market power by large businesses", i.e. banks.*

Despite "such misuses by large business and financial institutions" being widely reported in the media, the proposed changes are simply not adequate:

> *"The proposed amendments leave small businesses and farmers at the mercy of the courts, which, according to the 2001 Martin Committee Review, favour large financial institutions due to their vastly superior resources."*

Thus, while appearing to act on the recommendations made in the

Murray review by amending the legislation, there are two major limitations placed on the definition of "small businesses", which mean that government still fails to protect small businesses.

Firstly is the fact that the proposed legislation:

> *"Restricts the definition of a small business to such an extent that the unfair contract term protections will cover only the smallest contracts of the smallest businesses."*

This is done by introducing financial limits on the ASIC Act's definition of small business contracts, to include only those contracts of $100,000 to $250,000. This means that mortgages, most leases, and the vast majority of farming contracts in Australia will not be given the necessary protection by the proposed legislation changes, as recommended in the Murray Review.

Secondly, is the limitation placed on the definition of small businesses to mean those businesses that employ less than 20 people. This, the TSBC believes, "fails to take account of the nature of small businesses in Australia", and therefore does not protect the majority of small businesses many of which employ more than this amount on a casual basis.

By significantly narrowing the definition of "small businesses", the proposed extension of unfair contract term protections to small businesses in fact does very little in actually providing much-needed protection for small businesses and individuals. Instead, the changes are an attempt by the government to appear as though addressing those problems identified in the review, without actually providing the protection recommended by the Murray Review

Wilkie Bill 2012

Despite widespread government inaction in the face of banking abuses, there have been some attempts at reforming the bank regulatory system. The Wilkie Bill, formally the Banking Amendment (Banking Code of Conduct) Bill 2012, proposed a number of legislative changes to the Banking Act 1959, aiming to change the nature of banking self-regulation in Australia. The Bill, if it had been passed, would enshrine into legislation the promises made under the Code, formally holding banks to account for breaches. Among the most important clauses in the Bill is section 36A(1), which would insert into the Banking Act the stipulation:

> *(1) "The Minister must, by legislative instrument, make the Banking Code of Conduct (the Code)."*

Further, section 36B would compel the Australian Prudential Regulation Authority to handle customer complaints, where a bank "has failed to comply with the Code in dealing with their customers". This responsibility was outline in section 36B(3):

> *(1) "APRA **must** accept the complaint if APRA is satisfied, on evidence provided by the customer:*
>
> *(a) that the ADI could have failed to comply with the Code; and*
>
> *(b) that the customer has taken reasonable steps to:*
>
> *(i) bring the failure to the attention of the ADI; and*
>
> *(ii) resolve with the ADI any matters arising from the failure; and*

(c) that one or more matters arising from the failure might not have been properly resolved."

Once APRA accepted the complaint, it would be further bound to investigate the matter under section 36C. Section 36D of the Bill would provide APRA with 'name and shame' powers far beyond those currently held by the CCMC. It would allow APRA to publicly name a bank that has failed to comply with the Code, by publishing the business name of the bank:

(a) "on a website managed by APRA; and

(b) so that the publication is available throughout Australia in a newspaper".

The Bill would further protect the Code from amendments and alterations by banks in pursuing their interests, as section 36F would prevent the Minister by law from amending the Code:

"Without consulting persons or bodies that the Minister is satisfied represent the majority of:

(a) Australian customers of ADIs [banks], other than business customers;

(b) Australian small business customers of ADIs;

(c) ADIs."

The Code would have to be reviewed "at least every 3 years". In doing so, this would put the onus of enforcement on an independent statutory body, rather than the FOS - a private company - or the CCMC - an ineffective tool severely restricted the Australian Bankers' Association.

Both state and federal governments have accepted - particularly following the Financial Systems Inquiry in 2014 - that the self-regulatory system in Australia does not sufficiently protect consumers and provide avenues for redress for breaches under the Code. However, successive governments continue to fail to introduce the necessary legislative amendments, such as the Wilkie Bill, that would protect the rights of individuals and small business.

In light of these facts, it is clear that the state and federal governments, the banking regulators, as well as the FOS and CCMC, have all played a part in the misleading and deceptive conduct of the major banks against their customers.

By failing to provide adequate protection either under legislation or by the state and federal regulatory bodies, and by failing to address issues regarding penalties and avenues for redress for breaches of the Code, the government has assisted in creating a code of practice that provides merely the facade of consumer protection. All the while, the leading banks continue to profit at the expense of their small business, farmers, and individual consumers from dishonest and unconscionable practices.

Conclusions

The [redacted] Nature of Self-Regulation:

This paper has explained the need for reforms required to ensure a more fair and just banking system in Australia.

Reforms

There is a range of essential reforms that are vital to ensuring that the self-regulated banking system in Australia digresses from the dishonest period of banking practices that has plagued the last decade.

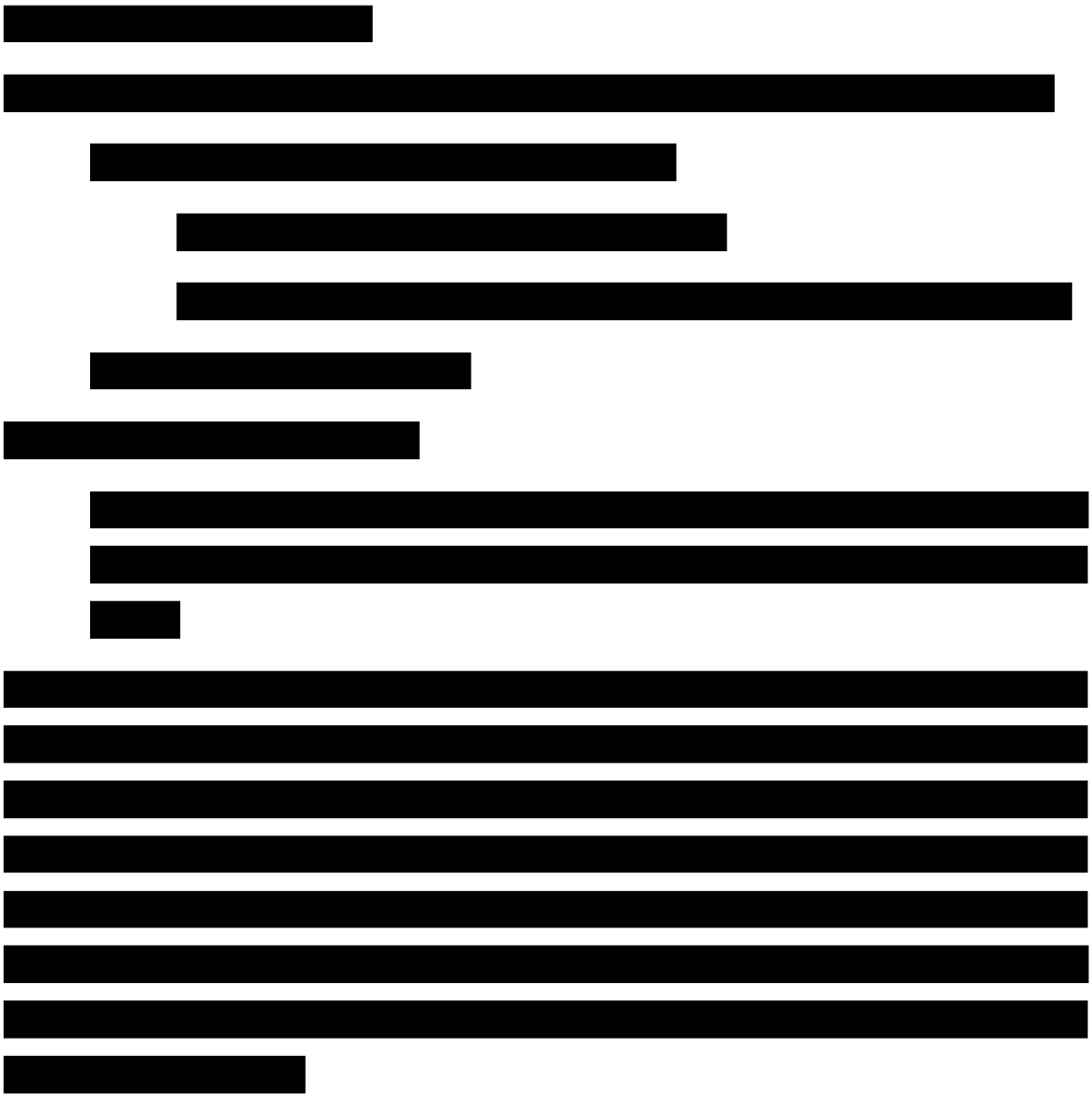
Firstly, it is essential that legislation like the Wilkie Bill (2012) be re-submitted to parliament and enacted into law, to ensure individuals, small businesses and farmers are afforded protection under Australian law.

Secondly, effective regulation needs to be introduced by the current industry regulators, including ASIC, APRA, and Treasury, to ensure that there are appropriate checks and balances in place to monitor the conduct of banks towards their customers.

Thirdly, in implementing effective legislation and regulation, banks that act dishonestly must face punishment, by way of enforceable penalties for breaches of the Code. As stated by Minister for Environment Greg Hunt, Australians should have the right to bring those abusing their power to some government authority.

Fourthly, the internal and external dispute resolution mechanisms of the Australian banks should be reformed so that small businesses, farmers, and individual customers can have complaints arbitrated quickly, cheaply, and fairly. The concerns outlined by the Martin Committee that the judicial system is unfairly weighted towards leading banks - whose resources far outweigh small businesses, farmers, and individuals—is as true today as in 1991.

Lastly, it is essential that the Code of Banking Practice be endorsed and agreed upon not just by the major banks and the CCMC and FOS, but also the community, to restore the balance between banks and customers



In 1991, the Martin Committee issued a general recommendation on banks, to:

"Provide opportunity for customers to report suspicions of fraud and corruption".

Not only have the state and federal governments, regulators—both public and bunk-funded—and the banks failed to take stock of the Martin Committee, but, indeed, all have been party to the deceptive and unconscionable banking system that fails to protect small businesses, farmers, and individuals.

It would seem only a matter of time before there is a shift away from banks that rely in Unfair Contract Term provisions.

Government, regulators, and banks' misconduct during the period of Treasurer and Prime Minister Scott Morrison

On 15 September 2015, Malcolm Turnbull was appointed Prime Minister. He also had an opportunity to rectify [redacted] contemporary codes. [redacted] neither took any action to protect small businesses and farmers. There were a million complaints each year when Turnbull and Scott Morrison were responsible for the banking sector, and both knew or should have known the Code was misleading.

In the 5 years prior to 2017, subscribing banks had received 5,518,039 complaints, of which 286,342 required financial difficulties assistance and 97,059 had complaints that were not resolved in 5 standard days.

There was considerable debate by Prime Minister Turnbull and Treasurer Scott Morrison on behalf of the Coalition and Labor and the Nationals who believed the banking Royal Commission was essential. There were also concerns by Scott Morrison and Treasury's Secretary's John Fraser that favoured their preferred candidate for the new ABA Chief Executive which concerned the Treasurer.

On 13 June 2017, Christopher Doogan AM filed a submission with the Senate Economics References Committee - inquiry into consumer protection in the banking, insurance, and financial sector. He said:

The Code is a voluntary Code of conduct which sets standards of good banking practice for subscribing banks to follow when dealing with persons who are, or who may become, an individual or small business customer of a Code-subscribing bank, or a guarantor.

The Code and Mandate were developed and published by the ABA. Once a bank subscribes to the Code it becomes mandatory for that bank to comply with the Code and the obligations under the Code are incorporated into the contracts between the bank and those customers to whom the Code applies.

At about this time, several Nationals had advised the government they were going to have a Parliamentary Inquiry into dishonest banking practices and neither Turnbull nor Morrison was going to allow this to happen.

The next day, an article titled *'Plan to let APRA fire bankers'* by Michael Roddan published in The Australian stated:

The federal government has proposed giving the prudential regulator the power to fire banking executives without going through the Federal Court as part of new rules to hold bankers to account.

In a Treasury consultation paper for the new Banking Executive Accountability Regime, released yesterday, the government floated plans to give the Australian Prudential Regulation Auth-ority the power to establish "new expectations" for banking executives and their remuneration.

The measures were announced in the budget in May, following recommendations from the government's parliamentary inquiry into the four major banks. Liberal MP David Coleman, who chaired the inquiry, recommended accountability rules like those that govern banking conduct in Britain.

The lenders have been given three weeks to respond to the consultation paper, which proposes that banks must register prospective executives and directors with APRA and provide the regulator with "maps of their roles and responsibilities". Executives in bank subsidiaries that operate in non-banking sectors and foreign sub-sidiaries of the banks will also fall under the new rules.

The regime will give APRA stronger powers to remove direct-ors and executives from the insti-tutions it regulates, subject to review. Currently, the regulator must go through the Federal Court and appeals processes.

The paper has said expectations of lenders and their directors and executives "will be specified and where these expectations are not met "there will be civil penalties" and APRA will have power to impose penalties on banks not "appropriately monitoring" the suitability of executives.

The list of accountable" bankers will cover the chairs of board committees and managers re-sponsible for areas with a "significant" share of revenue, profits or assets. I twill apply to bankers with 'significant influence over con-duct and behaviour' of workers.

Acting Treasurer Kelly O'Dwyer said it was "imperative Australians have trust and confidence" in the banking system.

'Banks must operate at the highest standards and meet the needs and expectations of con-sumers and businesses,' Ms O'Dwyer said. 'But recurring scandals have shown that this is not always the case.

'It is important that there are mechanisms in place to deter poor behaviour and ensure that banks are held to account where they fail to meet the standards expected of them.'

Under the new powers, vari-able remuneration for senior executives will be deferred for at least four years and APRA will have stronger powers to require banks to review and adjust remuneration policies. Feedback has been requested on whether shifting from variable to base remuneration would be problematic and affect risk-taking.

'The BEAR should make it easier to hold senior individuals to account for their behaviour in car-rying out their responsibilities,' the paper said.

Treasury is consulting with APRA to ensure the new regime does not conflict with the regulator's existing powers.

The 2016 – 2017 CCMC Annual Report states:

*This year, banks reported that they received **1,205,523 complaints**, 1% more than in the previous financial year. Notwithstanding this slight increase, we were pleased to see banks investing in staff to resolve complaints as quickly as possible – 92% of the complaints reported were closed within the first 5 days. Following this year's Code review, the Code is set to gain approval from Australian Securities and Investments Commission (ASIC) toward the end of 2017 or early 2018. With this, consumers can have greater confidence that the Code sets high standards and meets the regulator's benchmarks for monitoring and enforcement.*

The CCMC's achievements this year would not have been possible without the direction and advice of my fellow CCMC members, Sharon Projekt and Gordon Renouf, who have again fulfilled their respective roles as industry and consumer and small business representative with vigour. The staff continue to improve the efficiency and impact of our work, providing a valuable service to the banking industry and the community.

Under the Code, banks must assess applications for credit using the care and skill of a diligent and prudent banker.

Ensuring that customers can repay debt without serious financial difficulty is a fundamental part of responsible lending. To assess whether a customer can repay unsecured credit, banks look at the customer's current income and expenditure. Responding to the CCMC's inquiry, banks reported they generally consider a debt serviceable as long as income is greater than expenditure.

On 9 November 2017, Jemima Whyte published an article '***Can Australian Bankers' Association CEO Anna Bligh persuade us to trust banks?***' stating:

Even Anna Bligh's staunchest supporters were stunned when the former Queensland premier, who is still a member of the Labor Party, aligned herself with – or worse, put herself at the beck and call of – what many consider a slippery industry: the banks.

"I think it's good therapy for her," says former Queensland premier and Bligh's predecessor, Peter Beattie.

"I've seen people go through enormous trauma when they have lost elections. Good for her, and it will be good for the banks if, with a bit of luck, they listen to her.

"People don't understand how hard it is to go through what she went through. The fact she was able to pick herself up shows incredible character and strength."

Bligh's explosive re-entry into the high-profile world of politics and big business comes at a time when banks have never, in her words, been so politically contested.

It followed a few low-profile years after a devastating defeat as premier. In this time, Bligh moved to Sydney, battled cancer, wrote a book, and spent more than two years at the helm of not-for-profit YWCA NSW.

But when recruiter Heidrick & Struggles approached her in November 2016 to see if she'd like to run the Australian Bankers' Association, the industry's peak lobby group, she quickly saw the appeal, even if she didn't expect to take the job.

"If you put aside the Australian government, the Australian banking and finance system pulls some of the biggest economic levers in the country," she says. "Not only in the broader macro-economy, but in the lives and wellbeing of every Australian. That means getting them right really matters.

"The challenge for the banks is to re-earn the trust of Australians, and there's no easy way out of this. If you want to earn trust you have to be trustworthy, and that means changing some of the things that have become endemic in the industry. Banking has not, either globally or locally, lived up to the expectations of the community and customers."

So how did Bligh convince herself the bank chiefs really did want someone to shake things up? How was she sure that an industry that has spent decades talking about putting the customer first and culture change wanted to do it this time around?

"I took the fact that they [the banks] were interested in putting me in the position as the strongest possible indicator that they were ready for change," she says. "Whatever people think about me, I don't think people think I am a status quo kind of person."

Later in the interview, she tells BOSS: "I didn't quite anticipate the partisan nature of it, but I'm completely unworried by that. The banking industry right now is highly politically contested."

More scandals

Bligh, 57, signed on for the out-of-the-box role knowing there were plenty of problems in the sector: the fallout from financial planning scandals was still being felt; ASIC was investigating major banks for manipulating the bank bill swap rate and failing to properly assess borrowers' income. New regulation was rolling in almost by the day, as the Opposition calls for a royal commission into the banking sector were growing louder.

She took her time before throwing her hat in the ring, meeting with National Australia Bank chief executive Andrew Thorburn and Bendigo and Adelaide Bank's Mike Hirst before seriously considering the role. After Christmas she had met ("eyeballing") all the bank chiefs.

"None of them, not one of them, tried to gild the lily or whitewash any of the reality. I felt I was dealing with people who really clearly, and viscerally, understood they were leading the industry at a particular moment in history, and they wanted to treat it as an opportunity to make the industry a better one."

Bligh understands how her appointment as ABA chief executive signals a fresh approach, but even she admits she did not anticipate the political backlash that accompanied the announcement in February.

"I did anticipate there would be a lot of raised eyebrows, because I do accept that it's not necessarily a role that people would have thought ..." she says, before checking herself and moving on to talk about the appeal of the challenge and the skills she brings from her political and public roles.

Bligh describes the local banks as being in an unprecedented position in terms of public and political scrutiny, exacerbated by specific scandals and poor customer experience, but also part of a broader trend of declining trust in big business and a global backlash against banks, typified by Occupy Wall Street and fallout from the global financial crisis.

Banking insiders who were in Canberra on the day Bligh's new role was announced in February describe the mood at Treasurer Scott Morrison's office as icy.

The appointment was taken as a signal the banks were betting against a Coalition win at the next election, despite the government's efforts to fend off Labor's calls for a banking royal commission. The strategy of letting the politicians know of the appointment at the last minute wasn't considered helpful, either.

Morrison distanced himself quickly from the ABA's new appointment: on February 19, just after he'd finished a round of meetings with bank chairmen, he said he would continue to deal with the ABA professionally, but made it clear his preference was to deal directly with the banks. He would also continue to meet with bank CEOs, he added.

Morrison was also incensed that one of his own staffers, Sasha Grebe, had been overlooked for the ABA's leadership role.

The appointment was so incendiary that some even speculated Bligh's appointment was behind the government's decision to blindside the banks with its $6.2 billion bank tax in the May federal budget.

The federal budget, by any measure, was a baptism of fire for Bligh, who had started just a month earlier. The banks were hit with a barrage of reforms: bank executives faced drastic curbs on pay and bonuses, and greater accountability; competition in banking was referred to the Productivity Commission; banks were forced to provide their data to competitors; and APRA was pushed to encourage more start-up banks to compete in the sector.

And of course, the ultimate hit: the bank tax.

Early on budget day, Bligh sketched out a rough plan of attack with bank chiefs. The Australian Financial Review had reported a bank tax might be in the budget and Treasury had scheduled phone calls with the bank chiefs after the budget. She was in Parliament House on budget night and says she had two thoughts when the tax was revealed.

"I knew the banks were in big trouble. I was shocked at the size of the tax," she says.

Within the hour after budget lock-up, she'd spoken to all the banks impacted by the tax, been on Sky News and the ABC and had issued a media release declaring: "A political tax grab to cover a budget black hole."

"This was not a straightforward issue for the ABA," she says, noting that some smaller banks saw it as a levelling of the playing field.

"Having been at the pointy end of a government, the higher the octane, the bigger the issue, the stronger the pressure, the more complex the problem, the better it is [for Bligh]," says Andrew Fraser, Bligh's former treasurer. "You've got to have a tremendous capacity, and Anna has capacity that seemingly knows no bounds."

Equally, Fraser, who has also pursued a high-profile career outside of politics, is critical of the reaction Bligh faced. "The hyper-partisan nature of politics today needs to be met with a more mature approach across the economy."

Quick win

Westpac chief Brian Hartzer – who says Bligh is doing a great job – puts the government's reasoning for the shock bank tax down to just about everything other than the new ABA's chief. "Since banks were on the nose, there was a perception that this would receive popular support and would contribute to general revenue for the government when it was having trouble getting their other spending cuts through," Hartzer says.

When asked about her relationship with the government, Bligh's words are equally careful.

"I think it's very important in my role that I'm touching base with the senior decision-makers in Canberra on a very regular basis. I don't have any problem in that regard."

Bligh says she has met with Treasurer Morrison at least five times and spoken to him on the phone a few times since her February appointment. She is in reasonably regular contact with his chief of staff, Phil Gaetjens. Bligh adds she's had a similar number of meetings with shadow treasurer Chris Bowen.

As a comparison, Bligh's predecessor, Steven Münchenberg, was likely to have met with the Treasurer that many times in a year.

The industry needs strong links to both sides of politics, she says. "Ultimately, some of the things the industry wants to achieve will require regulation by the government, and at some point, in a robust democracy like Australia, governments change so you need good relationships on all sides to ensure we get the best regulatory environment.

"It's a pretty rough-and-tumble game in Canberra at the moment."

And it hasn't slowed down. Bligh describes some moments as drinking from a fire hydrant.

Political taint

One banking executive notes that Bligh was – understandably – a little less high profile than usual around the $370 million South Australian bank tax. It coincided with her wedding to Anthony Bertini two days later, added proof that this job – like that of a politician – is relentless.

She's more than made up for that since, and the significance of a former Labor premier doing battle with a current one hasn't been lost on many wondering if it is possible to ever shake the political taint in this role.

While the proposed tax isn't expected to pass the state's upper house, it's a significant policy test as the banks and ABA want to ensure the idea of a state tax is killed off as quickly as possible.

ANZ chairman David Gonski publicly received most of the credit for watering down the Banking Executive Accountability Regime (BEAR) reforms, and Bligh says she sees it as an obligation for all bank chairmen and CEOs to build and use their Canberra relationships.

For all the talk about the industry pulling together to improve its image, the reality is every bank puts themselves first. And at the moment, most of the majors are doing their best to stand apart from CBA, which they privately blame for adding to the political heat; and there's always to-and-fro between the big banks and the smaller regional players.

It's a delicate balance: the banks need to unite around industry issues such as money-laundering and data sharing, while restoring their own credibility and trust with customers.

The banks may have fallen into line around scrapping ATM fees but they were furious when CBA moved first (they "needed a quick win" said one senior banker) and the rest raced to catch up. It could have been done differently.

The ABA, banks and others had been discussing forming a joint venture vehicle to manage ATM fees, where economies of scale would pay for some, at least, of the reduced fees. Discussions continue on that front.

Bligh knows the banks are still in the thick of it. "I feel I'm in the middle of an industry that has begun a substantial reset," she says. "Right now, the world is living through the single biggest transfer of power from institutions to customers, from large commercial corporates to their consumers, from the political world to constituents, and that transfer of power is never going to be reversed."

Tapping into that view of customers will be critical in the ABA role.

"[Politicians] have started talking about banks because they've had constituents come and talk to them about unacceptable experiences," she says. "They're talking about banks because they've seen headlines about unacceptable conduct that is undesirable and, ultimately, when politicians continue to see those things happening, they react. The politically contested nature of it is, in my view, driven entirely by politicians' perception of community and public views."

Fraser says Bligh has the best emotional intelligence of anyone he knows, adding: "She's like a water diviner of opinion. I've never seen polling or anything that mitigated against what Anna knew instinctively."

It's just the start: Bligh is overhauling the ABA's structures and systems and is advertising for more people to fill external-facing roles. Working groups and sub-committees have been re-examined and refreshed.

The lobby group will be renamed the Australian Banking Association, and Bligh plans to increase the number of council meetings. She has already drafted former political staffers from both sides of politics.

The ABA has rewritten governance processes to make it easier to move quickly, and the banks will put more funding into the lobby group.

Bligh credits the NAB's chief Andrew Thorburn – the outgoing ABA chair and the man behind her ABA appointment – with pushing the need to accelerate change, though it's clear she has played a large part as well.

Take the Sedgwick report, for instance, which recommended decoupling the link between performance incentives and sales targets and was handed in a week before Bligh started. The industry planned to respond within three months, but Bligh and Thorburn moved faster. Bligh sees the remuneration changes as a critical part of rebuilding trust: "Customers should only be offered another banking product when it is clearly in their interests, rather than an offer made as a way of filling a bank employee's target." As for why the banks ever lost sight of the customers. Bligh notes it's always tempting in large organisations to use easily definable measures.

ANZ's Shayne Elliott – known by some of his banking peers as "Showtime Shayne" because of his willingness to get out in front of the cameras, particularly after the Four Corners program on home loans which the banks and the ABA had tried to respond as a group, though ANZ and Elliott chose to go their own way – is next up as ABA chair from December.

ANZ and some of the other banks have reservations about how the communication of her appointment was handled, but Bligh says: "Shayne is well respected across the industry and government, and I think he'll make a great chair of the ABA."

She's not biting on the theory that ANZ is now in the box seat in terms of industry dynamics with Elliott heading the ABA and ANZ chair David Gonski the most politically palatable of the bank chairs.

"I sit around a table that is well populated by powerful people."

Given the political risks of appointing Bligh, it's telling the only consistent criticism of her term so far is that she thinks like a premier, not a lobbyist. That's mainly reflected in her staffing choices and her preference that journalists go through her media team, rather than directly to her.

Bligh defines success as a gradual improvement in the level of community trust, which will be measured by public relations firm Edelman. In the shorter term, her ultimate test will be rebuilding the industry's standing, as the threat of a royal commission looms.

Regardless the industry must change itself. "I'd like to think we'll see more breathing space for the industry to really embed the reforms."

Letters Patent, Royal Commission and ANZ's response

On 14 December 2017 Prime Minister Turnbull and the Governor General signed the Letters Patent. It introduced a new era of banking in Australia but was limited by the government's decision to only provide sufficient time for Justice Hayne to review 27 of the 1.1 million complaints that year. **The Letters Patent states**:

Now Therefore We do, by Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the Royal Commissions Act 1902, and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into the following matters:

a) *Whether any conduct by financial services entities (including by directors, officers or employees of, or by anyone acting on behalf of, those entities) might have amounted to misconduct and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency;*

b) *Whether any conduct, practices, behaviour or business activities by financial services entities fall below community standards and expectations;*

c) *Whether the use by financial services entities of superannuation members' retirement savings, for any purpose, does not meet community standards and expectations or is otherwise not in the best interests of those members;*

d) *Whether any findings in respects of the matters mentioned in paragraphs (a) (b) and (c):*

i) are attribute to the particular culture and governance practices of a financial services entity or broader cultural or governance practices in the relevant industry or relevant subsector; or

ii) result from other practices, including risk management, recruitment and remunerations practices, of a financial services entity, or in the relevant industry or relevant subsector;

e) The effectiveness of mechanisms for redress for consumers of financial services who suffer detriment as a result of misconduct by financial services entities;

g) The effectiveness and ability if regulators of financial services entities to identity and address misconduct by those entities;

h) Whether any further changes to any of the following any necessary to minimise the likelihood of misconduct by financial services entities in future (considering any law reforms announced by the Commonwealth Government):

(i) the legal framework;

(ii) practices within financial services entities;

(iii) The financial regulators;

The next day, Kenneth Hayne was appointed Commissioner and he wrote to all of the banks in order to obtain documents in relation to misconduct by banks and regulators since 2008 and practices that fall below community standards. Justice Hayne wrote to leading banks, including ANZ, stating:

On the day after the Letters Patent issued, I wrote to a number of entities in the financial services industries and bodies representative of the participants in the industry inviting each to make an early written submission to the Commission addressing a number of questions. Those questions used the language of the terms of reference. They were:

(1) Excluding cases of theft from the entity itself or from an associated entity, has the entity, or in the case of a representative body, a member of the representative body, identified any misconduct by the entity, including by its director's offices or

employees or by anyone otherwise acting on its behalf which occurred at any time since 1 January 2008? If so, what is the nature, extent and effect of that misconduct?

(2) Has the entity identified any conduct, practice, behaviour, or business activity it has engaged in, including by its director's offices or employees or by anyone otherwise acting on its behalf, ***since 1 January 2008****, which it considers* ***has fallen below community standards and expectations****? If so, what is the nature, extent and effect of that conduct, practice, behaviour, or activity?*

(3) If yes to either or both of Questions 1 and 2:

(a) Is the identified conduct, practice, behaviour, or activity the subject of another inquiry or investigation or a ***criminal or civil proceeding****?*

(b) Does the entity attribute any of the identified conduct, practice, behaviour or activity to the particular ***culture or governance practices*** *of the entity? If so, describe that culture or governance practice.*

(c) Does the entity attribute any of the identified conduct, practice, behaviour, or activity to some broader cultural or governance practices in the industry or sector of the industry in which the entity operates? If so, describe those cultural or governance practices.

(d) Does the entity consider that the identified conduct, practice, behaviour, or activity results from other practices, including risk management, recruitment, or remuneration practices? If so, describe those practices.

(e) What steps has the entity taken to:

(i) remedy the consequences for consumers or other businesses of the ***identified conduct, practice, behaviour, or activity.***

(ii) prevent recurrence of ***conduct, practice, behaviour, or activity of the kind identified.***

On 29 January 2018, ANZ responded the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry dated 15 December 2017, stating:

ANZ is one of the five largest listed companies in Australia. As at 30 September 2017, it had total assets of $897 billion and over 550,000 shareholders (most of whom are members of the Australian community). It employs about 47,000 people (approximately 21,000 in Australia) and operates in 34 markets, providing banking and financial services to around 8 million customers, of which about 6 million are in Australia.

ANZ's three Australian-focused business divisions are: Wealth Australia (Wealth) (providing insurance, investment, superannuation, and financial advice services); Australia (providing banking and related services to consumer and commercial customers); and Institutional (servicing global institutional and large business customers). The activities of each of the divisions are supported by centres of expertise including Technology, Services, Operations, Compliance and Risk.

Approach

In its letters of 15 December 2017, the Commission asked ANZ to identify the steps it has taken to remedy the consequences for consumers or other businesses of the identified conduct, practice, behaviour or activity. In referring to "consumers or other businesses" ANZ understands the Commission to be interested in matters which have had consequences for ANZ's customers in Australia.

ANZ has sought to cover, either individually or by describing groups of similar events, both misconduct and conduct that ANZ considers has failed to meet CSEs and which has either had a material impact on a large number of customers or a significant impact on a smaller number of customers in Australia.

This submission does not generally cover this is due to the scale of ANZ's businesses, the 10-year period of time covered by the Commission's questions (relevant period) and the page limit for the submission. It also reflects ANZ's understanding of what the Commission is seeking, given that both letters of 15 December 2017 and the Letters Patent focus on consumers who have suffered detriment and the effectiveness of mechanisms of redress for those consumers. ANZ is willing to provide further assistance to the Commission.

By adopting this approach to its submission, ANZ in no way wishes to diminish or understate the importance of any particular case or category of conduct, whether covered in this submission or not. ANZ acknowledges that there have been and will be individual cases where it will not have met CSEs or will have engaged in misconduct. ANZ is committed to addressing cases of that kind through its complaints and internal dispute resolution (IDR) processes and will also look closely at any matters brought to its attention through the Royal Commission.

ANZ works hard to remedy the consequences of misconduct and failures when they are identified, so that affected customers are not left in a position of disadvantage.

Remediation generally includes interest or other compensation to reflect the time between the failure occurring and ANZ compensating the customer. In 2017, ANZ, in consultation with its Customer Fairness Advisor, sought to articulate the principles applicable to all remediation carried out by the bank (remediation principles).

They are: (a) we will listen; (b) we will apologise; (c) we will compensate; (d) we will commit resources to fix the problem; (e) we will explain our approach clearly; (f) we will act speedily; and (g) we will learn from mistakes when they are made. One of the Customer Fairness Advisor's priorities is to look at remediation across ANZ and consider improvements to establish a more consistent approach.

ANZ has taken a number of steps during the relevant period to reduce the risk of misconduct and conduct falling below CSEs, both proactively and in response to concerns identified through its risk management framework, internal and external dispute resolution, and customer feedback.

ANZ acknowledges that at times over the relevant period it could have been better at identifying and implementing these changes more quickly, but it has learned lessons and has renewed its focus on getting this right in recent years.

It also acknowledges that there is more to do, and a number of initiatives are ongoing.

First, ANZ has taken a number of steps over the relevant period to improve its culture, including:

- *periodically refreshing and relaunching its 2009 Code of Conduct and 2008 ICARE values to all staff, including most recently in 2017;*
- *mandatory annual staff training and assessment on the Code of Conduct (including, since 2017, heightened consequences for performance assessment and remuneration where staff fail to undertake and pass the assessment);*
- *regular senior management communications to, and engagement with, staff regarding values, purpose and the Code of Conduct;*
- *introducing in 2016 a program of regular culture assessments of ANZ business units, conducted by internal audit and external consultants, with significant issues reported to senior management, who then supervise remedial action, and the Board;*
- *the appointment, in 2017, of former Australian Commonwealth Ombudsman, Colin Neave AM, as ANZ's first Customer Fairness Advisor, reporting directly to the CEO and independently identifying and providing guidance to the bank on key issues for customers; and*

Second, ANZ has changed its performance management and remuneration structures to increase accountability and reduce the risk that incentives encourage inappropriate conduct, including by:

Introducing the mandatory deferral of incentives for its management board (now ExCo) in 2008. This was introduced uniformly across ANZ in 2009, with the ability to withhold deferred remuneration in certain circumstances, including for reasons related to behaviour and conduct.

Nature of conduct, causes, reporting and remediation

System, process, and human failures causing detriment to a number of customers will frequently involve a breach of contract. Failures which affect a number of customers over a long period of time do not meet CSEs. There are also instances where ANZ has identified misconduct (for example, breaches of s 912A(1)(a) of the Corporations Act) and it is possible that some conduct may contravene the CBP or other Codes.

Either in compliance with its obligations under s 912D of the Corporations Act or because of their scale and significance, ANZ has notified ASIC of a number of these cases and subsequently informed ASIC about the progress and approach taken on its remediation activities. ANZ is also currently involved in a class action relating to its contractual entitlement to charge certain periodical payment non-payment fees,43 having earlier paid $28.8 million to customers through a remediation program in 2016.

These system, process and human failures have a variety of causes, reflecting the range and complexity of the underlying products, systems and processes. ANZ nonetheless considers that there have been too many failures over the relevant period and that it should have put more focus on preventing and detecting matters of this kind. ANZ has taken and is taking action to address this, as explained below.

Where ANZ identifies an issue, it remediates customers who are impacted (as the case studies demonstrate), takes steps to fix the problem and considers whether anything is required to reduce the risk of recurrence. For example, as highlighted in the case studies, ANZ, among other things implements system, process, and control enhancements.

ANZ has been actively working to minimise the number of systemic issues relating to incorrect charging of feed and interest. For example, ANZ monitors the continuing alignment of fees and charges for its Retail and Commercial product lines with its terms and conditions. ANZ has also built and is building a number of forensic reporting tools to assist in identifying system, process or human failures earlier. ANZ is also working to simplify its product offerings and systems to reduce the incidence of problems.

Remediation

Within Australia division, remediation of customer financial loss is a process that can involve significant complexity, as the case studies discussed at [6.7]-[6.27] show.

ANZ is committed to taking proper steps to identify the extent of an issue, the customers affected, and the amount of appropriate remediation. This necessarily takes some time to get right.

For cases involving incorrect charging or payments, remediation can involve the retrieval of historical data about transactions, fees charged, or interest awarded over time. Such information is often archived or must be reconstructed with the assistance of external providers. For example, in remediating the Commercial Cards Letter of Offer issue (discussed at [6.7]-[6.9]), affected customers had to be identified following a close analysis of customer data against six separate sets of contractual terms, which varied over time and between customers. This

involved the manual review of some customer data and the recovery of information from archives.

It is also often necessary to develop a technical solution to identify and extract all information necessary for the remediation. For example, in the ATM Retractions matter (discussed from [6.24]-[6.27]), external providers were engaged to build a solution to calculate remediation payments. In the MBORP matter (discussed from [6.10]-[6.15]), it was necessary to isolate and analyse billions of lines of data to reconstruct home loan information in order to determine customer entitlements. The proper discounts and interest rates were then applied to this dataset, to accurately identify the impact on the customer.

ANZ accepts that in some instances, even having regards to the complexity of the issues identified, it has not completed customer remediation programs in a timely way and therefore has not met CSEs. This, coupled with the detection of a number of issues by ANZ over recent years, has led to the existence of a backlog of matters that have not been appropriately progressed. For example, for the:

(a) Commercial Cards Letters of Offer matter, it took approximately three years and three months from the date that investigations began (October 2014) to the completion of customer remediation (December 2017); and

(b) ATM Retractions matter, investigations began in December 2015 and, while there was a pilot remediation program in February 2017, it is expected that the remainder of customers will not be reimbursed until April 2018 due to the data complexities.

ASIC has received data about times for ANZ's remediation activities including as part of its Breach Reporting Project, which is discussed from [8.1].

Prior to 2017, accountability for each remediation rested with the sponsoring business executive, with support as needed from risk, compliance and legal

staff, and the project delivery team which typically carries out large remediation programs. This structure created clear accountability for individual remediation programs but had the effect of disaggregating ANZ's efforts and inhibiting its ability to take an overarching approach.

ANZ is now moving towards a more centralised and systematised approach to remediation within Australia division. Key steps that ANZ has taken to date include:

(a) The articulation of the remediation principles described at [4.17].

(b) The creation of the Australia division Executive Remediation Governance Forum in 2017. The forum is involved in overseeing remediation within Australia division and, where necessary, seeking resources and funding to ensure that remediation progresses in a timely way.

Committing resources to projects in FY2017-2018 to try to address the backlog referred to above including the allocation of approximately 130 staff to deal with large customer remediation programs in the new Responsible Banking team (discussed at [6.100(b)]).

Agribusiness issues – Landmark

In March 2010, ANZ acquired the Landmark loan book ($2.4 billion) and deposit book ($300 million) (Landmark acquisition). At the time of the Landmark acquisition, approximately 225 Landmark loans were impaired or in financial difficulty.

There have been a number of recent public inquiries into ANZ's management of impaired or defaulting loans of former Landmark customers.52 A number of civil proceedings have been brought by former Landmark customers against ANZ. A private prosecution was commenced against an ANZ officer but was discontinued by the Commonwealth Director of Public Prosecutions.

The allegations made against ANZ in these contexts have been of three main types:

(a) allegations relating to conduct by Landmark (with which ANZ was not involved) prior to the Landmark acquisition (for example, in making a particular loan to a Landmark customer);

(b) allegations relating to the circumstances of the Landmark acquisition (namely, that ANZ was somehow incentivised to default or foreclose on customers because it had purchased Landmark for 16% of the value of the Landmark loan book or that it had made the purchase to reduce its securitisation exposure); and

(c) allegations relating to ANZ's conduct after the Landmark acquisition (for example, poor communication with former Landmark customers after the acquisition; "engineering defaults" by relying on non-monetary defaults and constructive breaches; inappropriate enforcement action; unilaterally and significantly altering loan terms and conditions; and not making customers aware of valuations carried out on their security properties).

The allegations made about the circumstances of the Landmark acquisition (set out in [6.80(b)]) are demonstrably incorrect and were addressed during the inquiries referred to above. These allegations are not addressed further in this submission.

Subject to what follows, ANZ has not identified any systemic issues relating to the allegations in (a) and (c) about its conduct. ANZ accepts and has accepted that, in certain respects, its management of some former Landmark customers and their accounts at the time of and immediately following the Landmark acquisition fell below CSEs. In a small number of cases, its conduct either may have or more than likely did, also constitute a breach of the obligation in the CBP to act fairly and reasonably towards its customers. ANZ acknowledges that

it should have been more responsive and empathetic to some customers, particularly given their difficult financial circumstances, and recognises that its failure to do so caused distress in some cases.

With the cooperation of the customers affected, ANZ has taken steps to reach a settlement of the issues it has identified with each of the customers concerned. A small number of cases remain unresolved.

To prevent recurrence of the issues identified, since 2014, ANZ has continued to refine and improve its processes and procedures for managing high risk and defaulting agribusiness accounts. It now has dedicated agribusiness teams and has made the following changes to its management of all agribusiness accounts (not just those relating to former Landmark customers):

(a) ANZ aims for increased engagement with and understanding of agribusiness customers and their needs through more frequent face-to-face farm visits.

(b) any enforcement decisions must now be approved by a member of the Lending Services leadership team.

(c) ANZ encourages customers to obtain independent legal and financial advice where appropriate and will often provide financial assistance to facilitate this.

(d) ANZ offers farm debt mediation in all disputed cases, even if not required, and in most instances pays the mediator's fees in full.

(e) ANZ provides customers with copies of property valuations, and obtains customer input into the valuation process wherever appropriate.

(f) in 2014, ANZ implemented a moratorium on new farm repossessions and a freeze on increasing interest rates for farmers impacted by drought, which was extended to 2016 as a result of the worsening drought conditions. This initiative is now part of ANZ's broader practice for natural disasters.

(g) Lending Services has undergone cultural change and has formulated its own "Purpose Statement", which is to "manage the bank's high-risk customers to achieve the best outcome for ANZ and our customer". Training has also been provided to members of the Lending Services team, with a focus on empathy when dealing with difficult and distressing customer situations.

ASIC breach reporting

Section 912D of the Corporations Act requires AFS Licensees to report in writing to ASIC any "significant" breach (or likely significant breach) of their obligations under ss 912A or 912B of the Corporations Act as soon as practicable and in any case, within 10 business days after "becoming aware" of the significant breach or likely significant breach.

The Corporation's Act does not define "significant breach". Section 912D requires an AFSL-holder to "self-assess" the significance of breaches based on statutory criteria.

A number of ANZ entities hold AFS licences. ANZ regularly reports matters to ASIC under or by reference to s 912D. For example, in respect of the AFS Licensees covered by the ASIC Breach Reporting Project, there were 55 reports over 2014-2016. Some matters are reported to ASIC even though ANZ has not determined that a significant breach has occurred (for example, because investigations are ongoing). ANZ also typically informs ASIC of other matters which have a significant effect on customers or relate to key ASIC priorities (eg financial adviser conduct), irrespective of whether they are reportable under s 912D.

To comply with its s 912D breach reporting and other like obligations, ANZ has in place systems, policies and procedures that facilitate the identification, recording, investigation and, where appropriate, escalation and reporting of compliance events. Relevant business units are responsible for carrying out

these investigations, with support from assurance, compliance and other areas of the bank as required.

ANZ has considered its incident management processes as part of its response to the ASIC Breach Reporting Project. ANZ is concerned that the time it takes to investigate matters in order to determine whether they are significant breaches for the purpose of its s 912D reporting obligations may, in some circumstances, have fallen below CSEs. While some matters over the period were reported to ASIC less than a month after the potential conduct or issue was first identified, others have taken much longer. For example: (a) in one Wealth matter relating to a particular financial adviser whose conduct fell within the description at [5.19], almost two years passed between the first identification of the potential conduct and its reporting to ASIC; and (b) in one Australia division matter relating to the calculation of break costs on asset finance contracts (discussed at [6.16] to [6.19]), more than 10 months passed between the identification of the potential issue and its reporting to ASIC. In each case, over the period investigations were undertaken to consider whether there was a breach and understand its nature, extent, and significance.

As the ASIC Enforcement Review Taskforce acknowledges, AFS Licensees may "need a relatively high degree of information and well-developed understanding of the circumstances giving rise to the breach to satisfy the criteria for reporting". Depending on an AFS Licensee's circumstances – including where, when and by whom the incident is identified – and the scale, nature, and complexity of the business, this can take time.

Historically, ANZ's practice has been to investigate matters thoroughly to inform its decisions on breach reporting (among other things). While this helps to facilitate accurate reporting, ANZ is considering whether its practice requires modification so that ASIC is informed of matters at an earlier stage.

systems and processes that might be made to facilitate the more efficient investigation and handling of events. The scope of the changes being considered encompasses, but is broader than, ANZ's breach reporting obligations under s 912D. The focus is on the management of events that occur within ANZ, not just significant breaches.

Changes are being considered both at a "whole of organisation" level and at individual divisional levels. For example, ANZ is considering changes that might be made to its Compliance and Operational Risk (COR) system, which is used by the bank to record information about operational risk incidents.

In addition, ANZ is considering what changes might be made in order to clarify the requirements for internally reporting compliance breaches, and to improve the timeliness of recording events in the COR system. In conjunction with this, ANZ is pursuing an internal communications strategy to refresh employees' understanding of their responsibilities in relation to the identification and management of events (including the importance of raising identified issues quickly, and recording, investigating, and escalating them appropriately), and to promote a "speak up" culture within the bank. Whilst ANZ regularly communicates with its employees about these matters, this strategy aims to reinforce these messages in different ways for maximum impact.

Further, ANZ expects to continue to engage with ASIC as part of its Breach Reporting Project. In parallel, the ASIC Enforcement Review has consulted on changes to the framework for breach reporting. It is one of a number of inquiries and reports that have considered breach reporting in recent years.

Other regulatory matters

ANZ acknowledges that there have been compliance failures, amounting to misconduct, which are not referred to in detail in this submission and which have

not had any, or any material, adverse financial impact on customers but which ANZ nevertheless takes seriously. These include the following matters.

First, there have been failures to provide or provide correct Statements of Advice, Financial Services Guides, PDSs, policy schedules, offer documentation, account statements, statutory notices and other documents to customers, or to make appropriate oral disclosures (for example, due to errors in call scripts or failures by staff to follow them). Where appropriate, ANZ has reported these matters to ASIC. ANZ generally remediates them by providing correct documents/disclosures and, where appropriate, making enhancements to its systems and processes to reduce the risk of recurrence.

Second, though ANZ has a process for the review of advertising materials by the product, assurance and legal teams, from time to time it makes errors in relation to statutory requirements dealing with the content of advertising. One example is that on 15 November 2010, ASIC notified ANZ that an advertisement promoting ANZ's fixed rate home loan on 11 November 2010 did not contain a comparison rate as required by s 160 of the NCC. In response, ANZ took immediate steps to withdraw existing and planned advertisements from various media. When advertising issues are identified, ANZ takes steps to minimise the risk of recurrence, including withdrawing or correcting advertisements and marketing materials.

Third, as explained in [4.2], this submission has set out instances of misconduct or conduct that failed to meet CSEs. This will not include reviews and audits conducted by ANZ under the supervision of APRA that seek to identify and mitigate risk across its business. ANZ acknowledges that from time to time these audits and reviews have raised concerns about or suggested improvements in relation to specific risk management and related practices, and does not seek to

diminish the importance of those findings by omitting them from this submission.

Fourth, ANZ is mindful of the important role which AUSTRAC plays in the banking and financial services sector generally and of ANZ's obligations to support AUSTRAC accordingly. In a small number of cases, system, process or human failures have led to delays or omissions in ANZ's reporting of certain information to AUSTRAC. For example, in late 2010, ANZ became aware that it was lodging incorrect International Funds Transfer Instruction reports, because ANZ's automated system was incorrectly coded to populate those reports with the name of the customer rather than that of the payer. ANZ engages with AUSTRAC on matters of this kind and remediates its systems and processes to AUSTRAC's satisfaction (by, for example, changing its automated system in the case mentioned above). ANZ does not consider that these matters are attributable to any broader cultural, governance or other practice within ANZ. There is a governance process for addressing AML/CTF issues which is reviewed from time to time as part of continuous improvement processes.

Finally, there are occasionally delays in submitting financial statements, auditor report compliance plans and like documentation to ASIC and APRA.

Other staff conduct

ANZ takes disciplinary action against its employees for workplace behaviours in breach of ANZ's Code of Conduct and which are contrary to CSEs, up to and including termination of employment. ANZ has dismissed Australian-based employees for reasons that included conduct that had, or risked having, an adverse customer impact, and a number of other employees resigned during the course of investigations.

ANZ's Code of Conduct sets the clear expectation that staff will comply with the law at all times. [redacted]

[redacted]

[redacted] *ANZ takes these cases seriously, including by engaging with law enforcement agencies and taking disciplinary action against ANZ employees. ANZ seeks to ensure that customers do not bear any losses arising from such conduct.*

ANZ has systems to investigate issues of concern; promote a positive culture and values and attract and retain staff who share those values. ANZ periodically reviews and strengthens those systems.

ON 2 February 2018, ANZ further responded the Commission's further letter into Misconduct in the Banking, Superannuation and Financial Services Industry, stating:

Question: What are the functions, powers and resources of the Customer Fairness Advisor referred to in [4.17] and the Customer Advocate referred to in footnote 3?

Customer Fairness Advisor

The Customer Fairness Advisor reports directly to ANZ's CEO, Shayne Elliott. The Customer Fairness Advisor role was established in December 2016. The role is currently filled by former Commonwealth Ombudsman Colin Neave AM. The Customer Fairness Advisor's role is to provide frank and independent assessments of the fairness of ANZ's products and services to the CEO and to divisions and business units, and advice about how any issues arising from those assessments should be addressed. He assists, on his own initiative, in guiding and informing ANZ's decision-making to ensure ANZ's retail and small business customers are treated fairly. He is also a member of ANZ's Responsible Business Committee and provides regular updates to the Board.

The key functions of the Customer Fairness Advisor include:

(a) advising on customer remediation including the development of the Customer Remediation Principles (referred to in [4.17] of ANZ's submission to the Commission dated 29 January 2018 (January Submission));

(b) reviewing and providing feedback on products and services;

(c) engaging with external consumer representatives; and

(d) representation on the Executive Remediation Governance Forum discussed in [1.27(c)] below.

Customer Advocate

ANZ established the Office of the Customer Advocate in 2002 to impartially review disputes involving retail and small business customers in Australia, where the customer is not satisfied with the outcome of ANZ's internal dispute resolution process. In 2012, its scope was expanded to include customers of Wealth. The Customer Advocate is also engaged on a range of other matters, including broader community engagement, sensitive product and policy changes, remediation, and in some instances complex terminations of customer relationships.

Question: What are the steps ANZ has taken to invest and improve the Operational Risk Management and Compliance Framework and its supporting systems referred to in [4.21]?

Operational Risk Management and Compliance Framework

ANZ has a single group-wide Operational Risk Measurement and Management Framework (ORMMF), which comprises policies and guidance in relation to operational risk and compliance and is designed to protect the interests of ANZ and its customers.

Consistent with the approach taken by the Basel Committee on Banking Supervision, ANZ defines "operational risk" as the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events.

Within this framework, a "compliance event" is a failure by ANZ to meet a regulatory or legislative obligation, a voluntary code or an obligation articulated in an ANZ policy.

To protect the interests of ANZ and its customers, ANZ has taken steps to invest in and improve its operational risk management and compliance framework and its supporting systems (including ANZ's policies, systems and processes of whistleblowing, complaints handling, and monitoring for risk and compliance issues). Those steps include:

(a) In 2008, ANZ established the "risk is everyone's responsibility" principle, to promote risk awareness within the bank, particularly within the frontline business units (providing the first line of defence). Over the period since 2008, the principle has been refreshed and developed through the introduction of new policy documents, staff training, leadership toolkits and internal and external communications.

(b) Also in 2008, ANZ revised its whistle blower protection policy, established an independent whistle blower hotline maintained by Deloitte and clarified the roles and responsibilities of ANZ's Whistle blower Protection Officers, who are to receive, act on and report disclosures, and engage assistance to undertake investigations

c. In 2010, ANZ commenced a program with a view to developing its operational risk management in line with evolving industry practices. This led to the implementation of the ORMMF in 2012, which standardised and enhanced the identification of key risks, key controls and treatment plans across each of the divisions and underlying business units. The program was the beginning of a

material change to the way in which operational risk is managed at ANZ. It included new and redesigned processes and systems, supported by more specialised and trained teams of people.

In 2012, ANZ commenced a project to establish a new operational risk capital model and scenario analysis process to measure operational risk, which led to a new APRA-accredited model in 2015. The model, in particular, provided additional structure to the way in which ANZ identifies and manages the risk to the delivery of fair customer outcomes.

(f) Also in 2012, ANZ introduced a mechanism to measure how the divisions (and underlying business units) had implemented, and were practically operating, the ORMMF. The mechanism required business units to prepare and implement action plans to address any identified concerns, which were then tracked and reported to management at both the divisional and Group levels from 2013.

(g) In 2013, ANZ implemented a new compliance operating model to highlight the importance, and increase the visibility, of compliance across the bank. This included the appointment of an Executive Chief Compliance Officer and investment in additional compliance and financial crime prevention personnel.

(h) Between 2013 and 2015, ANZ made a substantial investment in an ANZ-wide intranet system to further manage operational risk and compliance. This created a single system, COR, to capture risks, controls, treatment plans, events and obligations, providing the ability to analyse, escalate and report information across the bank.

(i) Between 2013 and 2016, ANZ made substantial investments in its financial crime prevention infrastructure. This included substantial investments in enhanced capabilities for monitoring and alerting suspicious transactions, and improvements to detection capabilities in ANZ's sanctions monitoring system.

Between 2013 and 2017, ANZ engaged expert consultants to undertake reviews of the effectiveness of the ORMMF as it applies to Wealth and to assess risk culture.

(k) Between 2016 and 2017, ANZ further updated its whistle blower policies and procedures and refreshed its whistle blower awareness campaign. Measures included extending the policy to third party vendors and franchisees in Wealth, and

the appointment of senior executives as whistle blower champions. The awareness campaign resulted in an increase in the number of disclosures, with 121 disclosures made in 2017, up from 71 in 2016.

(l) Since 2016, Australia division has made a number of changes to the way it analyses complaints including improved use of data to identify potential trends and possible areas for improvement. It now reports monthly to the Group Executive of Australia division on these matters.

(m) In 2017, Australia division enhanced its Customer Resolution and Complaints Quality Framework. This involves coaching and assessment of complaints personnel and enhanced recording and reporting mechanisms. These mechanisms assist to identify critical errors that may impact ANZ's customers and its business and provide insights to support continuous improvement.

(n) In 2017, Wealth implemented a number of measures to further strengthen its risk culture, including: the introduction of a risk culture update to be made annually to the Boards of the Wealth entities; the inclusion of risk culture as a standing agenda item to be addressed at each Wealth Board meeting; and the inclusion of a risk culture section in Internal Audit Quarterly Reports to the Wealth Board Audit Committees.

Question : What are the steps ANZ has taken in its move towards a more centralised and systematised approach to remediation within Australia division?

Australia division has made a number of changes to the way it runs and governs customer remediation projects to support its move to a more centralised and systematised approach to help address its failure to meet CSEs due to delays in remediation, as identified in [6.39] of the January Submission.

The steps ANZ has taken in its move towards a more centralised and systematised approach to remediation within Australia division have involved:

(a) The development over time of specialisation in remediation which, in July 2016, was formalised with the establishment of a remediation project team, which is dedicated to, and responsible for, delivering large remediation and industry reform projects under the direction of Steering Committees. This has helped to ensure that prioritisation and resource-allocation decisions take into account all active and upcoming remediation projects.

In December 2016, ANZ established the role of Customer Fairness Advisor. As discussed, one of their key functions is to advise on customer remediation In August 2017, the Executive Remediation Governance Forum was established (the Remediation Governance Forum), which includes ANZ's Customer Fairness Advisor. Its aim was to create a divisional approach to remediation and increase the visibility of remediation issues. In addition, the Remediation Governance Forum provides a central, high-level body with oversight of remediation projects being carried out within Australia division.

(d) Also in 2017, ANZ created a central remediation resource run by the remediation project team, which allows for sharing of knowledge and an increased level of consistency across remediation projects. The resource:

(i) provides clear visibility for business stakeholders on the progress of remediation projects and any hurdles faced;

(ii) provides a consolidated view of risks, assumptions and dependencies;

(iii) maps out the critical activities that need to be executed to remediate a customer; and

(iv) creates a physical remediation hub to demonstrate progress and lessons learned to business stakeholders and team members.

(e) A remediation framework has recently been developed for use across Australia division (the Framework). Its purpose is to guide the approach to remediation and to contribute to a consistent approach. It provides guidance to, for example, the approach to remediation design and data analysis, a methodology for calculating

compensation to customers, and a general approach to customer engagement and communication. The Framework was introduced at the end of January 2018.

ANZ is currently establishing a Responsible Banking team which, from April 2018, will have approximately 130 people dedicated to large customer remediation programs across Australia division. The Responsible Banking team will capitalise on the benefits of centralisation, continuing and building on the work of the remediation project team as described above. ANZ has appointed a dedicated executive for the Responsible Banking team from April 2018 onwards.

Australia division also seeks to proactively provide regular updates to ASIC on its progress in remediating impacted customers. Updates are generally provided during a quarterly remediation update meeting with ASIC.

Question: What are the changes ANZ is considering to its event identification, recording and reporting systems and processes to facilitate the more efficient investigation and handling of events, referred to in [8.8]?

As noted in the January Submission at [8.4], ANZ has in place systems, policies and processes to facilitate the identification, recording, investigation and, where appropriate, escalation and reporting of events (which include but are not limited to significant breaches for the purpose of s 912D of the Corporations Act).

Within ANZ, such events broadly cover operational risk events and compliance events. Staff are required to record all such events in ANZ's COR system, identifying both their operational and compliance consequences. COR underpins the ORMMF and serves a number of functions in relation to the reporting, management and monitoring of key risks and events.

ANZ is concerned about the time taken to investigate matters in order to determine whether they are significant breaches for the purpose of its s 912D reporting obligations. This fits within a broader concern about delays in event identification, recording, reporting and (where relevant) escalation more generally, including whether features of its COR system are contributing factors. There are a number of

changes presently being considered by ANZ that are intended to address these issues.

ANZ has recently commenced a project, one of the purposes of which is to consider improvements to its event identification, recording and reporting systems. As it is in its infancy, having only recently commenced its scoping stage, the potential changes being considered in the context of the project are not yet fully developed. It will be necessary for the project to review and analyse ANZ's current systems and processes before concrete recommendations can be made.

Other proposals or changes, which were identified separately from that project, are more advanced. For example, ANZ is considering a number of changes to its COR system. The primary purpose of these changes is to make the system more user-friendly and therefore more effective by improving quality of data about events recorded in COR. This is intended to facilitate managing each event and monitoring and improving ANZ's event management system as a whole.

ANZ is also developing, for bank-wide introduction, an operational risk and compliance "dashboard" which will supplement existing COR reporting and achieve increased accessibility and business use. The intention is to provide relevant staff with easily accessible real-time (or close to real-time) business risk data, in the form of a subset of COR data, extracted daily and presented in a new form. One purpose is to encourage accountability for data quality and timeliness of reporting, by making apparent how and when events have been recorded, reported and escalated. Previously, this information has only come from manually prepared reports, on a periodic basis, from Assurance teams.

The dashboard is still undergoing testing and being refined prior to bank-wide implementation. ANZ is presently working on the content of a campaign and training to support a bank-wide launch.

Question: What are the changes that ANZ is considering in order to clarify the requirements for internally reporting compliance breaches, referred to in [8.10]?

The reference of the January Submission to changes that "might be made in order to clarify the requirements for internally reporting compliance breaches" is principally a reference to aspects of the project described above. However, it also refers to staff communication campaigns and training for this purpose. Examples include the proposed training, which will also serve to reinforce to staff ANZ's requirements in relation to reporting and escalation of compliance breaches.

As noted above, the project is presently in its scoping stages. However, the changes that may be considered include clarifying or adjusting the roles and responsibilities of staff in the event identification, recording, and reporting processes, introducing more formal "lessons learned" meetings following the occurrence of particular events, and considering further changes to the COR system and other processes to make clearer to users what they must do to report, and where appropriate, escalate, a compliance event.

Part 2: Consumer lending

Question: What steps ANZ has taken in the past to remediate customers where ANZ has not complied with its responsible lending obligations and the circumstances in which such remediation was considered "appropriate" or not appropriate, referred to at [6.58]?

Where ANZ has investigated a complaint and identified that it has not complied with its responsible lending obligations, ANZ is guided by the FOS approach to remediation which is contained in the FOS guide, "Responsible Lending Obligations and Maladministration in Lending". Under this approach, the focus is on returning the customer to the position they would otherwise have been in. This includes: (a) reimbursing fees and interest incurred in relation to the loan and, depending on the use of the funds, a further possible adjustment for related losses or gains; and (b) reimbursement of the costs of purchasing or selling a security property, which may be offset by rental income derived by the borrower.

When it is the subject of an adverse outcome by the FOS, ANZ remediates customers in accordance with the recommendation of the FOS. A table of these cases is provided in the annexure to Part I of this response. The cases listed include FOS outcomes identified by ANZ or determined after 1 January 2013. In some instances, the conduct in question predates the application of the responsible lending obligations in the NCCP Act applying to ADIs. These cases, as well as the small business lending cases, have nevertheless been included in the table because they were subject to an adverse finding by FOS under its Terms of Reference.

Additionally, in some cases, where customers find themselves in financial difficulty even after being remediated, ANZ's hardship team assesses the customer's financial position and seeks to tailor a short- or long-term solution to provide further financial relief. This may include reduced payments, repayment "holiday" periods or loan restructures (including life tenancies).

Question: What is the "possible culture amongst financial advisers…of inadequate attention to service delivery" referred to in [5.13]?

In [5.13], ANZ referred to a possible culture amongst financial advisers of inadequate attention to service delivery.

Before Prime Access was introduced in 2003, planners typically interacted with clients on an occasional basis, and provided transactional advice about financial products. For example, a client may have met with a planner in 2000 for advice about life insurance, and then have met with a different planner in 2002 for advice about superannuation. Prime Access was intended to transform the client-planner relationship from being transactional to being an ongoing relationship, whereby one planner would regularly meet with the client with the aim of seeing that their financial strategy was appropriate for their personal circumstances.

However, it is now apparent that, as ANZFP transitioned to an ongoing service model, it failed to develop the processes and culture necessary to consistently deliver such services to its customers to the requisite level.

ANZ considers that, as an AFS Licensee, it did not provide adequate systems, direction and support to create a culture that was focused on delivering services to clients. ANZ refers, in particular, to the conduct identified in rows 1–5 of Part I to this response. ANZ does not, however, suggest that there was a deliberate practice or culture among planners of signing up customers to the Prime Access service without intending to provide them with documented annual reviews.

Question: What are the measures implemented to reduce the risk of recurrence referred to in [5.14]?

Monitoring and compliance

Whether financial advisers are complying with their obligations to deliver Prime Access ongoing services, and in particular documented annual reviews, is monitored in a number of ways.

First, annual fee disclosure statements which ANZFP is required to provide to clients to whom there are ongoing service obligations require disclosure of, among other things, whether promised services were delivered over the previous year. When the business control team referred to at [3.23] prepares fee disclosure statements, to determine whether or not annual reviews have been undertaken, they check for a COIN diary note recording the completion of a documented annual review.

Secondly, from December 2017, the central para-planning team has had available a "Diary Note QC Tool". This tool checks a sample (10%) of diary notes recording Prime Access annual reviews for a given financial adviser to determine whether there is a corresponding advice document appearing in COIN as having been dispatched within two months. The sample is, by default, selected by a random sample tool but the selection can instead be weighted if that is desired. The intention is for this tool to be run monthly. ANZ is, at present, reviewing the data produced by the initial run of the tool to determine that it is operating properly before it is implemented on an ongoing basis.

Question: What are the internal policies and procedures ANZ now has for reporting in compliance with s 912D of the Corporations Act 2001 (Cth)? If those policies and procedures have changed over time, identify what changes were made and when they were made.

Section 8, Part A of the January Submission addresses, at a high level, breach reporting processes and issues across ANZ as a whole.

Policies and procedures that are relevant to breach reporting exist within ANZ at a general, "whole of bank" level (that is, they apply to all divisions and business units). These policies and procedures deal with operational risk and compliance management and establish the framework under which compliance incidents are identified, assessed, and escalated (including in compliance with breach reporting obligations). Specific procedures apply at the division and business unit levels, reflecting their particular circumstances. The following information describes the procedures applicable in Wealth (as this question was asked in the section of the annexure dealing with Wealth management).

All of the bank's relevant policies and procedures are designed to facilitate and support its breach reporting systems and procedures, which in turn form part of ANZ's broader processes and procedures relating to the identification, assessment and escalation of events more generally (not just significant breaches reportable under s 912D of the Act).

The 2017 - 2018 CCMC's Annual Report states:

This year the CCMC conducted an in-depth review of banks' breach identification, management, and reporting processes. This renewed focus on banks' breach reporting has increased transparency, holding banks to account for non-compliance.

This year, banks self-reported 10,123 breaches of the Code, a decrease of approximately 9.5% from 11,191 in 2016 - 17. The main categories for self-reported breaches – [provision of credit, privacy and confidentiality, and debt collection] – have remained largely unchanged for the last three years.

The CCMC has powers to investigate allegations that a bank has breached the Code. Investigations allow us to focus on concerns raised by individual customers, and to consider compliance issues within individual banks.

In 2017 - 18, the CCMC received 32 new matters containing 53 Code breach allegations.

The Committee:

Three representatives make up the Committee. The CCMC's Independent Chair is jointly appointed by the ABA and the Australian Financial Complaints Authority (AFCA) Chief Ombudsman. The Chair is joined by an Industry Representative, appointed by Code-subscribing banks, and a Representative of Individual and Small Business customers, appointed by the consumer representatives of the AFCA Board of Directors.

Christopher Doogan AM: *FIML FAICD, Independent Chairperson Current term: 31 January 2017 – 30 January 2020*

Chris is a company director and lawyer by background, having occupied several senior positions in both the private and public sectors.

His public sector positions included Deputy Comptroller-General and Comptroller-General of Customs prior to his appointment to the High Court of Australia as inaugural Chief Executive and Principal Registrar. In addition to partnership in a leading law firm of which he was the Managing Partner, he has been CEO of the National Capital Authority; Chairman of a company owned by the Commonwealth of Australia and the State of New South Wales, Law Courts Limited.

Sharon Projekt: *Industry Representative Current term: 7 August 2015 – 26 October 2018*

Sharon has a legal background with broad experience across the Australian retail banking sector in the areas of legal advice, compliance, and internal and external dispute resolution. She was first appointed to the CCMC in August 2012.

She has extensive experience in escalated and complex complaint handling and investigations, having worked on a number of high-profile projects.

The secretariat:

Gordon Renouf: *Consumer and Small Business Representative Current term: 1 July 2017 – 30 June 2020*

Gordon is a lawyer and consumer advocate. He is a co-founder and CEO of Ethical Consumers Australia, which operates the Good on You ethical shopping service. He is Deputy Chair of Justice Connect and the Consumers' Federation of Australia and serves on the boards of the Telecommunications Industry Ombudsman (as a Director with Consumer Experience) and Good Environmental Choice Australia. He served two terms as a member of the Commonwealth Government's Consumer Affairs Advisory Council, and from 2007 to 2009 he was a member of the executive of Consumers International, the global peak body for national consumer organisations.

Sally Davis: *GAICD, Chief Executive Officer, September 2015 – current Sally was appointed as Chief Executive Officer on 1 September 2015. Sally previously worked as Senior Manager of Systemic Issues at FOS and has worked at FOS and its predecessor schemes for over 18 years. Sally is an accredited mediator and holds a Bachelor of Commerce and a Bachelor of Laws degree from the University of Melbourne and a Graduate Diploma (Arts) from Monash University.*

Sally brings to this position extensive experience in financial services, as well as good relationships with regulators, industry, and consumer groups.

Unfair contract term protections submission

On 11 January 2019, a TSBC researcher submitted a review of unfair contract term protections for small businesses to the Consumer and Corporations Policy Division, The Treasury, stating:

> *I file a submission giving feedback on the effectiveness of the extension of unfair contract term protections to small business.*
>
> *I have outlined below details requested by The Treasury in relation to this review. This topic has a long history, and the following comments suggest that all contracts terms should be fair and reasonable, with protections for all business customers, regardless of their size.*

Research has demonstrated that large corporations are not bound by appropriate legislation with fit and proper governance standards, nor is their appropriate legislation that requires effective oversight. These failings result in the courts being burdened by expensive disputes that should be unnecessary.

In a recent report carried out by my staff in relation to unfair protections for small businesses, it became apparent that without appropriate legislation there can be an abuse of process which results in disadvantage to the smaller business customer.

Misleading Conduct

The current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) has reported on the adequacy of existing laws and policies in relation to existing contracts. It will report on internal systems and forms on industry self-regulation, including industry codes of conduct.

The Royal Commission will also look at the effectiveness and ability of regulators to address misconduct and whether further changes in relation to the legal framework and regulation are necessary to minimise the likelihood of misconduct. Additionally, it will look at the effective mechanisms of redress for customers who have suffered detriment.

The Letters Patent define 'misconduct' as including four kinds of conduct:

conduct that 'constitutes an offence against a Commonwealth, State or Territory law, as in force at the time of the alleged misconduct';

conduct that 'is misleading, deceptive or both';

conduct that 'is a breach of trust, breach of duty or unconscionable conduct'; and

conduct that 'breaches a professional standard of a recognised and widely accepted benchmark for conduct'.

The Code: Protecting Small Businesses

In relation to small businesses, the Royal Commission has a section on the Code of Banking Practice in its 28 September 2018 Interim Report. The Report states the Australian Bankers' Association (ABA) says, 'that it works with government, regulators and other stakeholders to improve the public understanding of the industry's contribution to the economy... to benefit from a stable, competitive and accessible banking industry.'

"In July 2018 ASIC approved the draft ABA [code] that the ABA submitted. The new code is to commence on 1 July 2019 and is called 'the Banking Code of Practice' ... The Code proceeds from the premise that the rules set out are consistent with, but go beyond the requirements of, the applicable law ... the Code sets out standards of behaviour that the banks except members of the community can expect [them] to follow."

In light of these commitments, The Treasury Review will note that the ABA and bank chief executives published a revised code in August 2003 and a modified code in May 2004 (earlier codes). These codes remained in place until February 2014.

These earlier codes led small business customers to believe:

"The Code is not legislation but when your bank adopts the Code it becomes a binding agreement between you and your bank. In some respects, the Code provides for situations not covered by the law and in others goes further than the law in providing rights and obligations. The ABA has established the Code Compliance Monitoring Committee (CCMC) which will monitor compliance and have the power to publicly name a bank which has been found guilty of a serious or systemic breach of the Code."

This quote provides customers with a false sense of protection when signing loan contracts and then further stated:

"The Code of Banking Practice is the banking industry's customer charter on good banking practice ... anyone can refer a possible breach of the Code to the [CCMC]. It investigates complaints that banks are not meeting their obligations under the

Code. ... The matter is investigated and the final decision on a breach of the Code is made by the CCMC in a written Determination to the complainant and the bank."

The Royal Commission

The Royal Commission regrettably had insufficient time to comment on the earlier banking codes and their commitment to binding contracts. The ABA and banks in 2013 (and now in 2018) claimed the earlier codes were binding agreements but are now stating:

"The Code will not apply to any banking service [or product, which includes loan contracts signed by banks that were reported to be binding] to the extent that this code applies."

In effect, saying the protection provided to small business customers under the contract will be unilaterally removed. The Treasury Review discussion paper could therefore make good any statements by the Royal Commission that seemed confused. For instance, its Interim Report states "the chief protection for small business borrowers has been and remains the Code."

There is a fractured relationship between banks and small business customers since 2004. This has occurred due to lack of oversight by bank directors and federal regulators. It is imperative for industry bodies and government to oversee protections that should be implemented from consumer feedback.

Whilst the Treasury review is not limited to financial institutions, it should concern itself with the practices set in place by banks that remained in place until 2014. The Royal Commission noted there were several thousand complaints by customers of the leading banks, which raised concerns that there is inadequate oversight by regulators.

Recent reports note the five leading banks (Commonwealth, Westpac, NAB, St George Bank and ANZ Bank) hold accounts with 50 million Australians, which have resulted in these banks having a market capitalisation of $350 billion . These would have included many of the homeowners, 2.2 million small business accounts and

135,000 farmers. These banks have been able to unilaterally change loan contract provisions in their favour.

This section suggests [redacted] *made statements that were false and misleading to the Royal Commission. If they used or made statements bad faith, the persons responsible should self-admit and be held accountable.*

In light of the above circumstances, the Review of Unfair Contract Term Protections for Small Businesses extends beyond the questions raised in the discussion paper.

SAI Global Standards

The standard was prepared by a committee OB-009, Complaints Handling, which was approved on behalf of the Council of Standards Australia on 24 February 2006 and published on 5 April 2006. Represented on the committee were:

- *Australian Chamber of Commerce and Industry;*
- *Australian Competition and Consumer Commission;*
- *Australian Securities and Investments Commission;*
- *Banking and Financial Services Ombudsman;*
- *Consumers' Federation of Australia;*
- *Australian Law Reform Commission, and*

Independent Chairman

This standard was designed to provide international guidelines that would promote effective complaint-handling standards for customers bound by contracts governed by state and federal legislation. The standards were approved by the Commonwealth Government, which entered into a Memorandum of Understanding with Standards Australia.

The Memorandum states "Australian Standards are consensus based voluntary documents with which compliance is not mandatory unless incorporated into law or called up in contractual arrangements". The standard sets out guidelines that

The Treasury review should require small business contracts to adopt when drafting contracts.

This standard is important for complaints-handling as it sets out in detail what steps have to be taken into account between the parties of contracts. A copy of the standard can be purchased online from SAI Global Store https://infostore.saiglobal.com/.

Unfair Contracts

The above statements can be researched by the Treasury in documents filed with Parliamentary Inquiries by the Tasmanian Small Business Council since 2010. This feedback might assist with amendments to and effectiveness of extensions of changes for small business customers.

The Treasury might consider:

statements made by the Martin Committee's review in 1991 noted that the Governor General and High Court Justice Sir Ninian Stevens in 2001, stated "the Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court".

This statement deserves consideration as it was reinforced by NSW Chief Judge, Tom Bathurst, and South Australian Chief Judge John Doyle in June 2012. In circumstances where small businesses cannot protect their rights, legislation rather than codes should be mandatory.

whether subscribing banks could lawfully change provisions in binding contracts which claim to incorporate the 2004 Code. This Discussion Paper might provide an opportunity for the Treasury to review the importance of the current standard referred to by ASIC in Regulatory Guide 165. This is Commonwealth Government approved and has retained that status since April 2006. The AS ISO 10002:2006 Standard provides options for federal regulators to monitor practices by large corporations so that customers are protected from misleading and deceptive

conduct such as unilaterally varied loan contracts, as has been standard practice by the leading banks and their association.

the importance of the SAI Global standards and whether these guidelines should be made mandatory. If so, the Australian Financial Complaints Authority ('AFCA') should only be required to adjudicate unresolved disputes if the resolution process outlined in the standard has proved ineffective.

requiring large corporations that fail to comply with misconduct, as defined in the Letters Patent by the Royal Commission, to self-admit under Section 912D of the Corporations Act, and admissions should be made public, including the requirement by corporations to provide redress and apology as set out in AS ISO 10002:2014 standard.

Whilst industry codes may have their place, I suggest there should be legislation to protect all customers and that there should be no exemptions. It seems that the decision by governments since 2003 to allow specific industries to be self-regulated has only introduced additional burdens on small business organisations and governments to supervise and prosecute unfair practices.

On 1 February 2019, Kenneth Hayne Royal Commission published the final report into Misconduct in the Banking, Superannuation and Financial Services Industry, stating:

Introduction

1. This report

The central task of the Commission has been to inquire into, and report on, whether any conduct of financial services entities might have amounted to misconduct and whether any conduct, practices, behaviour or business activities by those entities fell below community standards and expectations. The conduct identified and described in the Commission's Interim Report and the further conduct identified and described in this Report includes conduct by many entities that has taken place over many years causing substantial loss to many customers but yielding substantial profit to the entities concerned.

This Final Report seeks to take what has been learned in respect of each part of the financial services industry that has been examined and identify:

- *issues;*
- *causes; and*
- *responses and recommendations.*

Four observations

Those analyses, taken together, will reveal the importance of four observations about what has been shown by the Commission's work: the connection between conduct and reward; the asymmetry of power and information between financial services entities and their customers; the effect of conflicts between duty and interest; and holding entities to account.

Each of those observations should be explained.

First, in almost every case, the conduct in issue was driven not only by the relevant entity's pursuit of profit but also by individuals' pursuit of gain, whether in the form of remuneration for the individual or profit for the individual's business. Providing a service to customers was relegated to second place. Sales became all important.

The conduct identified and condemned in this Final Report and in the Interim Report can and should be examined by reference to how the person doing the relevant acts, or failing to do what should have been done, was rewarded for the conduct.

Rewarding misconduct is wrong. Yet incentive, bonus and commission schemes throughout the financial services industry have measured sales and profit, but not compliance with the law and proper standards. Incentives have been offered, and rewards have been paid, regardless of whether the sale was made, or profit derived, in accordance with law. Rewards have been paid regardless of whether the person rewarded should have done what they did.

Second, entities and individuals acted in the ways they did because they could. Entities set the terms on which they would deal, consumers often had little detailed knowledge or

understanding of the transaction and consumers had next to no power to negotiate the terms. At most, a consumer could choose from an array of products offered by an entity, or by that entity and others, and the consumer was often not able to make a well-informed choice between them. There was a marked imbalance of power and knowledge between those providing the product or service and those acquiring it.

Third, consumers often dealt with a financial services entity through an intermediary.

The interests of client, intermediary and provider of a product or service are not only different, but they are also opposed. An intermediary who seeks to 'stand in more than one canoe' cannot. Duty (to client) and (self) interest pull in opposite directions.

Chapter 7 of the Corporations Act 2001 (Cth) (the Corporations Act), and the National Consumer Credit Protection Act 2009 (Cth) (the NCCP Act) (but not the Superannuation Industry (Supervision) Act 1993 (Cth) – the SIS Act), speak of 'managing' conflicts of interest. But experience shows that conflicts between duty and interest can seldom be managed; self-interest will almost always trump duty.

A 'good enough' outcome was pursued instead of the best interests of the relevant clients or members.

(Notions of best interests and conflicts between duty and interest are further examined below in connection with mortgage brokers, financial advice and superannuation.)

Fourth, too often, financial services entities that broke the law were not properly held to account. Misconduct will be deterred only if entities believe that misconduct will be detected, denounced and justly punished. Misconduct, especially misconduct that yields profit, is not deterred by requiring those who are found to have done wrong to do no more than pay compensation. And wrongdoing is not denounced by issuing a media release.

The Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account. The community recognises, and the community expects its regulators to

recognise, that these are two different steps: having a wrongdoer compensate those harmed is one thing; holding wrongdoers to account is another.

But choices must now be made. The arrangements of the past have allowed conduct of the kinds and extent described here and in the Interim Report of the Commission. The damage done by that conduct to individuals and to the overall health and reputation of the financial services industry has been large. Saying sorry and promising not to do it again has not prevented recurrence. The time has come to decide what is to be done in response to what has happened. The financial services industry is too important to the economy of the nation to allow what has happened in the past to continue or to happen again.

1.2 Primary responsibility

There can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities: their boards and senior management. Nothing that is said in this Report should be understood as diminishing that responsibility.

Because it is the entities, their boards and senior executives who bear primary responsibility for what has happened, close attention must be given to their culture, their governance and their remuneration practices.

1.3 Key questions

In its written submission in response to the Interim Report, Treasury identified the key questions emerging from the Interim Report as

- *To what extent can the law be simplified so that its intent is met, rather than merely its terms being complied with, and how can this be done?*
- *Should the approach to addressing conflicts of interest changefrom managing conflicts to removing them, either by banning all or some forms of conflicted remuneration and sales or profit-based remuneration and/or changing industry structures?*

- *What can be done to improve compliance with the law (and industry codes), and the effectiveness of the regulators, to deter misconduct and ensure that grave misconduct meets with proportionate consequences?*

What more can be done to achieve effective leadership, good governance and appropriate culture within financial services firms so that firms 'obey the law, do not mislead or deceive, are fair, provide fit for purpose service with care and skill, and act in the best interests of their clients'?

Extending the Commission

Why deal with these issues now? Why make my Final Report now? Why not extend the work of the Commission? Many suggested that I seek an extension of the time by which my Final Report was due to allow for further public hearings.

I did not seek any extension of time for this Final Report for the reasons I gave in the Introduction to the Interim Report. As I said there:

> *The Letters Patent require me to inquire into, and report on, whether any conduct by financial services entities, including banks and their associated entities, might have amounted to misconduct and whether any conduct, practices, behaviour or business activities by those entities fall below community standards and expectations. I must execute those tasks conscious of the fact that the banking system is a central artery in the body of the economy. Defects and obstructions in the artery can have very large effects. Likewise, prolonged injections of doubt and uncertainty can affect performance.*

I concluded then, and remain of the view, that these reasons oblige me to execute my tasks promptly and do so in ways that would achieve two related purposes: to identify properly the underlying causes of conduct of the kinds referred to in the Terms of Reference; and to prompt proper consideration of how best to avoid recurrence of similar conduct.

Not every complaint that was made could be publicly examined. There were too many to do that. Hence, choices had to be made and, inevitably, the choices that were made will have disappointed those not chosen.

The decision not to seek an extension was taken recognising that the Commission could provide no remedy to those who complained that they had been affected by misconduct. The most that could be done was to provide them with a public platform to voice their complaint. I recognise the importance of a Royal Commission in giving public voice to the issues and concerns that prompted its establishment. But the decision not to seek extension was also taken recognising the central importance that the health of the financial system has for the nation's economy and thus for every member of this society. For me, these wider considerations were determinative.

It is time to grapple with the key questions identified. And it is necessary, therefore, to state plainly the principles and general rules that underpin the answers that are to be given.

Submissions were received from financial services entities; the Australian Prudential Regulation Authority (APRA); the Australian Securities and Investments Commission (ASIC); Treasury; those who have been affected by the conduct that has been the subject of the Commission's inquiries; other interested parties given leave to appear at some of the Commission's hearings (including the Finance Sector Union and consumer bodies such as CHOICE and the Consumer Action Law Centre); industry associations (including the Australian Banking Association (ABA) bodies representing financial advisers, mortgage brokers and others); academics; and members of the public more generally.

The focus of this Report must be on issues, causes and responses.

- *banking;*
- *financial advice;*

Underlying principles

At their most basic, the underlying principles reflect the six norms of conduct I identified in the Interim Report:

- *obey the law;*
- *do not mislead or deceive;*

- *act fairly;*
- *provide services that are fit for purpose;*
- *deliver services with reasonable care and skill; and*
- *when acting for another, act in the best interests of that other.*

These norms of conduct are fundamental precepts. Each is well-established, widely accepted, and easily understood.

The six norms of conduct I have identified are all reflected in existing law. But the reflection is piecemeal.

The general obligations of Australian financial services licence (AFSL) holders, stated in section 912A of the Corporations Act, and the general obligations of Australian Credit Licence (ACL) holders, stated in section 47 of the NCCP Act, stand out.

First, both provisions impose an overarching obligation to 'do all things necessary to ensure' that the financial services or credit activities authorised by the licence are provided 'efficiently, honestly and fairly'.7 Understood properly, this requirement would embrace all six norms.

Second, both provisions oblige licence holders to comply with, in the case of AFSL holders, the financial services laws and, in the case of ACL holders, the credit legislation.8 That is, licence holders must obey the law.

Third, both provisions oblige licence holders to maintain their own competence to provide the licenced services and to ensure that their representatives are both adequately trained and competent to provide those services. That is, they are required to have the capacity to deliver services with reasonable care and skill.

As the law now stands, breach of these general obligations carries no penalty. They are licence conditions enforceable only indirectly, by threatening withdrawal of the licence.

That said, the requirement that an AFSL holder acts honestly is expressed further in section 1041G of the Corporations Act, which makes it an offence to engage in dishonest conduct in relation to a financial product or financial service.

The more particular norms I state about not misleading or deceiving and acting fairly are reflected in the provisions of the Australian Securities and Investment Commission Act 2001 (Cth) (the ASIC Act) about misleading or deceptive conduct, false or misleading representations, unconscionable conduct and unfair contract terms. And the requirement to provide services that are fit for purpose and deliver services with reasonable care and skill are also reflected in the ASIC Act. But some of those provisions apply generally and some apply only to dealings with consumers. And the unconscionable conduct and consumer protection provisions use definitions of 'financial product' and 'financial service' that differ from those provided by Chapter 7 of the Corporations Act.

The sixth norm – when acting for another, act in the best interests of that other – is reflected in the financial advice sector by the best interests duty imposed by section 961B of the Corporations Act, together with the associated obligation provided by section 961J to give priority to the client's interests over other interests.

As I say, the six norms of conduct I have set out are reflected in existing law, but the reflection is piecemeal.

Apply and enforce the law

The first general rule, that the law must be applied and its application enforced, requires no development or explanation. It is a defining feature of a society governed by the rule of law.

Too often, entities have paid too little attention to issues of regulatory, compliance and conduct risks. And the risks of regulatory or other non-compliance and of misconduct are the risks of departure from the first general rule of 'obey the law'.

Industry codes

Industry codes are expressed as promises made by industry participants. If industry codes are to be more than public relations puffs, the promises made must be made seriously. If they are made seriously (and those bound by the codes say that they are), the promises that are set out in the code, and are intended to govern the particular relations between the provider and the acquirer of a financial product or financial service, must be kept. This

must entail that the promises can be enforced by those to whom the promises are made: the customer who acquires the product or service, and the guarantors of loans to individuals and small businesses.

Hawking

'Hawking' company securities, by making unsolicited approaches to potential buyers, has long been unlawful. The practice has long been unlawful because it too readily allows the fraudulent or unscrupulous to prey upon the unsuspecting. There is no real check on what is said to the target and often the target is not able to check the truth of what is said. The asymmetry of power and information between the provider of the product and service and the acquirer is very large. Even if the 'hawker' is not fraudulent or unscrupulous (and, too often, cases examined in evidence showed that the hawker was at least unscrupulous) the acquirer is nevertheless 'unsuspecting'.

Hawking financial products and managed investment products is now generally prohibited. But there are some exceptions. Other than the provisions relating to offers not made to retail clients and offers made under an eligible employee share schem.

Intermediaries

In the Interim Report, I pointed out how difficult it may be to decide for whom intermediaries act and to whom a particular intermediary may owe duties and responsibilities.

The general rule that should apply throughout the financial services industry is that an intermediary who is paid to act as intermediary:

- *acts for the person who pays the intermediary;*
- *owes the person who pays a duty to act only in the interests*
- *of that person; and*
- *ordinarily owes the person who pays a duty to act in the best interests of that person.*

Making change carefully and simply

Treasury, and many of the entities that made submissions, urged the need for caution before recommending change. This is undeniably right.

History shows, as Treasury submitted, that legislative simplification can be a long and difficult task. Programs to simplify the law relating to income taxation and to reform corporate law have extended over many years – well beyond the life of a single Parliament. And I do not doubt that simplifying the law that relates to the financial services industry would be a large task. But there are two parts of that task that can inform, and I consider should inform, what is done in response to this Report.

First, it is time to start reducing the number and the area of operation of special rules, exceptions and carve outs. Reducing their number and their area of operation is itself a large step towards simplificiation. Not only that, it leaves less room for 'gaming' the system by forcing events or transactions into exceptional boxes not intended to contain them.

Second, it is time to draw explicit connections in the legislation between the particular rules that are made and the fundamental norms to which those rules give effect. Drawing that connection will have three consequences.

It will explain to the regulated community (and the regulator) why the rule is there and, at the same time, reinforce the importance of the relevant fundamental norm of conduct.

Emphasising the fact of departure may assist in reducing both the number and the extent of these qualifications.

As I said in the Interim Report, two points must be made. First, where would be the acquisition? Who would acquire anything? What proprietary benefit or interest would accrue to any person? Second, if the point is good, it was good at the time when most forms of conflicted remuneration were prohibited.

Recommendations

All of the recommendations set out below are to be read and understood in the light of what is said in the body of the Report. In particular, each recommendation is to be read in

light of the reasons given for making it and what is said about other steps regulators, entities and the industry more generally can, and should, take in response to the conduct and events referred to in the Interim Report and this Report.

Recommendations by subject matter

Consumer lending: Direct lending

Recommendation 1.1 – The NCCP Act

The NCCP Act should not be amended to alter the obligation to assess unsuitability.

Recommendation 1.2 – Best interests duty

The law should be amended to provide that, when acting in connection with home lending, mortgage brokers must act in the best interests of the intending borrower. The obligation should be a civil penalty provision.

Recommendation 1.3 – Mortgage broker remuneration

The borrower, not the lender, should pay the mortgage broker a fee for acting in connection with home lending.

Recommendation 1.4 – Establishment of working group

A Treasury-led working group should be established to monitor

and, if necessary, adjust the remuneration model referred to in Recommendation 1.3, and any fee that lenders should be required to charge to achieve a level playing field, in response to market changes.

Recommendation 1.5 – Mortgage brokers as financial advisers

After a sufficient period of transition, mortgage brokers should be subject to and regulated by the law that applies to entities providing financial product advice to retail clients.

Recommendation 1.6 – Misconduct by mortgage brokers ACL holders should:

- *be bound by information-sharing and reporting obligations in respect of mortgage brokers similar to those referred to in Recommendations 2.7 and 2.8 for financial advisers; and*
- *take the same steps in response to detecting misconduct of a mortgage broker as those referred to in Recommendation 2.9 for financial advisers.*

Recommendation 1.7 – Removal of point-of-sale exemption

The exemption of retail dealers from the operation of the NCCP Act should be abolished.

Recommendation 1.8 – Amending the Banking Code The ABA should amend the Banking Code to provide that:

- *banks will work with customers:*
  - *who live in remote areas; or*
  - *who are not adept in using English*

to identify a suitable way for those customers to access and undertake their banking;

Recommendation 1.9 – No extension of the NCCP Act

The NCCP Act should not be amended to extend its operation to lending to small businesses.

Recommendation 1.10 – Definition of 'small business'

The ABA should amend the definition of 'small business' in the Banking Code so that the Code applies to any business or group employing fewer than 100 full-time equivalent employees, where the loan applied for is less than $5 million.

Recommendation 1.11 – Farm debt mediation

A national scheme of farm debt mediation should be enacted.

Recommendation 1.12 – Valuations of land APRA should amend Prudential Standard APS 220 to:

- *require that internal appraisals of the value of land taken or to*

- *be taken as security should be independent of loan origination, loan processing and loan decision processes; and*
- *provide for valuation of agricultural land in a manner that will recognise, to the extent possible:*
  - *the likelihood of external events affecting its realisable value; and*
  - *the time that may be taken to realise the land at a reasonable price affecting its realisable value.*

Recommendation 1.13 – Charging default interest

The ABA should amend the Banking Code to provide that, while a declaration remains in force, banks will not charge default interest on loans secured by agricultural land in an area declared to be affected by drought or other natural disaster.

Recommendation 1.14 – Distressed agricultural loans

When dealing with distressed agricultural loans, banks should:

- *ensure that those loans are managed by experienced agricultural bankers;*
- *offer farm debt mediation as soon as a loan is classified as distressed;*
- *manage every distressed loan on the footing that working out will be the best outcome for bank and borrower, and enforcement the worst;*
- *recognise that appointment of receivers or any other form of external administrator is a remedy of last resort; and*
- *cease charging default interest when there is no realistic prospect of recovering the amount charged.*

Recommendation 1.15 – Enforceable code provisions The law should be amended to provide:

- *that ASIC's power to approve codes of conduct extends to codes relating to all APRA-regulated institutions and ACL holders;*

- *that industry codes of conduct approved by ASIC may include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law;*
- *that ASIC may take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code;*
- *for remedies, modelled on those now set out in Part VI of the Competition and Consumer Act, for breach of an 'enforceable code provision'; and*
- *for the establishment and imposition of mandatory financial services industry codes.*

Recommendation 1.16 – 2019 Banking Code

In respect of the Banking Code that ASIC approved in 2018, the ABA and ASIC should take all necessary steps to have the provisions that govern the terms of the contract made or to be made between the bank and the customer or guarantor designated as 'enforceable code provisions'.

Recommendation 1.17 – BEAR product responsibility

After appropriate consultation, APRA should determine for the purposes of section 37BA(2)(b) of the Banking Act, a responsibility, within each ADI subject to the BEAR, for all steps in the design, delivery and maintenance of all products offered to customers by the ADI and any necessary remediation of customers in respect of any of those products.

Recommendation 2.1 – Annual renewal and payment

The law should be amended to provide that ongoing fee arrangements (whenever made):

- *must be renewed annually by the client;*
- *must record in writing each year the services that the client will be entitled to receive and the total of the fees that are to be charged; and*
- *may neither permit nor require payment of fees from any account held for or on behalf of the client except on the client's express written authority to the entity that conducts*

that account given at, or immediately after, the latest renewal of the ongoing fee arrangement.

Recommendation 2.2 – Disclosure of lack of independence

The law should be amended to require that a financial adviser who would contravene section 923A of the Corporations Act by assuming or using any of the restricted words or expressions identified in section 923A(5) (including 'independent', 'impartial' and 'unbiased') must, before providing personal advice to a retail client, give to the client a written statement (in or to the effect of a form to be prescribed) explaining simply and concisely why the adviser is not independent, impartial and unbiased.

Recommendation 2.3 – Review of measures to improve the quality of advice

In three years' time, there should be a review by Government in consultation with ASIC of the effectiveness of measures that have been implemented by the Government, regulators and financial services entities to improve the quality of financial advice. The review should preferably be completed by 30 June 2022, but no later than 31 December 2022.

Among other things, that review should consider whether it is necessary to retain the 'safe harbour' provision in section 961B(2) of the Corporations Act. Unless there is a clear justification for retaining that provision, it should be repealed.

Recommendation 2.4 – Grandfathered commissions

Grandfathering provisions for conflicted remuneration should be repealed as soon as is reasonably practicable.

Recommendation 2.5 – Life risk insurance commissions

When ASIC conducts its review of conflicted remuneration relating to life risk insurance products and the operation of the ASIC Corporations (Life Insurance Commissions) Instrument 2017/510, ASIC should consider further reducing the cap on commissions in respect of life risk insurance products. Unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero.

Recommendation 2.8 – Reporting compliance concerns

All AFSL holders should be required, as a condition of their licence, to report 'serious compliance concerns' about individual financial advisers to ASIC on a quarterly basis.

Recommendation 2.9 – Misconduct by financial advisers

All AFSL holders should be required, as a condition of their licence, to take the following steps when they detect that a financial adviser has engaged in misconduct in respect of financial advice given to a retail client (whether by giving inappropriate advice or otherwise):

- *make whatever inquiries are reasonably necessary to determine the nature and full extent of the adviser's misconduct; and*
- *where there is sufficient information to suggest that an adviser has engaged in misconduct, tell affected clients and remediate those clients promptly.*

Recommendation 2.10 – A new disciplinary system

The law should be amended to establish a new disciplinary system for financial advisers that:

- *requires all financial advisers who provide personal financial advice to retail clients to be registered;*
- *provides for a single, central, disciplinary body;*
- *requires AFSL holders to report 'serious compliance concerns' to the disciplinary body; and*
- *allows clients and other stakeholders to report information about the conduct of financial advisers to the disciplinary body.*

Recommendation 5.6 – Changing culture and governance

All financial services entities should, as often as reasonably possible, take proper steps to:

- *assess the entity's culture and its governance;*
- *identify any problems with that culture and governance;*
- *deal with those problems; and*
- *determine whether the changes it has made have been effective.*

Recommendation 5.7 – Supervision of culture and governance

In conducting its prudential supervision of APRA-regulated institutions and in revising its prudential standards and guidance, APRA should:

- *build a supervisory program focused on building culture that will mitigate the risk of misconduct;*
- *use a risk-based approach to its reviews;*
- *assess the cultural drivers of misconduct in entities; and*
- *encourage entities to give proper attention to sound management of conduct risk and improving entity governance.*

Recommendation 6.1 – Retain twin peaks

The 'twin peaks' model of financial regulation should be retained.

Recommendation 6.2 – ASIC's approach to enforcement ASIC should adopt an approach to enforcement that:

- *takes, as its starting point, the question of whether a court should determine the consequences of a contravention;*
- *recognises that infringement notices should principally be used in respect of administrative failings by entities, will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation;*

Recommendation 6.4 – ASIC as conduct regulator

Without limiting any powers APRA currently has under the SIS Act, ASIC should be given the power to enforce all provisions in the SIS Act that are, or will become, civil penalty provisions or otherwise give rise to a cause of action against an RSE licensee or director for conduct that may harm a consumer. There should be co-regulation by APRA and ASIC of these provisions.

Recommendation 6.9 – Statutory obligation to co-operate The law should be amended to oblige each of APRA and ASIC to:

- *co-operate with the other;*
- *share information to the maximum extent practicable; and*
- *notify the other whenever it forms the belief that a breach in respect of which the other has enforcement responsibility may have occurred.*

Recommendation 6.10 – Co-operation memorandum

ASIC and APRA should prepare and maintain a joint memorandum setting out how they intend to comply with their statutory obligation to co-operate.

The memorandum should be reviewed biennially and each of ASIC and APRA should report each year on the operation of and steps taken under it in its annual report.

Recommendation 6.13 – Regular capability reviews

APRA and ASIC should each be subject to at least quadrennial capability reviews. A capability review should be undertaken for APRA as soon as is reasonably practicable.

Recommendation 6.14 – A new oversight authority

A new oversight authority for APRA and ASIC, independent of Government, should be established by legislation to assess the effectiveness of each regulator in discharging its functions and meeting its statutory objects.

The authority should be comprised of three part-time members and staffed by a permanent secretariat.

It should be required to report to the Minister in respect of each regulator at least biennially.

Recommendation 7.1 – Compensation scheme of last resort

The three principal recommendations to establish a compensation scheme of last resort made by the panel appointed by government to review external dispute and complaints arrangements made in its supplementary final report should be carried into effect.

Recommendation 7.2 – Implementation of recommendations

The recommendations of the ASIC Enforcement Review Taskforce made in December 2017 that relate to self-reporting of contraventions by financial services and credit licensees should be carried into effect.

Recommendation 7.4 – Fundamental norms

As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.

Simplifying the law so that its intent is met

A general recommendation is that, as far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated (Recommendation 7.3).

In this way, the first, and essential, step to take is to reduce exceptions and carve outs.

The more complicated the law, the harder it is to see unifying and informing principles and purposes. Exceptions and limitations encourage literal application and focusing on boundary-marking and categorisation. Boundary-marking and categorisation may promote uncertainty. Removing exceptions and limitations encourages understanding and application of the law in accordance with its purposes. That is, 'its intent is met, rather than merely its terms complied with'. Like cases are more evidently treated alike. Uncertainty may be reduced.

Regulators and compliance

The recommendations seek to improve the effectiveness of the regulators in deterring misconduct and ensuring that there are just and appropriate consequences for misconduct.

Some recommendations seek to increase the ways in which the regulators can enforce the law by recommending that:

- *the BEAR be extended to other APRA-regulated institutions (Recommendations 3.9, 4.12 and 6.8);*

- *APRA determine a new responsibility under the BEAR for bank products (Recommendation 1.17);*
- *the breach of trustee and director covenants and obligations under the SIS Act should be subject to civil penalties (Recommendation 3.7); and*
- *the ASIC Enforcement Review Taskforce recommendations be carried into effect (Recommendation 7.2).*
- *co-operation and information sharing between APRA and ASIC (Recommendations 6.9 and 6.10).*
- *ASIC's approach to enforcement (Recommendation 6.2); and*
- *the need for ASIC to undertake, or play a part in, reviews relating to the quality of advice by, and commissions paid to, financial advisers (Recommendations 2.3, 2.5 and 2.6).*
- *requiring co-operation with external dispute resolution processes (Recommendation 4.11).*

4.4 Culture, governance and remuneration

Because primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who manage and control them, effective leadership, good governance and appropriate culture within the entities are fundamentally important.

- *APRA's giving effect to the Financial Stability Board's publications concerning sound compensation principles and practices (Recommendation 5.1); and*
- *APRA using supervision, prudential standards and guidance to:*
  - *promote and encourage sound management by APRA-regulated institutions of not only financial risk but also misconduct, compliance and other non-financial risks (Recommendations 5.2 and 5.3); and*
  - *take steps (identified in Recommendation 5.7) to encourage entities to give proper attention to sound management of conduct risk and improving entity governance.*

Increasing protections

There are recommendations that seek to change, or add to, the law, or industry codes of conduct, in ways that will increase protections to consumers from misconduct or conduct that falls below community standards and expectations. Those recommendations are:

- *about making some provisions of industry codes enforceable (Recommendations 1.15, 1.16 and 4.9) to give certainty and enforceability to the terms of the contract between a financial services entity and its client or a guarantor;*
- *that the ABA amend the Banking Code (in the ways identified in Recommendation 1.8) to improve access to banking;*
- *about the enactment of a national scheme of farm debt mediation (Recommendation 1.11);*
- *about the valuation of land (Recommendation 1.12), the charging of default interest (Recommendation 1.13) and how banks should deal with distressed agricultural loans (Recommendation 1.14);*
- *establishing a compensation scheme of last resort (Recommendation 7.1).*

These recommendations seek to improve the law to protect consumers from the misconduct and conduct that fell below community standards and expectations identified by the Commission. They are recommendations for changes that will reduce the chance that conduct of the kinds identified will happen again, or happen again with the same effect for consumers.

The responsible lending provisions of the Banking Code

Again, there was little or no debate about the way in which the Banking Code framed the lender's responsible lending obligation – to 'exercise the care and skill of a diligent and prudent banker'. I see no reason to alter this formulation of the obligation. I discuss the enforceability of this and other provisions of the Code below.

Home lending through mortgage brokers

As I said in the Interim Report, almost every person buying a house in Australia will borrow a large part of the cost. Many Australians have home loans with one of the major lenders.

At the time of the Interim Report, home loans were, and they remain, the largest asset on the books of authorised deposit-taking institutions (ADIs).

The mortgage broking industry is a key distribution channel for home loans, accounting for more than half of all residential home loans settled. Reliance on the broker channel among the larger banks is varied. Approximately 40% of all CBA loans come through the broking channel, while for ANZ the amount is around 55%. Because of their smaller physical branch presence, smaller lenders are more dependent upon brokers to compete in the home loan market. But brokers are not the only means by which smaller banks deal in that market. Most home loans made by Bendigo and Adelaide Bank are made through the bank's network of community owned branches. The branch receives a share of the revenue produced by the loan. In addition to this, Bendigo and Adelaide Bank lends to 'mortgage managers' who make home loans to customers at a rate higher than the rate charged to the manager by the bank.

Consideration of lending arranged through mortgage brokers must begin by recognising two facts. First, borrowers look to mortgage brokers for advice about how to finance what is, for many borrowers, the most valuable asset they will buy in a single transaction.44 And brokers not only give advice about what they think is best for the borrower, they submit the loan application on the borrower's behalf and, to the extent the terms are negotiable, negotiate the terms of the loan for the borrower.

Second, as already noted, it is not easy to determine for whom a mortgage broker acts. The lender pays the broker, not the borrower. Typically, the lender pays a commission, both an upfront commission and a trail commission.

Yet, despite brokers playing this advisory role, the Corporations Act 2001 (Cth) (the Corporations Act) provisions about providing financial product advice to retail clients do not apply to giving advice about a residential home loan. Those provisions do not apply because a mortgage that secures obligations under a credit contract (not otherwise expressly included by operation of some particular sections of Chapter 7 of the Corporations Act) is not a 'financial product' for the purposes of Chapter 7 of the Act.

Hence, making a recommendation or stating an opinion about a mortgage is not giving 'financial product advice'. And it is not considered to be personal advice, even though the broker would be expected to consider the borrower's objectives, financial situation and needs. It follows that the best interests duty that the Corporations Act imposes on those who provide personal advice to a retail client does not apply to a mortgage broker.

The holder of an ACL must do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly, and fairly, and they must have in place 'adequate arrangements to ensure that clients … are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives'.

In February 2019, the government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, with title '*Restoring trust in Australia's financial system*'. The Hon Josh Frydenberg stated:

Today, the Government releases its response to the landmark Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

The Government is acting on all 76 recommendations contained within the Royal Commission's Final Report and in a number of important areas is going further. In his report, Commissioner Hayne has recognised the many significant actions the Government has already taken.

In outlining the Government's response to the Royal Commission, the Government's principal focus is on restoring trust in our financial system and delivering better consumer outcomes, while maintaining the flow of credit and continuing to promote competition. These objectives are vitally important to the health of the economy and therefore to the health of our community.

The Royal Commission conducted seven rounds of public hearings over 68 days, called more than 130 witnesses and reviewed over 10,000 public submissions. The Final Report of the Royal Commission, together with the Interim Report released on 28 September 2018, has provided a comprehensive and forensic inquiry of our financial system.

As we have heard, too often the conduct within our financial institutions has been in breach of existing laws and fallen well below community expectations. The price paid by our community has been immense and goes beyond just the financial. Businesses have been broken, and the emotional stress and personal pain have broken lives.

As Commissioner Hayne has made clear: "there can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities".

My message to the financial sector is that misconduct must end, and the interests of consumers must now come first. From today the sector must change and change forever.

Commissioner Hayne's recommendations and the Government's response advance the interests of consumers in four keyways. First, they strengthen and expand the protections for consumers, small business, and rural and remote communities. Second, they raise accountability and governance standards. Third, they enhance the effectiveness of regulators. Fourth, they provide for remediation for those harmed by misconduct.

For the first time the Government will establish a compensation scheme of last resort to ensure that consumers can have their case heard and be confident that where compensation is owed it will be paid. This will be a scheme paid for by industry reflecting their obligation to right their wrongs.

I would like to thank Commissioner Hayne for the outstanding manner in which he has conducted the Royal Commission and express my gratitude for the tireless work of those involved. I also wish to acknowledge all of those individuals who provided submissions and came forward to give evidence. Their stories and experiences drive home the necessity for change.

The Government is confident that the actions announced today will put in place the legislative framework necessary, providing the regulators with the powers and the resources to hold those who abuse our trust to account. In doing so the community's trust in our financial sector can and will be restored.

The Government will build on its existing reforms.

The Royal Commission has endorsed many of the themes and individual reforms the Government is currently pursuing. However, the Royal Commission has also found that there is further work to be done. The Government agrees.

The Royal Commission has shone a spotlight on the extent of wrongdoing and misconduct across the financial system. It has identified entities putting profits ahead of people and rewarding misconduct, a lack of accountability for those who broke the law, and regulators who need to be more effective in denouncing and punishing misconduct.

This response will address the issues identified by the Royal Commission and substantially build on the Government's existing agenda by:

- *strengthening protections for consumers, small businesses and rural and regional communities;*
- *enhancing accountability;*
- *ensuring strong and effective financial system regulators; and*
- *further improving consumer and small business access to redress.*

In undertaking these reforms, the Government will ensure that the financial system continues to provide consumers and small businesses with access to credit and other affordable financial services that they need, and that the financial system remains competitive, efficient and resilient.

Strengthening protections for consumers, small businesses, and rural and regional communities

All Australians have the right to be treated fairly and honestly in their dealings with financial services entities. It is fundamental to ensure consumers have trust in the financial system.

We have already reformed remuneration practices in the life insurance advice sector and introduced new educational and ethical requirements for financial advisers. We have protected consumers from being granted excessive credit limits and building up unsustainable debt across credit cards and simplified how interest is calculated.

Legislation is before the Parliament to ensure financial products are appropriately targeted and to give the Australian Securities and Investments Commission (ASIC) the power to intervene to prevent consumer harm. Legislation is also before the Parliament which contains a comprehensive package of reforms designed to protect Australians' superannuation savings from undue erosion by fees and insurance premiums, and to improve outcomes for members of superannuation funds.

We will further strengthen these protections, including by:

- *requiring mortgage brokers to act in the best interests of borrowers;*
- *removing conflicts of interest between brokers and consumers by banning trail commissions and other inappropriate forms of lender-paid commissions on new loans from 1 July 2020 with a further review in three years on the implications of removing upfront commissions and moving to a borrower pays remuneration structure;*
- *ending the grandfathering of the conflicted remuneration provisions effective from 1 January 2021 and, in addition to the Royal Commission's recommendation, requiring that any grandfathered conflicted remuneration at this date be rebated to clients;*
- *ensuring superannuation fund members only have one default account (for new members entering the system);*
- *protecting vulnerable consumers through clarifying and strengthening the unsolicited selling (anti hawking) provisions, including for superannuation and insurance products;*
- *prohibiting the deduction of any advice fees (other than intra fund advice) from MySuper accounts;*
- *supporting the expansion of the definition of small business in the Banking Code;*
- *establishing a comprehensive national scheme for farm debt mediation;*
- *supporting the elimination of default interest on loans in areas impacted by natural disasters;*

- *supporting the appointment of receivers or any other form of external administrator only as a remedy of last resort; and*
- *supporting more inclusive practices for Aboriginal and Torres Strait Islander persons.*

The Royal Commission has also put industry on notice that it must step up and improve how it deals with distressed agricultural loans.

On 20 August 2019, APRA stated *it strengthened rules to combat contagion risk within banking groups.*

> *The Australian Prudential Regulation Authority (APRA) has released a strengthened prudential standard aimed at mitigating contagion risk within banking groups.*
>
> *The updated Prudential Standard APS 222 Associations with Related Entities (APS 222) will further reduce the risk of problems in one part of a corporate group having a detrimental impact on an authorised deposit-taking institution (ADI).*
>
> *Deputy Chair John Lonsdale said APRA began consulting last July on proposed changes to APS 222 to incorporate some of the lessons learned from the global financial crisis.*
>
> *"Concessions in the existing framework led to some ADIs establishing operations in foreign jurisdictions, which are managed and funded within the domestic bank.*
>
> *"APRA has only limited visibility of these operations, which also fall outside the purview of foreign regulators. They complicate operating structures and there is no certainty their assets would be available to an ADI if it were to enter resolution. There are currently around 100 such operations within a small number of ADIs.*
>
> *"Additionally, if an ADI were to fully utilise some of the limits within the existing framework, they would be exposed to excessive levels of contagion risk," Mr Lonsdale said.*

APRA received submissions from 10 stakeholders to its consultation; most supported updating the requirements, however some raised concerns about the complexity of implementing certain proposed changes.

Responding to the consultation, APRA confirmed that APS 222 will be updated to include:

- *a broader definition of related entities that includes board directors and substantial shareholders;*
- *revised limits on the extent to which ADIs can be exposed to related entities;*
- *minimum requirements for ADIs to assess contagion risk; and*
- *removing the eligibility of ADIs' overseas subsidiaries to be regulated under APRA's Extended Licensed Entity framework.*

In 2019, it was apparent that the [redacted] and regulators were far more serious than small businesses and farmers could have believed possible. The ABA, National Australia Bank and St George Bank published codes omitting ASIC Regulatory Guide 165 (2001) from clause 35.1(b) of the Code. [redacted]

In 2019, Adele Ferguson's Banking Bad book, Chapter 27 - ANZ - Slow to respond, loath to change, stated:

Time was not on the Commission's side. Hayne had given himself just two weeks to hear from the big four banks, AMP, Macquarie and the regulators. If he expected more than motherhood statements and apologies, he must have been disappointed.

Shayne Elliott, the boss of ANZ since January 2016, appeared on 28 November. It was obvious that he had listened to the testimony of CBA's Matt Comyn and Catherine Livingstone and NAB's Andrew Thorburn and Ken Henry and learned from their mistakes. Elliott spoke clearly and directly and kept to the topic of the seventh round of hearings – why misconduct had occurred and what could be done to prevent it in the future – without being asked.

Rowena Orr asked Elliott to explain what he meant by a statement in his submission to the royal commission that misconduct had occurred at ANZ largely due to a culture that had become overly focussed on revenue and sales.

He replied, 'People who drove good revenue outcomes were seen to be doing a good job, and we paid less attention to how they achieved those outcomes.'

Orr then listed a series of other causes that Elliott had identified in his submission including poorly calibrated performance and remuneration plans. 'You accept that that has been a contributing cause?'

Elliott replied, 'Yes, I do'.

'Failures to quickly recognise systemic issues and to elevate them to senior management for action?'

'Yes,' said Elliott.

'Insufficiently clear lines of responsibility and accountability?'

'Yes.'

'And inadequate investment in things such as customer remediation programs?'

'Yes'.

Orr then asked, 'Has ANZ's technology and its oversight of technology also been a contributing cause, in your view?'

'Yes.'

Admitting everything, he then tried to put what went wrong into its context. The industry, he said, had had the good fortune to be profitable and fast growing at the same time. But that had encouraged it to get bigger and it created complex organisations that were difficult to manage. The only clear measures of success were profit and revenue.

At this stage of the hearings, though, after the testimonies of so many board chairs and senior executives, it was impossible not to be cynical. 'Margin Call', a business column in The Australian, didn't buy Elliott's spin: 'It was hard to believe this self-flagellating man

was the same banker who once ran ANZ's infamously fast-and-loose institutional bank back in the Mike Smith-era. The same banker who as ANZ's CFO sat on the board of Malaysia's scandalous AmBank. The same banker currently fighting a criminal cartel case launched by Rod Sims' ACCC [Australian Competition and Consumer Council] over ANZ's August 2015 capital raising.' This was a reference to the revelation that around two million ANZ customers had been overcharged on their credit card and home loan accounts or hadn't received discounts the bank had offered in relation to their home loans. It amounted to hundreds of millions of dollars falling into the pockets of ANZ and its staff. According to Elliott, the discrepancies were 'processing errors' due to the legacy systems in use at ANZ.

Despite the mea culpas, it was clear that when it came to identifying problems, reporting them to ASIC and remediating customers, ANZ had performed poorly. Orr turned to a September 2018 ASIC investigation into the breach reporting practices of twelve entities, including ANZ, over a three-year period from 2014 to 2017. ANZ had provided ASIC with data on eighty-seven significant breaches that it had reported in that three-year period. ASIC found that the twelve entities took, on average, 1517 days to identify an incident that was later determined to be a significant breach. ASIC hadn't been any more specific, but Orr was. She revealed that on average it had taken ANZ more than four years to identify problems linked to customer detriment, another seven months to file a breach report with ASIC, and another six months after that to make the first repayment to customers.

'How did it get to the point, Mr Elliott, in ANZ where it took more than four years for you to identify incidents that involved significant breaches?' Orr asked.

Elliott blamed it on ineffective systems and processes which didn't proactively identify issues. He said staff weren't always encouraged by senior management to identify and report compliance issues, and the bank's compliance and operational risk database was complex and difficult to navigate. He claimed that in the past year ANZ had been trying to fix its systems, but when Orr asked him to commit to a shorter time frame for identifying incidents, Elliott started to duck and weave.

'What average would you like to see, as opposed to the 1517-day average?' Orr asked.

'I'm not – I'm not sure it's the type of statistic that lends itself to a target . . . I don't know that I can put a number on that. But I would say it's significantly lower than 1500 days,' Elliott replied.

Orr then returned to the ASIC document which had referred to one institution where 'there was less focus on customer remediation. It was seen as a distraction, at the expense of earning revenue, and therefore not always given the highest priority.' She outed the institution as ANZ. In fact, the ASIC assessment was based on an internal ANZ document entitled 'The changing focus of customer remediation', which concluded that remediation was 'delivered in an ad hoc and inconsistent way'.

Orr asked Elliott, 'What happened at ANZ that led to it treating remediation of its customers, for errors that ANZ had made, as a distraction?'

Elliott tried to distance himself from the document. He said it had been pulled together by a team of mid-ranked executives and was not 'an official analysis', so therefore it didn't reflect a widespread attitude. In other words, it was another case of 'nothing to see here'.

Bank victims sitting in the courtroom shook their heads in disgust. Susan Henry, a former trauma counsellor and victim of the collapsed managed investment scheme Timbercorp, which had been bankrolled by ANZ, sent me a message which expressed the mood: 'Noble assurances, claims of shame, contrition, learning and commitment to change are hollow spin . . . It's about so much more than cataclysmic loss of money for victims and their families. Abuse of power and betrayal of trust [have] wide-ranging detrimental impacts extending to society as a whole.'

It wasn't a good look for Elliott or the bank. Nor was Orr's revelation that ANZ had missed several ASIC deadlines, including a refund of trailing commissions to about six thousand customers and the repayment of adviser services fees to about three thousand customers. Elliott responded: 'Our limitations to date relate to the complexity we've built into our business over time. Again, [it was] our fault, [and] shouldn't have happened, but it did . . .

We are getting better at this. In the future, with better processes and a simpler bank, the time scales will come down dramatically.'

The bank had changed its attitude to remediation, he said. 'There has been a significant uplift in ANZ's understanding of the importance of remediation. And the reason I know that is it is talked about more at our board. The facts are that we are now beginning to get first payments to customers faster than we were before. That we are learning from mistakes and being able to apply learnings from one set of remediations to another. So I do believe there has been an impact of those but there's clearly more to . . . more to do.'

Orr moved on to the subject of executive remuneration and suggested there should be more transparency around payments and bonuses, and that executives should be held accountable when things go wrong.

Elliott rejected this, arguing that publishing more details about bonuses would amount to little more than 'ritualistic public shaming' which would be of little value 'in fact, potentially a significantly negative consequence in terms of attracting, retaining, motivating the very best people for the future'.

'Can I suggest to you that it's not so much about a public shaming; it's just a part of holding them accountable?' Orr said.

Elliott vehemently disagreed. 'I have forty thousand people who come to work every day at ANZ in thirty-three countries. They have all sorts of backgrounds . . . For me to be able to confidently assess that I can nail that communication and it not to be misunderstood, that it not create a culture of fear, I think would be extraordinarily difficult.'

Unperturbed, Orr asked why Elliott was prepared to inform the public that his variable remuneration had been reduced. 'You tell us in your statement that it has been reduced on account of conduct issues raised in the Royal Commission and consequent reputational damage?'

'Yes,' said Elliott.

'I just want to ask you to reflect on what the difference is between publication of the consequences for you and publication of the consequences for your senior executives?'

Elliott said it was because he was the CEO. 'I have a higher degree of responsibility and accountability than anybody else in the company,' he said.

Orr turned to the email where Elliott had requested his own pay be deducted in line with the senior executives. 'It's about unity, accountability and frankly credibility, externally but even more importantly internally,' he had written to ANZ's chairman, David Gonski. 'I can't ask my people to be down 22 per cent unless my own rem reflects a similar number. I want you to reassess your recommended CEO rem as a result and have time to consider.' Elliott said he made the decision after announcing on 8 October that the bank would set aside $374 million to remediate customers who had received inappropriate advice or been charged fees for no service.

All very well, but Orr was trying to understand why Elliott considered the perception created internally was more important than the perception of the public. One of the problems with bank misconduct and poor culture was executives had managed to avoid the public glare and avoid public accountability. ANZ was no different.

Orr pointed out that it was the first time in a decade bonus had been cut and asked, 'Why is it that it has taken until the last financial year for ANZ to exercise this important power of withholding deferred remuneration?'

Elliott said he believed it was a failing on ANZ's part.

Yet while Elliott received a reduced short-term bonus, his overall package in 2018 was still $5.25 million, down from $6.2 million in 2017. To many observers, the fact that he and his executives had received a bonus of any kind during the royal commission, with all the dirty laundry it had aired, beggared belief. Investors reacted accordingly. At the bank's annual general meeting in December, 34 per cent of shareholders protested against the remuneration report. It was a first strike against the board.

Before finishing with Elliott, Orr asked him about the results of an internal culture survey which showed that only 67 per cent of staff felt they could raise issues and concerns at

ANZ without fear of reprisal or negative consequences. It was a 3 per cent decrease on the last survey in 2016.

Elliott understood the significance. 'If we don't have a culture where people feel free to speak, we will fail,' he replied. 'We will fail in terms of our responsibilities of being well managed and ultimately we will fail our customers.'

Clearly, ANZ still had a long way to go to rebuild trust and change its culture.

In November 2019, ASIC Commissioner Sean Hughes advised TSBC Chair that the code when customers signed loan contracts remains in place. The letter stated:

ASIC's view is that conduct engaged in while the earlier version of the Code was in operation will be assessed for compliance against the previous version of the Code, and conduct engaged in under a continuing facility since the new Code's commencement will be assessed for compliance against the new Code. ASIC's approval of the new Banking Code of Practice does not have the effect of changing the terms and conditions of existing contractual agreements to the detriment of banking customers and guarantors.

In December 2019, APRA published the *Governance and Senior Executives Accountabilities*, stating:

A stable and efficient financial system with strong and resilient financial institutions is critical to supporting and promoting economic growth and development in Australia and to the effective functioning of the economy. Financial crises can be deeply damaging and have a long-lasting adverse impact on people's lives. The APRA plays an important role in Australia's financial system by protecting around $6.8 trillion in assets for Australian bank depositors, superannuation fund members and insurance policyholders.

APRA was established by the Australian Government on 1 July 1998. It is an independent statutory authority accountable to the Australian Parliament. APRA supervises institutions in the financial sector in accordance with various laws of the Commonwealth. In performing and exercising its functions, APRA is required to balance the objectives of financial safety, efficiency competition, contestability, and competitive neutrality; and in balancing these objectives, is to promote financial system stability understand Australia.

APRA works closely with other agencies responsible for financial regulation in Australia including the Treasury; the ASIC, RBA; the ACCC and the Australian Transaction Reports and Analysis Centre.

APRA is governed by an executive group of APRA Members. The APRA members are appointed by the Governor-General on the advice of the Australian Government for terms of up to 5 years. Terms of appointment may be renewed.

'Frydenberg's directions to ASIC throw the banking royal commission under a bus.'

On 27 August 2021, Senior lecturer, Faculty of Law, University of Wollongong, published this article. He stated:

For Australia's habitually abused financial consumers it's Back to the Future (minus the DeLorean).

Treasurer Josh Frydenberg appears to have thrown the most important findings of the banking royal commission under a bus, in glorious double-speak.

On Thursday he issued a direction to the Australian Securities and Investments Commission through what is known as a statement of expectations.

It is very different from the previous such statement, issued in 2018.

This one includes an entirely new clause, placed right at the top.

The government expects ASIC to:

identify and pursue opportunities to contribute to the government's economic goals, including supporting Australia's economic recovery from the COVID pandemic.

It's an odd role for a corporate cop, on its face inconsistent with the way ASIC itself describes its function in the "our role" tab on its homepage.

Perhaps not yet updated to take account of the guidelines, ASIC's description says it is a regulator whose job is to "take whatever action we can, and which is necessary, to enforce and give effect to the law".

From 'why not litigate'...

It's how the royal commission saw ASIC's role. In his final report, Commissioner Kenneth Hayne was scathing about how ASIC carried out those duties, saying it was too ready to negotiate, and not keen enough to litigate.

Financial services entities are not ASIC's 'clients. ASIC does not perform its functions as a service to those entities. And it is well-established that 'an unconditional preference for negotiated compliance renders an agency susceptible to capture'.

Negotiation and persuasion, without enforcement, all too readily leads to the perception that compliance is voluntary. It is not.

Hayne said the first question ASIC should ask whenever misconduct was identified was "why not litigate?".

Frydenberg's new statement of expectations turns that on its head.

…to 'why not capitulate'

Rather than "why not litigate," it reads as "why not capitulate" - justified by the need to identify opportunities to contribute to Australia's economic recovery.

The statement says the government expects ASIC to "act independently" but also says it should "consult with the government and treasury in exercising its policy-related functions" - a requirement not previously expressed in those terms.

On 26 Nov 2021 ABC News published an article *ANZ dragged to court after cleaners and real estate agents helped write $18.5b in home loans*, written by business reporter Daniel Ziffer, stating:

Key points:

- *ASIC is suing ANZ in relation to 74 loans that may have breached the National Credit Act*
- *The loans were referred to the bank by "introducers" — third parties who were paid commissions for sending customers ANZ's way*
- *The banking royal commission heard evidence that some large-scale introducers were tailors or gym owners*

ANZ's 'Introducer' program paid third parties a commission and helped the bank write more than 50,000 loans worth at least $18.5 billion over just five years.

But the Australian Securities and Investments Commission (ASIC) has today commenced civil proceedings in the Federal Court relating to 74 of those loan applications, with allegations including fraudulent documents and "facilitating unlicensed persons engaging in credit activities".

The issue is not the specific occupation of those who made the referrals, but that they were meant to be people with specific insight into customers finances such as accountants and financial planners.

People who give personal financial advice are required to have a credit licence to do so.

ANZ is the smallest of the so-called big four banks, all of which ran programs paying people to introduce customers interested in home loans.

But the problem was obvious: kickbacks were paid if the loans were successfully processed. There was no commission if they failed.

Kenneth Hayne's banking royal commission exposed how generous payments induced dodgy operators - including a jailed NAB staff member - to falsify documents and pay cash bribes to get loans approved so the commission would be paid.

In a statement, ANZ said the civil charges related to three unlicensed third parties that provided home loan application documents to ANZ lenders.

"ANZ has co-operated with ASIC during its investigation and has established a customer remediation program as well as continuously improving its home loan processes and controls," the bank said in a statement.

Home loans are key to the profitability of Australian banks. ANZ's annual profit soared 72 per cent to $6.1 billion in the past financial year.

The bank's chief executive Shayne Elliott said some of that growth was due to growth in home loans during the COVID property boom.

ASIC action

ASIC deputy chair Sarah Court laid out the regulator's concerns.

"Some loans may have been granted by ANZ based on false information and some consumers may have entered into home loans that were beyond their ability to pay."

Ms Court said if banks are going to accept referrals of consumers seeking a home loan from individuals who don't have a credit licence, but who are receiving commission payments for the referrals, "they need to make sure they have the right systems in place to properly process" those applications.

ASIC is seeking declarations, "pecuniary penalties" - a fine as punishment - and other orders, including that ANZ must hire an independent expert to review ANZ's home loan customer referral system.

The proceedings will be heard at a future date, determined by the court.

ASIC took NAB to court over similar issues in 2019, with a maximum fine of $500 million in the offing.

The case ended last year and NAB paid a $15 million fine for breaking National Consumer Credit Protection laws relating to its 'Introducer' program.

NAB has shut the program, and a senior bank executive grilled for days at the banking royal commission over the scheme led a successful push by the banking industry to delay bringing in solutions recommended by the Hayne inquiry.

ANZ's program remains open but with stricter checks than before.

On 26 November 2021, the article ANZ to answer claims of dodgy lending, written by Ayesha de Kretser and James Eyers, stated:

ANZ Bank has been sued for alleged breaches of the credit act by the corporate regulator, which said the bank used cleaners and real estate agents as third party "introducers" to sell mortgages but failed to conduct proper checks on information supporting the loans.

ANZ is the second major bank to face claims of irresponsible lending after the Hayne royal commission identified dangers with banks using outside parties to send them mortgage business.

The case relates to 74 home loans issued between 2016 and 2018 that are alleged to have contravened the Consumer Credit Act, as well as further claims that ANZ did not meet its general conduct obligations under the Credit Act. Some of the alleged misconduct occurred until June 2020.

ANZ said it would consider ASIC's statement of claim and has so far co-operated with the investigation. The Melbourne-based bank has established a customer-remediation program and improved its home loan process controls, it said in a statement.

Last year, National Australia Bank was fined $15 million after claims it used hairdressers and gym instructors to illegally reel in borrowers who could not afford to repay loans, when it became the first bank to be taken to court by the corporate regulator after the Hayne royal commission, which criticised the banks for relying on outsiders to ship them business.

ASIC's material filed with the Federal Court on Thursday said the bank did not take reasonable steps to ensure its bankers carefully assessed the loan applications coming in from the third parties. ASIC says training was inadequate and ANZ did not have processes to validate the documentation attached to the loans applications.

ASIC is concerned that as a result of this conduct some loans may have been granted by ANZ based on false information and some consumers may have entered into home loans that were beyond their ability to pay," said ASIC deputy chairman Sarah Court.

"If banks are going to accept referrals of consumers seeking a home loan from unlicensed individuals, who receive commission payments for the referrals, they need to make sure they have the right systems in place to properly process those referrals."

ANZ's home loan introducer program referred more than 50,000 loans between 2015 and June 2020, resulting in $18.5 billion of lending, and at September 2018, about 18 per cent of all home loans being sold by ANZ was coming through the introducer program.

On 2 December 2021, Financial Review published an article *Things still getting worse at ANZ* written by Joe Aston – Columnist, stating:

The Reserve Bank and the Australian Prudential Regulation Authority released their monthly home loan market share figures on Tuesday and they contained more of the same from Shayne Elliott's ANZ Banking Group.

ANZ now commands 13.09 per cent of the Australian mortgage market, having shed another eight basis points in October, and 0.87 per cent in 12 months. In absolute terms, ANZ is the only big four bank whose book has shrunk in the past six months, a period of $73 billion in system growth.

It is also the only major bank to originate less than half (47 per cent) of its loan book through proprietary channels. Its reliance on mortgage brokers, and the commissions it pays them, is a key driver of its inferior return on equity (ROE) and net interest margin (NIM) profiles versus peers.

The third frightful data point for ANZ is its median approval time for (third-party) applications, currently a massive outlier at 51 days. This explains its evaporating market share. What broker would wait seven weeks to write a deal with ANZ when they can do one with Macquarie in seven days? CBA takes 11 days and NAB takes 12. This is not a new problem. ANZ was taking 79 days 14 months ago.

So Elliott is out there in the market promising to reduce the bank's annual running costs to $8 billion (from $8.7 billion) when he still can't even process a home loan application in a timely fashion.

At the very same time, Elliott has 800 employees working under digital boss Maile Carnegie on ANZ Plus, the abject debacle formerly known as ANZx (changing the vacuous name of a transformation project being the surest sign it's getting nowhere).

The scope and objective of ANZx/ANZ Plus is curiously ephemeral. First revealed in 2019, it started out as a new core banking platform (something Ralph Norris finished building for CBA more than 10 years ago) and would make mortgage approvals ten times simpler and faster.

In September last year, Elliott called ANZx "our big, awesome, all-singing, all-dancing, digitisation program. It's not just automation, it's a reframing of what does banking mean and how the business works."

By February this year, ANZ was flagging the May launch of transaction accounts and home loans by calendar year-end (i.e. now).

By May (when still no accounts were launched), ANZx was "a whole new proposition around financial well-being. The first test products are saving and transaction accounts. Built-in, completely new technology" and available this year. This is not singing or dancing, it is bread and butter. ANZ has offered saving and transaction accounts in its smartphone apps since Norris was still running CBA.

In September, Elliott described ANZx as "the reimagining of our purpose." The soaring guff is sick making.

"Initially ANZ Plus will include," we were promised in October, "an intelligent mobile banking app, two reimagined bank accounts, and access to coaches." Firstly, who cares? Secondly, it still doesn't!

As of today, this "ecosystem" is a beta app with 650 test users and functionality that extends only to savings analysis. It has no transactional banking capability. It has cost $500 million already, and $1 billion by the end of 2022, employs a battalion of software engineers and it still doesn't do anything. Where, alternatively, would ANZ be today if they'd just hired 800 mortgage assessors?

Carnegie was appointed in March 2016, in a blaze of headlines, to deliver a "superior digital experience" and foster an "innovation culture". ANZ's shitful blog, blue notes, was immediately touting her as Elliott's heir apparent.

More than five years later, there is nothing to show for it. Worse than nothing. At the risk of labouring the point, this is an organisation that still takes 51 days to process a home loan application.

There is no innovation culture – or at least there are no appreciable fruits of one – just a breakdown of operational focus dressed up in Tech Dude Bro doublespeak. The drivel of Silicon Valley has infected the bank. In 2017, Elliott announced the comprehensive restructure of 9000 jobs into "squads" or "tribes" of 10 people, to be "agile" like Google or Facebook. That was halted two years later and never spoken of again.

How can you sit on the ANZ board and sanction this many years of drift and non-delivery in the core banking franchise? The directors, a group carefully curated by previous chairman David Gonski, are earnestly preparing to choose Elliott's successor. A return to the basics – of banking and English – is what's sorely needed.

ASIC REGULATORY GUIDES

1. Regulatory Guide 165 (2001)

Superseded Regulatory Guide 165 – Licensing: Internal and External Dispute Resolution (November 2001)

[RG 165.1]

This guide explains how ASIC will administer the dispute resolution provisions of the Corporations Act 2001 (Corporations Act) as amended by the Financial Services Reform Act 2001 (FSR Act). These provisions set out the obligations for:

a) a licensee (s 912A(1)(g) and 912A (2));

to have a dispute resolution system available for their retail clients.

[RG 165.10]

Our requirements for IDR procedures are that you:

a. *satisfy the Essential Elements of Effective Complaints Handling in Section 2 of AS 4269-1995 (see [RG 165.14]- [RG 165.15]);*
b. *appropriately document the IDR procedures (see [RG 165.17])*
c. *have a system for informing complainants about the availability and accessibility of the relevant EDR scheme (see [RG 165.18]).*

[RG 165.12]

As a minimum, any IDR procedure must be able to deal with complaints made by "retail clients" as defined in s 761G and related regulations, and this includes small businesses: see [RG 165.47]. We encourage you to develop IDR procedures that have broader coverage consistent with the nature of your business and your dealings with consumers.

[RG 165.13]

Wherever possible, you should seek to resolve complaints directly with your clients through your IDR procedures. It is better for all parties that a complaint is dealt with at the earliest possible stage.

[RG 165.16]

The regulations also expressly state that we may have regard to any other matter we consider relevant when making requirements for IDR procedures: see reg 7.6.02(1)(b) and 7.9.77(1)(b). After reviewing AS 4269-1995 for the purposes of this guide, we believe that there are two other specific requirements with which your IDR procedure must comply.

[RG 165.17]

To make your IDR procedures as transparent and accessible as possible and to assist with staff training and awareness, you must document your IDR procedures. This includes setting out in writing:

a. *the procedures and policies for:*
    i. *receiving complaints;*
    ii. *investigating complaints;*
    iii. *responding to complaints within appropriate time limits;*
    iv. *referring unresolved complaints to an EDR scheme;*
    v. *recording information about complaints;*
    vi. *identifying and recording systematic issues;*
b. *the types of remedies available for resolving complaints; and*
c. *internal structures and reporting requirements for complaint handling.*

You should provide a copy of the procedures to all relevant staff. A simple and easy-to-use guide to the procedures should also be made available to consumers, either on request or when they want to make a complaint.

[RG 165.27]

The majority of complaints that your clients make about you will be dealt with under your IDR procedures. We believe that it is essential, therefore, for you to have effective IDR procedures in place so that complaints are dealt with promptly, fairly and consistently.

[RG 165.28]

IDR procedures can be used to deal effectively with, and monitor, all forms of consumer enquiry or complaint. The benefits of effective IDR procedures with broad coverage include:

a. *the opportunity to resolve complaints quickly and directly;*
b. *the ability to identify and address recurring or systemic problems, which can thus lead to product or service improvements;*
c. *the capacity to provide solutions to problems rather than have remedies imposed by an external body; and*
d. *improved levels of customer confidence and satisfaction.*

[RG 165.29]

Wherever possible, you should seek to resolve complaints directly with your clients through your IDR procedures. It is better for all parties that a complaint is dealt with at the earliest possible stage because it:

a. *prevents complaints from becoming entrenched;*
b. *preserves customer relationships; and*
c. *is often the most efficient and cost-effective way for an organisation to deal with complaints.*

[RG 165.30]

IDR procedures need to be documented to:

a. *enable the relevant staff to understand and follow the procedures;*
b. *promote accountability and transparency of the procedures;*
c. *facilitate the ease of understanding and accessibility of the procedures for consumers (i.e., via the production of user-friendly guides); and*
d. *facilitate the self-certification process.*

Schedule: IDR procedures and AS 4269-1995

You will need to obtain a copy of AS 4269-1995 and be aware of its requirements. AS ***4269-1995 provision Commitment [AS 4269-1995, 3.2]***

Commitment [AS 4269-1995, 3.2]: *There should be commitment to IDR procedures at all levels of an organisation, particularly the higher levels. In larger organisations, commitment at the level of the board [emphasis added] or other relevant governing body is essential to ensuring IDR procedures are integrated into the culture of the organisation. Such commitment can be demonstrated by:*

a. *ensuring all relevant staff are aware of, and educated about, IDR procedures;*
b. *ensuring that adequate resources are allocated to IDR; and*
c. *implementing management systems and reporting procedures to ensure timely and effective complaints handling and monitoring.*

Fairness [AS 4269-1995, 3.3]

In the interests of ensuring that complaints are dealt with fairly, IDR procedures should allow adequate opportunity for both parties to make their case. Wherever possible, a complaint should be investigated by staff not involved in the subject matter of the complaint.

In responding to complaints, you should give reasons for reaching a decision on the complaint and adequately address the issues that were raised in the initial complaint.

Resources [AS 4269-1995, 3.4]

ASIC considers that, at a minimum, when implementing IDR procedures, you should:

a. *establish a contact point for complainants;*
b. *nominate staff to handle complaints who have sufficient training and competence to deal with those complaints, including the authority to settle complaints or ready access to someone who has the necessary authority; and*
c. *ensure adequate systems are in place to handle complaints promptly, fairly and consistently.*

Visibility [AS 4269-1995, 3.5]

You should take reasonable steps to ensure that consumers know about the existence of your IDR procedures and how to make a complaint.

You should make details about your IDR procedures available in a convenient and accessible form.

All staff who deal with customers, not just complaints handling staff, should also have an understanding of the IDR procedures

Access [AS 4269-1995, 3.6]

You should have simple and accessible arrangements for making complaints. Complaints do not need to be in writing and, in some cases, insisting that complaints are in writing can be a disincentive to the complainant

Assistance [AS 4269-1995, 3.7]

You should have the resources to offer complainants some assistance with making their complaint if required.

Responsiveness [AS 4269-1995, 3.8]

Your IDR procedures should include clear response times for dealing with a complaint and the complainant should be made aware of these response times.

As a general rule, you should aim to respond to a complaint as soon as possible, and where a complaint is not resolved at the time of complaint, you should acknowledge the complaint promptly.

Charges [AS 4269-1995, 3.9]

ASIC considers that material explaining IDR procedures should be provided free of charge to complainants.

Remedies [AS 4269-1995, 3.10]

As a general rule, remedies should be fair and may be non-financial as well as, or instead of, financial. Where a financial remedy is considered appropriate, the aim should be to provide fair compensation.

Data collection [AS 4269-1995, 3.11]

Your procedures and management systems should include provisions for keeping details about the complaints received. Complaints handling data is a useful means of tracking compliance issues or risks.

ASIC may require you to produce complaints data in certain circumstances. You should, therefore, keep this data in accessible form.

Systemic and recurring problems [AS 4269-1995, 3.12]

You should ensure that the IDR procedures enable you to address systemic issues or recurring complaints identified in the complaints data. This will encourage the identification of compliance issues or risks, which can be investigated to determine their causes and then rectified.

Complaints, for example, might be classified according to breaches of law, such as:

a. *failure to provide a Financial Services Guide, Statement of Advice and/or PDS;*
b. *failure to disclose remuneration;*
c. *failure to provide appropriate advice;*
d. *failure to meet consumer protection standards or Codes of conduct;*
e. *fraud; and*
f. *other.*

We note that breaches of the licensee obligations must be reported to ASIC within 3 days: see s 912D.

Accountability [AS 4269-1995, 3.13]

Reports about complaints should be prepared for the senior management of your organisation.

ASIC Regulatory Guide 256: Client review and remediation conducted by advice licensees (September 2016) states:

This guide sets out our guidance on review and remediation conducted by Australian financial services (AFS) licensees who provide personal advice toretail clients (advice licensees).

Document history

This guide was issued in September 2016 and is based on legislation and regulations as at the date of issue.

Key points

This regulatory guide sets out our guidance on client review and remediation (review and remediation) that:

- *is conducted by Australian financial services (AFS) licensees who provide personal advice to retail clients (advice licensees); and*
- *seeks to remediate clients who have suffered loss or detriment as a result of misconduct or other compliance failure by an advice licensee (or its representatives) in giving personal advice.*

Review and remediation, which may be large or small scale, generallyaims to place affected clients in the position they would have been in if the misconduct or other compliance failure had not occurred

RG 256.2 *It is therefore important that advice licensees* ***proactively address systemic issues caused by misconduct or other compliance failures*** *and have robust review and remediation processes in place to protect and compensate their clients for loss or detriment suffered as a result.Critically, this means allocating adequate resources to the review andremediation to ensure it is conducted in an efficient and timely way.*

Who does this guide apply to?

RG 256.4 *Advice licensees seek, through review and remediation, to address* ***systemic issues where these issues are a result of the decisions, omissions, or behaviour*** *of the licensee (or its representatives) in relation to the provision of personal advice to clients.*

Review and remediation not related to personal advice

All review and remediation generally follow the same steps—that is:

(a) determining who are the potentially affected clients;

(b) designing and implementing the process;

(c) communicating with clients; and

(d) providing for external review if the client is not satisfied with the operation of the review and remediation or the result.

When will this guide apply?

RG 256.12 Our guidance applies to client review and remediation initiated on or after *the date of issue of this guide.*

Note: In this guide, the process of review and remediation is 'initiated' when an advice licensee makes the decision to address a systemic issue through review and remediation. The next steps will generally be to determine the scope of the review and remediation and then to design the framework.

What is client review and remediation?

RG 256.13 All AFS licensees have an obligation to ensure that their financial services *are provided efficiently, honestly, and fairly: s912A(1)(a) of the Corporations Act 2001 (Corporations Act).*

RG 256.14 Complying with this obligation includes AFS licensees taking responsibility for the consequences of their actions *if things go wrong when financial services are provided, and clients suffer loss or detriment. This includes remediating clients who have suffered loss or detriment as a result of misconduct or other compliance failure by the licensee or its current or former representatives.*

Note: This is consistent with the Federal Court of Australia's (Federal Court) view on the meaning of 'efficiently, honestly and fairly' for the purposes of s912A(1)(a) in Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (In Liquidation) [2012] FCA 414.

RG 256.18 *Regardless of the approach adopted, advice licensees should initiate the process of review and remediation as soon as they become aware of a systemic issue, rather than wait for a client to make a complaint or a claim against them.*

RG 256.19 The aim of review and remediation is generally to place affected clients in the position they would have been in *if the misconduct or other compliance failure had not occurred: see RG 256.128.*

What is a systemic issue?

RG 256.21 In this guide, we define a 'systemic issue' as an issue causing actual or potential loss or detriment to a number of clients as a result of misconduct *or other compliance failure by an advice licensee or its current or former representatives. The impact may be a monetary loss or non-monetary detriment.*

Our policy objectives

RG 256.27 It is important that review and remediation is conducted in a way *that is comprehensive, timely, fair and transparent. Consumers should have confidence that any review and remediation in which they are involved is conducted in this way, regardless of the size of the review and remediation or the size of the advice licensee.*

When to initiate review and remediation

RG 256.45 *Generally, review and remediation of the type covered in this guide will be appropriate if:*

(a) a systemic issue has been identified that is a result of the decisions, omissions or behaviour of an advice licensee, or an individual adviser or advisers (as representatives of the licensee), in relation to the provision of personal advice to retail clients; and

(b) the affected clients may have suffered a loss or detriment (whether monetary or non-monetary): see RG 256.3–RG 256.11.

Adequate resources

RG 256.61: *If you do not have adequate resources to conduct the review and remediation process (when appropriate), and to remediate clients, you may be in breach of this obligation.*

Monitoring and supervision

RG 256.63 Under the Corporations Act, an AFS licensee is required to*:*

> *(a) take reasonable steps to ensure that its representatives comply with the financial services laws* ***(s912A(1) (ca));*** *and*
>
> *(b) ensure its representatives are adequately trained, and competent, to provide the financial services authorised by the licensee* ***(s912A(1)(f)).***

RG 256.64 *Where a systemic issue is identified in relation to an existing representative, you have an obligation to take steps to rectify any deficiencies in the representative's behaviour.*

Compensation arrangements

RG 256.68 Under s912B of the Corporations Act, AFS licensees must have arrangements for compensating retail clients for loss *suffered as a result of a breach by the licensee or its representatives of their obligations in Ch 7 of the Corporations Act.*

Identifying the scope of review and remediation

RG 256.74 Identifying the scope of review and remediation is an important step *in ensuring that all potentially affected clients are captured by the review and remediation. This includes determining the nature of the misconduct or other compliance failure that has occurred, and which clients may have been affected, and testing whether the scope is appropriate.*

Inviting clients to participate in review and remediation

RG 256.89 You should identify the group of clients that fall within the scope of the review and remediation*. These clients will have their advice reviewed to determine whether any*

misconduct or other compliance failure has caused loss or detriment and, if so, be remediated for that loss or detriment. This is regardless of whether these clients have made a complaint about the advice they received or whether they have expressed an interest in participating in the review and remediation.

Designing a review and remediation process

***RG 256.100 All review and remediation processes should**:*

(a) adopt a consumer-focused approach;

Note: This includes advice licensees being helpful; communicating in plain English; showing commitment to remediating any loss or detriment suffered by clients; minimising negative impacts on clients; being objective, unbiased and equitable in their dealings with clients; and giving clients the benefit of the doubt where there is missing information.

(b) be free of charge to clients;

(c) have commitment from senior management; and

(d) be operated efficiently, honestly, and fairly.

Note: These principles are consistent with the principles set out in RG 165. You may also wish to consider the principles in RG 165 when designing and operating a review and remediation process.

Allocating adequate resources

***RG 256.108 Adequate resources should be allocated to review and remediation** to ensure the process is conducted in an efficient and timely way. If you do not have adequate resources allocated to review and remediation, you may be in breach of your AFS licensing obligations: see RG 256.60 - RG 256.62.*

Governance arrangements

***RG 256.145 All review and remediation processes should have appropriate governance arrangements**. The governance arrangements required as part of a review and remediation process will depend on the size of your business and the scope of the review*

and remediation.

RG 256.152 *In some situations, it may be appropriate for a firm or person external to your business and any related entities, who has expertise in overseeing review and remediation, to be engaged to provide assurance about the governance, design and operation of your review and remediation.*

RG 256.153 Engaging an independent expert may be appropriate *where:*

(a) complex issues are involved;

(b) the review forms part of an enforceable undertaking or ASIC - imposed licence condition(s);

(c) reporting to the public would be appropriate;

(d) there is nobody sufficiently independent or competent within the advice licensee to provide oversight; or

(e) the advice licensee has little or no experience in designing or implementing a review and remediation process, or similar activities.

Record keeping

RG 256.160 Specific record-keeping obligations are imposed on AFS licensees *under the AFS licence conditions in PF 209, and under [CO 14/923]. Record-keeping requirements are also implied by the general duties imposed under s912A of the Corporations Act. The relevant duties of a licensee that imply such a record-keeping obligation include:*

(a) the duty to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly' (s912A(1)(a));

(b) the duties to comply with the financial services laws and to take all reasonable steps to ensure its representatives comply with these laws (s912A(1)(c)–(ca));

(c) the duty to have an adequate dispute resolution system (s912A(1)(g)); and

(d) the duty to have adequate risk management systems in place (s912A(1)(h)).

ASIC reporting publicly

RG 256.166 *Where ASIC is overseeing the design and implementation of a review and remediation process, and public reporting is appropriate, we may also make public statements in relation to your review and remediation and our involvement.*

Part S: Crimes Act and Corporations Act

CRIMES ACT 1900 - SECT 316

Concealing serious indictable offence

316 Concealing serious indictable offence

1. An adult--

(a) who knows or believes that a serious indictable offence has been committed by another person, and

(b) who knows or believes that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and

(c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority,

is guilty of an offence.

: Maximum penalty--Imprisonment for--

(a) 2 years--if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or

(b) 3 years--if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or

(c) 5 years--if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(1A) For the purposes of subsection (1), a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force or other appropriate authority if--

(a) the information relates to a sexual offence or a domestic violence offence against a person (the ***"alleged victim"*** *), and*

(b) the alleged victim was an adult at the time the information was obtained by the person, and

(c) the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police or another appropriate authority.

(1B) Subsection (1A) does not limit the grounds on which it may be established that a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force or other appropriate authority.

2. A person who solicits, accepts or agrees to accept any benefit for the person or any other person in consideration for doing anything that would be an offence under subsection (1) is guilty of an offence.

Maximum penalty: Imprisonment for:

a. *5 years--if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or*
b. *6 years--if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or*
c. *7 years--if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.*

3. It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

4. A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions if the knowledge or belief that an offence has been committed was formed or the information referred to in

the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

CORPORATIONS ACT 2001 – SECT 769B

People are generally responsible for the conduct of their agents, employees etc.

1. *Subject to subsections (7) and (8), conduct engaged in on behalf of a body corporate:*
    a. *By a director, employee, or agent of the body, within the scope of the person's actual or apparent authority; or*
    b. *By any other person at the direction or with the consent or agreement (whether express or implied) od a director, employee or agent for the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;*
    c. *Is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also by the body corporate.*
2. *Conduct engaged in by a person (for example, the giving of money or property) in relation to:*
    a. *a director, employee or agent of a body corporate, acting within the scope of their actual or apparent authority; or*
    b. *any other person acting at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;*

is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also in relation to the body corporate.

3. If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or

apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (1)(b) is taken to be an agent of the body corporate concerned.

4. *Subject to subsections (7) and (8), conduct engaged in on behalf of a person other than a body corporate:*
    a. *by an employee or agent of the person, acting within the scope of the actual or apparent authority of the employee or agent; or*
    b. *by any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;*

is taken, for the purposes of a provision of this Chapter, or of a proceeding under this Chapter, to have been engaged in also by the first-mentioned person.

5. *Conduct engaged in by a person (for example, the giving of money or property) in relation to:*
    a. *an employee or agent of a person (the principal) other than a body corporate, acting within the scope of their actual or apparent authority; or*
    b. *any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent of a person (the principal) other than a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;*

is taken, for the purposes of a provision of this Chapter, or of a proceeding under this Chapter, to have been engaged in also in relation to the principal.

6. *If, in a proceeding under this Chapter in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, being an employee or agent by whom the conduct was engaged in within the scope of the employee's or agent's actual or apparent authority, had that state of mind. For this*

purpose, a person acting as mentioned in paragraph (4)(b) is taken to be an agent of the person first referred to in subsection (4).

7. *Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Part 7.7 or 7.7A, or a proceeding under this Chapter that relates to a provision of Part 7.7 or 7.7A, a financial service provided by a person in their capacity as an authorised representative of a financial services licensee is taken, or taken also, to have been provided by that financial services licensee.*
8. *Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Division 2 of Part 7.9, or a proceeding under this Chapter that relates to a provision of Division 2 of Part 7.9, conduct engaged in by a person in their capacity as a regulated person (within the meaning of section 1011B) is taken, or taken also, to have been engaged in by another such regulated person.*

(8A) Nothing in this section, other than subsections (7) and (8), excludes or limits the operation of subsection 601FB(2) in relation to the provisions of this Chapter or to proceedings under this Chapter.

9. *The regulations may provide that this section, or a particular provision of this section, has effect for specified purposes subject to modifications specified in the regulations. The regulations have effect accordingly.*
10. *In this section:*
    a. *a reference to a proceeding under this Chapter includes a reference to:*
        i. *a prosecution for an offence based on a provision of this Chapter; and*
        ii. *a proceeding under a provision of Part 9.4B that relates to a provision of this Chapter; and*
        iii. *any other proceeding under any other provision of Chapter 9 that relates to a provision of this Chapter; and*

b. *a reference to conduct is a reference to an act, an omission to perform an act, or a state of affairs; and*

c. *a reference to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.*

Note: For the meaning of offence based on a provision, see the definition in section 9.

CORPORATIONS ACT 2001 - SECT 184

Good faith, use of position and use of information--criminal offences

Good faith--directors and other officers

1. *A director or other officer of a corporation commits an offence if they:*

    a. *are reckless; or*

    b. *are dishonest;*

and fail to exercise their powers and discharge their duties:

    c. *in good faith in the best interests of the corporation; or*

    d. *for a proper purpose.*

Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

Use of position--directors, other officers and employees

2. *A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:*

    a. *with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or*

    b. *recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.*

(2A) To avoid doubt, it is not a defence in a proceeding for an offence against subsection (2) that the director, other officer or employee of the corporation uses their position dishonestly:

a. *with the intention of directly or indirectly gaining an advantage for the corporation; or*
b. *with the result that the corporation directly or indirectly gained an advantage.*

Use of information--directors, other officers and employees

3. *A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:*
    a. *with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or*
    b. *recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.*
4. *To avoid doubt, it is not a defence in a proceeding for an offence against subsection (3) that the person uses the information dishonestly:*
    a. *with the intention of directly or indirectly gaining an advantage for the corporation; or*
    b. *with the result that the corporation directly or indirectly gained an advantage.*

CORPORATIONS ACT 2001 - SECT 912A General obligations

1. *A financial services licensee must:*

a. *do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly, and fairly; and*

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

- *a. comply with the conditions on the licence; and*
- *b. comply with the financial services laws; and*

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws, except to the extent that:

- *i. those representatives are insurance fulfilment providers; and*
- *ii. the financial services laws relate to the provision of claims handling and settling services by those representatives; and*

(cb) if the licensee is the operator of an Australian passport fund, or a person with responsibilities in relation to an Australian passport fund, comply with the law of each host economy for the fund; and

- *c. subject to subsection (4) --have available adequate resources (including financial, technological, and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and*
- *d. maintain the competence to provide those financial services; and*
- *e. ensure that its representatives are adequately trained (including by complying with section 921D), and are competent, to provide those financial services; and*
- *f. if those financial services are provided to persons as retail clients:*
  - *i. have a dispute resolution system complying with subsection (2); and*
  - *ii. give ASIC the information specified in any instrument under subsection (2A); and*
- *g. subject to subsection (5) have adequate risk management systems; and*

h. *comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.*

2. To comply with this subsection, a dispute resolution system must consist of:

a. *an internal dispute resolution procedure that:*
   i. *complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and*
   ii. *covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence;*

CORPORATIONS ACT 2001 - SECT 912B

Compensation arrangements if financial services provided to persons as retail clients

1. *If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives. The arrangements must meet the requirements of subsection (2).*
2. *The arrangements must:*
   a. *if the regulations specify requirements that are applicable to all arrangements, or to arrangements of that kind--satisfy those requirements; or*
   b. *be approved in writing by ASIC.*
3. *Before approving arrangements under paragraph (2)(b), ASIC must have regard to:*
   a. *the financial services covered by the licence; and*
   b. *whether the arrangements will continue to cover persons after the licensee ceases carrying on the business of providing financial services, and the length of time for which that cover will continue;*

CORPORATIONS ACT 2001 - SECT 1041E False or misleading statements

1. A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:

a. the statement or information is false in a material particular or is materially misleading; and

b. the statement or information is likely:

i. to induce persons in this jurisdiction to apply for financial products; or

ii. to induce persons in this jurisdiction to dispose of or acquire financial products; or

iii. to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and

c. when the person makes the statement, or disseminates the information:

i. the person does not care whether the statement or information is true or false; or

ii. the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

2. For the purposes of the application of the Criminal Code in relation to an offence based on subsection (1), paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(c).

3. For the purposes of an offence based on subsection (1), strict liability applies to subparagraphs (1)(b)(i), (ii) and (iii).

CORPORATIONS ACT 2001 - SECT 1041H

Misleading or deceptive conduct (civil liability only)

1. A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

2. The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

(a) dealing in a financial product;

(b) without limiting paragraph (a):

i. *issuing a financial product;*
ii. *publishing a notice in relation to a financial product;*
iii. *making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;*
iv. *applying to become a standard employer-sponsor (within the meaning of the Superannuation Industry (Supervision) Act 1993) of a superannuation entity (within the meaning of that Act);*
v. *permitting a person to become a standard employer-sponsor (within the meaning of the Superannuation Industry (Supervision) Act 1993) of a superannuation entity (within the meaning of that Act);*
vi. *a trustee of a superannuation entity (within the meaning of the Superannuation Industry (Supervision) Act 1993) dealing with a beneficiary of that entity as such a beneficiary;*
vii. *a trustee of a superannuation entity (within the meaning of the Superannuation Industry (Supervision) Act 1993) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;*
viii. *applying, on behalf of an employee (within the meaning of the Retirement Savings Accounts Act 1997), for the employee to become the holder of an RSA product;*

ix. an RSA provider (within the meaning of the Retirement Savings Accounts Act 1997) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;

x. carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

3. If a person engages in conduct:

a. that contravenes:

i. section 670A (misleading or deceptive takeover document); or

ii. section 728 (misleading or deceptive fundraising document); or

(iia) section 738Y (other liabilities relating to defective CSF offer documents); or

iii. section 1021NA or 1021NB; or

b. in relation to a disclosure document or statement within the meaning of section 953A; or

c. in relation to a disclosure document or statement within the meaning of section 1022A;

the person's engaging in that conduct does not contravene subsection (1) of this section.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

CONCLUSION

This review has been prepared by ANZ's customers and me during the past 2 years to identify [redacted] to its individual, small business, and farming customers.

The foundation documents have been obtained from research carried out by the Australian and later the Tasmanian Small Business Council. It was not until 2019 that ASIC advised the missing document in clause 35.1(b) of the 2004 Code was ASIC Regulatory Guide 165 (2001). [redacted]

[redacted]

[redacted]

Once this document was discovered, ANZ's customers could successfully argue that damages caused to them should have been dealt with by Senators and the Treasury. I was relieved when I found that ASIC Regulatory Guide 165 (2001) was omitted from the Code [redacted]

[redacted]

We require the ACCC and the new government to recommend that the Treasurer, Jim Chalmers, and ASIC suspends or cancels ANZ's license [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Thank you for receiving this letter. I have also forwarded it to the bank's directors because the information in this letter is true and correct.

Should you require any further information, please contact me.

Yours sincerely,

[redacted]

Goran Latinovich

[redacted]