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[redacted]
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26 October 2018

The Honourable Kenneth Madison Hayne AC QC
Commissioner
Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Dear Commissioner Hayne

On 28 September 2018, the Banking Royal Commission (BRC) published its Interim Report.

Please see following our responses to the to the Banking Royal Commission report Interim Report, I also attach documents in support of my points.

On 28 September 2018, the Banking Royal Commission (BRC) published its Interim Report. It stated '*the chief protection for small business borrowers… has been, and remains the Code*.' (p.167)

The Code is prepared and published by the Australian Bankers Association (ABA)…The ABA says that it 'works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry' (p.165).

The Commission therefore began its work from the established premise that some banks and their associated entities had engaged in conduct during the preceding 10 years that was conduct that might amount to misconduct or was conduct that fell short of community standards and expectations (p.3).

The following response to the Interim Report outlines practices by the ABA, the Code Compliance Monitoring Committee (CCMC) and banks that demonstrate they have not acted honestly or met the standards expected by the community.

The Letters Patent

The Letters Patent record that 'Australia has one of the strongest and most stable banking, superannuation and financial services industries in the world, which performs a critical role in underpinning the Australian economy'.

The Letters Patent defined 'misconduct' as conduct that:

- 'constitutes an offence against a Commonwealth, State or Territory law, as in force at the time of the alleged misconduct';
- 'is misleading, deceptive or both';
- 'is a breach of trust, breach of duty or unconscionable conduct'; and
- 'breaches a professional standard ....

Do all Australians have adequate and appropriate access to banking services?

The Code defines '*banking service* [as] any financial service or product provided by us in Australia to you'.

The [redacted] did not provide us documents that were needed to resolve disputes as required under Part E: Resolution of Disputes: Monitoring and Sanctions in relation to banking services and products. These included the documents noted in clause 35.1 (b) The Australian Standard AS4269-1995 which set out the banks responsibility when investigating our complaints.

Responsible lending

Should the NCCP Act apply to any business lending? In particular, should any of its provisions apply to:

The NCCP Act should apply to SME businesses; agricultural businesses; guarantors of business loans because there should be one standard available to all customers so banks and signatories, and their lawyers (including Legal Aid solicitors) know or should know their responsibilities.

To what business lending should the Banking Code of Practice apply?

The Code of Banking Practice should be abandoned in light of the damages caused to our business and other small business customers. The Code could be effective if it was mandated.

Is the definition of 'small business' satisfactory?

I believe it would depend on whether banks are required to mandate the Code and, if so, whether NCCP Act protection is provided to all customers.

How should lenders manage exit from a loan at the end of the loan's term; if the borrower is in default?

Prior to loans being called in there should be some form of mediation that allowed all parties to present concerns to an appropriate forum.

We suffered damages when the [redacted] called in the loan whilst our business was experiencing financial difficulties, which meant that the bank was in breach of Code clause 25.2. Prior to commencing an action against us in the Court, the bank should not have been n breach AS ISO 10002:2006, which is essential for the appropriate use of clause 35.1(a-d).

Had [redacted] been transparent and provided all documents to us, including AS ISO 10002:2006, a Court may have found it was in breach of the Contract, which should have been rectified prior to any further action been taken.

Regulation and the regulators

Has ASIC's response to misconduct been appropriate? If not, why not? How can recurrence of inappropriate responses be prevented?

We have found that the bank did not comply with the AS ISO 10002:2006 and was therefore in breach of Code clause 35.1, which was part of the complaint filed with the bank prior to it commencing any action to sell our properties.

The banks Chief Executive, [redacted] and Chair, [redacted], knew or should have known the bank was required to comply with The Standard AS ISO 10002:2006. As this was a fundamental breach of the contract, ASIC should have investigated any allegations of misconduct by [redacted] Bank

On occasions when we discussed the above concerns with ASIC, it did not provide information that was relevant to The Standard AS ISO 10002:2006, and compliance with Code clause 35.1. Likewise, ASICs failure to require banks to comply with Code clause 35.1(a-d), meant the bank could direct or require the CCMC to use provisions in clause 8.1 in the Constitution, and the 12-month rule.

[redacted] This Act states:

(1) a Commonwealth public official is guilty of an offence if:

(a) the official:

(ii) engages in any conduct in the exercise of the official duties as a Commonwealth public official; [whereby]

(b) the official does so with the intention of:

(i) dishonestly obtaining a financial benefit for another person.

Has APRA's response to misconduct been appropriate? If not, why not? How can recurrence of inappropriate responses be prevented?

We have found APRA's response to complaints in relation to our agribusiness of misconduct by [redacted] was not appropriate.

Causes

What were the causes of the conduct identified and criticised in this report?

The Interim Report has not yet dealt with practices by ASIC and the banks. There may be breaches of clause 142.2, (above) by ASIC, and failure to comply with The Standard AS ISO 10002-2006 (and AS/NZS 10002:2014) by [redacted] Bank.

Likewise, when banks failed to comply with their responsibilities as set out in The Standard, the bank placed restrictions on the CCMC so it could use the constitution and the 12-month rule to obtain a financial advantage and avoid being prosecuted for misconduct.

The Interim Report has not made any comments on whether ASIC knew or should have known that The Standard had not been complied with by bank chief executives of [redacted]

We have also found the conduct of the ASIC appointed reviewer of the Code in 2008, [redacted], failed to address the failures by banks failure to comply with The Standard, which meant the customer advocates she was representing were not fully briefed on the requirement by the banks to comply with Code clause 35(a-d), nor the CCMCs practices whereby banks used the constitution to direct the CCMC to breach Code clause 34(b)(ii)

We have suffered damages when the bank required the CCMC to use provisions in clause 8.1(a-h) of the constitution and claimed we breached the 12-month rule. The Interim Report has not dealt with banks using the constitution to change contract terms.

Conflict of interest and duty?

In documents obtained under discovery recently, we note the bank provided information to the CCMC that was misleading. Also in June 2017, Mr Doogan, Chair, CCMC filed a submission with the 'Senate Inquiry into consumer protection in the banking, insurance and financial sector' stating:

> once the CCMC obtains an allegation in relation to a Code breach, it will be dealt with professionally within the context of the framework provided for by the Constitution … that applied at the time.

It does not seem possible that banks could use the constitution to change contract terms in Part E of the 2004 Code.

However, Mr Doogan now claims that the CCMC is not responsible for complying with Code clause 34(b)(ii). In documents obtained under discovery, senior CCMC

executives, state 'clause 34(h) is wide enough to capture the constitution, and 'in any event it was not the CCMC that created the constitution, but the ABA and banks'.

The Interim Report has not dealt with the potential conflict of interest whereby banks have directed the CCMC to advise customers they are bound by a 12-month rule. In fact, a constitution should be used to outline structure for an organisation, describe its purpose, and define the duties and responsibilities of the officers and members. The objective is to draft a document that covers these topics in a simple, clear and concise manner'. This demonstrates a conflict of interest exists between the ABA, the CCMC and banks.

This was a conflict of interest between the CCMC's responsibilities and customers of the [redacted] We have suffered damages as a result of practices by the bank when it had not complied with The Standard AS ISO 10002 2006. We believe ASIC and the bank should have required a copy of this document to be provided to customers and their lawyers prior to signing loan contracts.

The conflict of interest between [redacted] and the CCMC was not dealt with in response to our complaint.

Responses

What responses should be made to the conduct identified and criticised in this report?

Are changes in law necessary?

I have dealt with this question above. However, we suggest it was not the law but the application of the law that was the cause of dishonest practices by the regulators and banks that caused financial damage to us.

Should the financial services law be simplified?

The Code of Banking Practice 2018 should be mandated and oversight by federal regulators should be effective. In doing so, financial services law could be simplified and made more effective.

How should entities manage conduct and compliance risks?

By having practices that protect small businesses from unscrupulous and unfair conduct by banks and their associates. I refer to the ABA that published documents such as the Code of Banking Practice report dated September 2004 stating:

> '*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 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.*'

I also refer the Commission to the second ABA statement in relation to rights that customers will expect. Frequently Answered Questions (FAQ) on the Revised Code of Banking Practice 2004, 18 October 2004 states:

> '*The Code of Banking Practice is the banking industry's customer charter on good banking practice. A Code Compliance Monitoring Committee has been set up to investigate possible breaches of the Code. Anyone can refer a possible breach of the Code to this Committee.*
>
> *The CCMC investigates complaints banks are not meeting their obligations under the code. Usually an investigation starts when a customer writes to the CCMC with a complaint about a bank. The matter is investigated …[and] a final decision on a breach of the code is made by the CCMC in a written Determination to the complainant and the bank.*

The Interim Report does not deal with either claims banks breached The Standard AS ISO 10002 2006, nor concerns that these statements by the ABA, which have misled small businesses prior to 2014.

How should APRA and ASIC respond to conduct and compliance risk?

These regulators have failed to protect Australian small businesses such as our agribusiness for 15 years. The regulators have been incapable and unwilling to rectify the practices in circumstances where they have powers to investigate and prosecute any banks that have acted in breach of the law.

We note the Interim Report has raised these concerns without advising what steps the regulators will take to rectify misconduct. The Interim Report states:

> *There are important provisions that do apply to lending to small businesses. In particular, some provisions of the ASIC Act that apply to consumers apply also to lending to small businesses. The ASIC ACT prohibits misleading conduct in relation to financial services (ASIC Act ss 12DA, 12DB, 12DC, 12DF). (p.163)*

Should the regulatory architecture change?

As above.

What is the proper place for industry codes of conduct? Should industry codes of practice like the 2019 Banking Code of Practice be given legislative recognition and application?

The Code of Banking Practice should be transferred to a specialist regulator or be mandated as proposed by the Wilkie Bill 2017. If oversight is transferred to a federal

industry regulator, dishonest and corrupt banking practices should be immediately referred to the DPP for investigation and possible prosecution.

Should an intermediary be permitted to recommend to a consumer; provide personal financial advice to a consumer about; sell to a consumer; any financial product manufactured by an entity (or a related party of the entity) of which the intermediary is an employee or authorised representative?

As above.

Is structural change in the industry necessary?

Our case notes structural change has not been effective since the Code was amended in 2003. Therefore, structural change is necessary and overdue. In my earlier submissions, I noted that when [redacted], [redacted] CEO received a complaint from us on 19 May 2010, the [redacted] Bank responded by stating "Farm Debt Mediation is the proper forum for the resolution of these matters"

Summation

We believe the Interim Report has not dealt with dishonest and misleading practices by banks, whereby the ABA published Codes of Banking Practice which meant our bank did not have to comply with AS ISO 10002:2006.

We have reviewed hundreds of pages of documents we obtained under discovery in relation to our complaints , and they note [redacted] did not comply with The Standard on any occasion, when we first filed complaints with [redacted], [redacted] CEO

We trust the Royal Commission will deal with our responses in relation to the issues raised in the Interim Report.

Yours faithfully,

Claire Priestley

Attachments:

1. [redacted] 17 October 2018
2. [redacted] 25 October 2018
3. CCMC 2016 - Correspondence
4. Bank Victims Letter to [redacted] Chairman 2 February 2018