

**Royal Commission into Misconduct in the Banking, Superannuation and
Financial Services Industry**

REASONS FOR RULING

Ruling No: 02/2018

Application No: APD-016

Applicant: National Australia Bank Limited

Application for: Non-publication directions

Direction No: DIR-014

Date of reasons: 9 March 2018

Introduction

1 National Australia Bank Limited (**NAB**) has made an application for non-publication directions to be made under s 6D(3) of the *Royal Commissions Act* 1902 (Cth) (**the Act**) with respect to documents, or parts of documents, to be exhibited to a statement of Anthony John Waldron dated 2 March 2018.

2 Initially, NAB submitted that the documents for which it sought directions fell into one or more of six categories that justified the making of a non-publication direction. NAB provided an annexure that set out the Category or Categories into which it submitted that each of the documents for which it sought directions fell. On 6 March 2018, NAB delivered further written submissions in which it indicated that one of those categories – Category 5 – was not pressed. On 7 March 2018, NAB delivered a new annexure that set out the documents in respect of which it still sought a non-publication direction, and the Category or Categories that NAB said applied to those documents (**Revised Annexure**). NAB did not specifically identify the changes made or the differences between its original annexure and the Revised Annexure. It did not notify the Commission that it had abandoned the position set out in its further submissions with respect to Category 6(e) (which is explained below). To make changes of this kind without drawing them to the attention of the Commission is inconvenient and should not occur.

Categories 1 to 4

3 The documents that NAB submits fall within Categories 1 to 4 present no novel issue. I will give non-publication directions with respect to the parts of those documents that NAB submits fall within Categories 1, 2, 3 and 4 as identified in the Revised Annexure and by the shading on those documents. That is, there should be directions precluding publication of:

- a. information to the extent that it would reveal any contact or identifying information of customers of NAB (Category 1);
- b. information that would reveal any identifying information of employees of NAB against whom allegations of misconduct have been made, or in respect of whom, in the context of the document, it is suggested have been involved in misconduct (Category 2);
- c. information that would reveal any direct contact information of employees of NAB (Category 3); and
- d. information that would reveal any direct contact information of third parties (Category 4).

4 In addition, despite NAB making no claim for a non-publication direction with respect to the personal and identifying information of certain third parties who are named in the documents (typically as introducers or persons associated with introducers in connection with matters being investigated by NAB), there should be non-publication directions with respect to the personal and identifying information of those persons. In respect of one document (document numbered 1 in the Revised Annexure), this should require not only redaction of lists of names appearing in the body of that document at paragraph 2.2, on page 4, and paragraph 2.6, on pages 7 and 8, but also a non-publication direction with respect to the whole of the contents of several appendices to that document (Appendices 2 to 7 inclusive).

5 Further, NAB has shaded a number of parts of documents numbered 25 and 26 in the Revised Annexure, in which reference is made to one or more whistleblowers. The shading is premised on Categories 1, 2, 3 and 4 of NAB's claim. Insofar as material in the documents falls within one of those four categories, a non-publication direction should be made. However, some of the material shaded includes the summary of the allegations made by a whistleblower and, in some respects, the outcome of NAB's investigation of those allegations. That material is relevant to the

inquiry of the Commission and not covered by Categories 1, 2, 3 or 4. That material ought not to be redacted and no non-publication direction should be made in that respect. However, information that might identify a whistleblower should not be published. Information that might identify a whistleblower would include the gender of the whistleblower. In addition, with respect to those employees the subject of complaint, the branches at which they worked should not be published so as to avoid identifying them. However, their positions within NAB should be published.

Category 6

6 There remains for consideration the claims made with respect to Category 6. The original scope of Category 6 raised issues of general importance which warrant publishing my ruling.

7 Category 6 was identified as "[i]nformation not in the public domain that is not relevant to the Case Study under consideration and the disclosure of which would" have one or more of five identified effects. In a later submission, NAB identified Category 6 as:

"information that fits *each* of the following criteria (**category 6**):

- (i) it is not relevant to the Case Study;
- (ii) it is not in the public domain; and
- (iii) it is subject to one of the public interest considerations outlined in subparagraphs (a) to (e) of category 6." (emphasis in original)

8 I leave aside whether the description of each of the matters identified in subparagraphs (a) to (e) of Category 6 is properly called a public interest consideration. At least to some degree, the matters mentioned in those subparagraphs appear to me to focus more on private than public interests, but it is not necessary to pursue that issue.

9 The central point underpinning Category 6 is that information in the documents (or, in some cases, entire documents) to be exhibited to the statement of Mr Waldron is (or are said to be) irrelevant to the particular Case Study being pursued.

10 If the proposition is right, and entire documents are irrelevant to the matters
which are the subject of the statement, the logical corollary would be that NAB should
not have exhibited those documents to the statement. To the extent that only part of
a document is said to be relevant to the issues addressed in the statement, the more
desirable course to pursue would have been to quote in the statement only so much of
the text of the document as is said to be relevant, identify in the body of the statement
(by Document ID number) the document from which it is taken and, as NAB did in
this case, deliver to the Commission, with the statement, a copy of the whole,
unredacted, document. That course should be followed in future cases.

11 NAB had originally submitted that some of the documents said to fall within
Category 6 were wholly irrelevant to the matters the subject of the Case Study to which
the statement relates. By its Revised Annexure, NAB appeared to have abandoned
that submission. It was right to do so. None of the documents, either as originally, or
presently, said to fall within Category 6 is wholly irrelevant to the matters the subject
of the Case Study to which the statement relates.

12 I accept that there are parts of some documents exhibited to Mr Waldron's
statement that contain information that does not bear upon the immediate subject of
inquiry. Those documents include, for example, records for or about certain
management meetings at which a number of different issues were discussed and
decided, some relating to the issues with which Mr Waldron's statement is concerned,
and some not.

13 By the Revised Annexure, NAB has limited its claims based on Category 6 to
documents numbered 4 to 12 and 14 to 16 in the Revised Annexure. For the purposes
of the hearings to commence on 13 March 2018, there should be non-publication
directions given in respect of the parts of those documents that have been shaded by
NAB on the basis of both subparagraphs (c) and (d) of Category 6, and thereby marked
for redaction, but subject to any further direction that I might make that alters the ambit
of the material subject to a non-publication direction.

14 In particular, I note that the scope of the material relevant to the Case Study in those hearings is likely to be clearer once the hearings commence. If Counsel Assisting seeks to refer to a shaded part of one of the documents the subject of a non-publication direction during submissions or examination or cross-examination of a witness, it may well be open to me to conclude that the material is relevant and that, therefore, the scope of the direction as to non-publication should be further limited.

15 It is necessary to make some further points.

16 First, there were cases in which NAB sought redaction of material that contained incidental references to relevant topics. For example, in the document numbered 12 in the Revised Annexure, incidental references to "Project Winnow" at pages 4 (at .2136), 13 (at .2145) and 17 (at .2149) are claimed to be irrelevant. During the course of the hearing, it may become apparent that such incidental references are not irrelevant. I strongly discourage persons who produce statements and documents to the Commission from seeking to redact incidental references in documents to relevant topics.

17 Second, a non-publication direction was originally sought with respect to the entirety of document numbered 94 in the Revised Annexure. Document 94 in the Revised Annexure is a letter from NAB to the Australian Securities and Investments Commission providing an update on Project Winnow. The claim based on Category 6 has now been abandoned and, instead, part of this document is claimed by NAB to fall into Categories 3 and 4. However, the document has not been shaded for material that falls within Categories 3 or 4. That should be done and I will make a non-publication direction with respect to that material.

18 It may also be useful to say something further about each of the separate "public interest considerations" which NAB relied on in connection with its claims under Category 6.

19 The first two kinds of asserted effect were that disclosure of the documents would:

- "a. reveal commercial or contractual arrangements between NAB and third parties, the terms of which are agreed by the parties to be confidential; or
- b. be liable to diminish the proprietary or competitive commercial value of the information to NAB".

20 No document was identified as falling within either of these specific subparagraphs, though a number of documents were said to fall within Category 6 (without further specification).

21 Those apart, the particular claims that were made were originally classed as depending on one or other of subparagraphs 6(c), (d) or (e). By the Revised Annexure, NAB no longer asserted that any document fell within Category 6(e).

22 When considering Category 6(c), a difficulty that arises is that NAB chose to bundle together, as a single category, documents that were described as being:

"likely to unreasonably adversely affect:

- (A) the public interest (for example, revealing methodology of fraud and/or the susceptibility of NAB's systems to the same);
- (B) NAB's legitimate business, commercial, or financial interests, including by causing harm to NAB's reputation".

23 To the extent to which a non-publication direction would serve a wider public purpose, such as keeping fraud detection procedures confidential, a non-publication direction can, and often will, be made. But that is not the way in which NAB cast its claim in respect of these documents. And in contrast with the keeping of fraud detection procedures confidential, the bare fact that publication of a document relevant to inquiries into misconduct may harm NAB's reputation is not likely to warrant the making of a non-publication direction. Nevertheless, for the reasons already given, non-publication directions should be given in respect of the shaded parts of the documents falling into Category 6 (documents numbered 4 to 9, 11, 12, 15 and 16 in the Revised Annexure) and subject to the qualification that I have explained above.

24 Category 6(d) was described as documents that "reveal internal management deliberations, considerations or operational matters". The bare fact that documents would have that effect is not reason enough to make a non-publication direction.

25 Category 6(e) was described as documents that "reveal details of ongoing investigations by a Regulator". Ultimately, none of the documents in the Revised Annexure was said by NAB to fall into this part of Category 6. In any case, without more, the fact that publication of documents would have that effect would not be reason enough to make a non-publication direction.

K M HAYNE