

**IN THE ROYAL COMMISSION INTO MISCONDUCT IN  
THE BANKING, SUPERANNUATION AND FINANCIAL  
SERVICES INDUSTRY**

**SUBMISSION ON BEHALF OF ROSS DILLON**

**Introduction**

- 1 Ross Dillon gave evidence in respect of a case study concerning the National Australia Bank (**NAB**), NAB's provision of credit to Mr Dillon's business, National Music (**National Music**), and NAB's dealings with the proceeds of sale of Mr Dillon's former family home, a farm known as Goanna Downs.
- 2 These submissions seek to briefly set out some relevant matters which support a conclusion that NAB, in its dealings with Mr Dillon:
  - (a) engaged in misleading or deceptive conduct;
  - (b) failed to act consistently and ethically (and thereby breached the Code of Banking Practice); and
  - (c) acted in a manner which fell below community standards and expectations.
- 3 These submissions:
  - (a) set out the relevant factual background, including National Music's facilities with NAB (paragraphs 4 to 6), the discussions about the potential sale of Goanna Downs (paragraphs 7 to 13), the events following the sale of Goanna Downs (paragraphs 14 to 19), and the reduction in National Music's facilities (paragraph 20); and
  - (b) make relatively brief submissions as to why the Commission ought conclude that NAB's conduct towards Mr Dillon and National Music was misleading or deceptive, fell below community standards and expectations, and constituted a breach of the Code of Banking Practice (paragraphs 21 to 28).

## Relevant factual background

### *National Music's facilities with NAB*

4 From around 2003 onwards, National Music had the following facilities with NAB:<sup>1</sup>

- (a) Overdraft Facility;
- (b) Trade Facility;
- (c) Market Rate Facility;
- (d) Debtor Finance Facility;
- (e) Asset Finance Facility; and
- (f) Bank Guarantee Facility.

5 National Music was never behind in its superannuation payments, BAS payments, or interest or principal repayments to the NAB.<sup>2</sup>

6 As NAB conceded during the cross-examination of Ross McNaughton, it did not hold any security over Goanna Downs in respect of National Music's facilities with NAB.<sup>3</sup>

### *Discussions between Mr Dillon and NAB concerning the proposed sale of Goanna Downs*

7 Between 2010 and 2015, Mr Dillon engaged in a number of discussions with various business bank managers at NAB concerning National Music's borrowings, and Mr Dillon's intentions with respect to Goanna Downs.

8 By 2015, the business bank manager dealing with National Music's facilities was Shaun Bassett. Mr Bassett and Mr Dillon gave evidence about the expected application of proceeds from the sale of Goanna Downs to National Music's facilities

- (a) Mr Dillon's evidence was that Mr Bassett told him on around 2 March 2015 that Mr Dillon would have to "put in around \$200,000 to \$300,000 into the [National Music] business" following the sale of Goanna Downs.<sup>4</sup>
- (b) Mr Bassett's "close action monitoring plan" dated 19 March 2015 recorded that:<sup>5</sup>

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<sup>1</sup> Mr Dillon's witness statement, [3]: WIT.0001.0045.0001 at .0002.

<sup>2</sup> Mr Dillon's witness statement, [14]: WIT.0001.0045.0001 at .0003.

<sup>3</sup> Transcript, P-2889.25 and following.

<sup>4</sup> Mr Dillon's witness statement, [21]: WIT.0001.0045.0001 at .0004.

<sup>5</sup> NAB.005.376.1199.

*“Upon selling of Goanna Downs [Mr Dillon] will inject circa \$200-400k in to National Music...”*

9 There were tensions between the evidence of Mr Dillon and NAB’s representatives concerning what – if any – discussion occurred about the use of the remainder of the funds from the sale of Goanna Downs. Mr Dillon’s evidence was that he intended to retain sufficient funds to purchase a home in Melbourne.<sup>6</sup> Mr Bassett’s evidence was that he did not give any indication to Mr Dillon as to “what level of funds NAB would require upon settlement of the property”.<sup>7</sup> Other documents on which NAB relied (from an earlier time period) are consistent with Mr Dillon’s stated intention: for example, Kevin Matthews’ EBL submission in April 2010 reported that:<sup>8</sup>

*“Principals will retain about \$800k - \$1.000m to purchase another PPR [principal place of residence], with the balance of settlement funds to be applied to debt reduction - this will see the PPCK [Mr Dillon’s personal security facility] cleared in full (\$1.150m), and a significant reduction in the Trade Refinance facility - the balance of business debts will be secured by the new property to be purchased”*

10 A further internal NAB document from March 2013 contained a similar annotation:<sup>9</sup>

*“from the sale proceeds, the client will look to payout the Portfolio Facility (P4.1) and lease (P5.1), \$200k will be put back into the business, with the balance of he funds to go towards purchasing another property with a small mortgage (note: no commitment given re funding)”*

11 NAB’s witness, Mr McNaughton, agreed that the document was “consistent with the proposal that Mr Dillon says he was also talking about in 2015”.<sup>10</sup>

12 In cross-examination, Mr Dillon did not accept that he ever expressed an intention to NAB to contribute all funds from the sale to reduce National Music’s debt.<sup>11</sup>

13 Ultimately, it is likely to be unnecessary for the Commission to reach a concluded view as to whose account should be preferred. In circumstances where other key

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<sup>6</sup> Mr Dillon’s witness statement, [24]: WIT.0001.0045.0001 at .0004 - .0005.

<sup>7</sup> Mr Bassett’s statutory declaration, [3]: RCD.9999.0042.0001.

<sup>8</sup> NAB.005.342.0021 at .0024.

<sup>9</sup> NAB.005.342.0128 at .0133.

<sup>10</sup> Transcript, P-2851.08.

<sup>11</sup> Transcript, P-2851.

witnesses have not given evidence (such as Mr Matthews, who was heavily involved in the banking arrangements of National Music), it is respectfully submitted that the Commission is not in a place to reach such a view. However, the absence of such a conclusion does not alter the availability of the findings that are open to the Commission, and sought by Mr Dillon. That is because the objectively ascertainable circumstances, recorded in NAB's communications with Mr Dillon and set out in further detail below, make clear that NAB's conduct with respect to National Music and Mr Dillon was misleading or deceptive.

*Events following the sale of Goanna Downs*

- 14 Returning to the narrative, on 30 April 2015, Mr Dillon sold Goanna Downs for \$2.2 million.<sup>12</sup> Mr Dillon informed Mr Bassett of the sale on the same day. Mr Dillon expressed some concern about Mr Bassett's request for a copy of the discharge authority.<sup>13</sup> The following day, Mr Bassett informed Mr Dillon – for the first time – that NAB intended to retain 100% of the sale proceeds.<sup>14</sup>
- 15 Between Mr Dillon notifying Mr Bassett of the sale, and Mr Bassett informing Mr Dillon of NAB's intentions, there was a series of internal emails between Mr Bassett and Ms Moynahan of NAB.<sup>15</sup> On 30 April 2015, Ms Moynahan emailed Mr Bassett that “we should pay down our facilities from the sale of Goanna Downs and therefore will require all net funds to Nab”.<sup>16</sup> The internal email chain culminated in Ms Moynahan drafting an email to be sent to Mr Dillon, which she first sent to Mr Bassett for comment.<sup>17</sup> She noted:<sup>18</sup>

*“Shaun, my initial thoughts were to advance the \$100k based on their cash flow forecast and deliver the news that all funds from the sale will come to Nab.”*

- 16 On 4 May 2015, a meeting occurred between Ms Moynahan and Mr Bassett of NAB, and Mr Dillon, Mr McMahon and Ms Buchanan of National Music.

<sup>12</sup> Mr Dillon's witness statement, [25]: WIT.0001.0045.0001 at .0005.

<sup>13</sup> NAB.134.006.4961.

<sup>14</sup> Mr Dillon's witness statement, [27]: WIT.0001.0045.0001 at .0005.

<sup>15</sup> NAB.134.007.9183.

<sup>16</sup> NAB.134.007.9166.

<sup>17</sup> NAB.141.001.5774.

<sup>18</sup> NAB.141.001.5774 at .5775 (emphasis added).

- 17 Following the meeting, on 5 May 2015 Ms Moynahan sent an email to Mr Dillon and the other National Music representatives, summarising the outcomes of the meeting.<sup>19</sup> In the course of that email, Ms Moynahan summarised the state of the existing National Music facilities, and preceded the summary with the introduction “The Nab facilities secured by Goanna Downs are as follows”. Of course, as Mr McNaughton acknowledged<sup>20</sup>, the National Music facilities were not secured by Goanna Downs.
- 18 Ms Moynahan sent a further email to Mr Dillon on 5 May 2015, in which she again listed “The Nab facilities secured by Goanna Downs”.<sup>21</sup> She also stated: “You advised there will be \$2,122,000 available from the sale and the Nab expects to collect all of these funds to reduce the secured facilities”.<sup>22</sup>
- 19 A final discussion occurred between Ms Moynahan and Mr Dillon on 5 May 2015, to which Ms Moynahan referred when she emailed Mr Bassett on the same day and stated that “[Mr Dillon] accepts that the repayments of facilities is what is required”.<sup>23</sup>

#### *The reduction of National Music’s facilities*

- 20 Following the discussions concerning the application of the Goanna Downs sales proceeds, NAB took steps to reduce the size of National Music’s facilities. The reduction in those facilities had a disastrous effect on National Music’s performance, as it left National Music unable to purchase and import the necessary quantities of new stock to drive revenue.<sup>24</sup>

#### **NAB’s conduct, and its consequences**

- 21 It is apparent from the foregoing that NAB did not, at any stage, clarify with Mr Dillon that it did not hold security over Goanna Downs in respect of National Music’s facilities. That failure is, in one sense, unsurprising: it appears from at least Ms Moynahan’s emails that she understood that NAB *did* hold security over Goanna Downs in respect of the facilities, and Mr McNaughton gave evidence that he only became aware of the absence of security in the course of preparing to give evidence.<sup>25</sup>

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<sup>19</sup> NAB.134.009.2614.

<sup>20</sup> See paragraph 6 above.

<sup>21</sup> NAB.134.006.4829.

<sup>22</sup> Emphasis added.

<sup>23</sup> NAB.141.001.5898.

<sup>24</sup> See Mr Dillon’s witness statement, [36]-[39]: WIT.0001.0045.0001 at .0007 - .0008.

<sup>25</sup> See Transcript, P-2890.

22 NAB's conduct involved at least two instances of misleading or deceptive conduct occurred.

23 First, Ms Moynahan's various representations that the "NAB facilities secured by Goanna Downs" included the National Music facilities were false. The facilities were not secured by Goanna Downs, except in a most indirect sense.<sup>26</sup> The representations by Ms Moynahan formed the factual basis on which negotiations between NAB and National Music took place concerning the application of the Goanna Downs funds, and self-evidently influenced the arrangement reached between Mr Dillon and NAB to contribute the funds from Goanna Downs to reduce the National Music facilities.

24 Secondly, and perhaps alternatively, NAB's failure to clarify the true position with Mr Dillon constituted misleading or deceptive conduct by silence.<sup>27</sup> The following circumstances gave rise to an expectation by Mr Dillon that NAB would have disclosed the true position (namely, that it held no security over Goanna Downs in respect of the National Music facilities):

- (a) first, NAB and Mr Dillon had drastically unequal bargaining power: Mr Dillon was reliant on NAB for both personal finance and National Music's finance;
- (b) secondly, National Music was a relatively unsophisticated counterparty: it had only ten employees, and none was legally trained;
- (c) thirdly, Mr Dillon had engaged in discussions with NAB over a number of years concerning the sale of Goanna Downs and the injection of sale proceeds into National Music, and it was reasonable for him to expect NAB to make clear the legal basis (if any) on which such an injection was required to occur; and
- (d) fourthly, the non-disclosure was made in circumstances where detailed financial figures and calculations concerning the National Music facilities were presented to Mr Dillon, yet a highly salient fact (namely NAB's absence of security over Goanna Downs under the terms of the facilities) was withheld.

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<sup>26</sup> Being via personal guarantees, which were not called upon by NAB.

<sup>27</sup> *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357.

- 25 It is, of course, not to the point that the relevant actors at NAB might not, themselves, have understood the true position.<sup>28</sup>
- 26 For essentially the same reasons, NAB's conduct has fallen below the standards set by the Banking Code,<sup>29</sup> and below the expectations of the community.
- 27 The consequences of NAB's misleading conduct have been catastrophic. Mr Dillon has been left in a position where he now rents a property (having previously owned a valuable property). Mr Dillon's evidence was that if he had been told the true position, he would not have sold Goanna Downs at that time, which would have allowed him the opportunity to sell the property for a higher price to a person who was willing to pay that amount upon receiving funds.<sup>30</sup> Mr Dillon and his wife have suffered deleterious health consequences, and the emotional impact has been significant.<sup>31</sup>
- 28 Accordingly, Mr Dillon submits that the Commission make the findings urged in paragraph 2 above.

**Dated: 8 June 2018**

**M.D. Tehan**

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<sup>28</sup> *Fraser v NRMA Holdings* (1995) 55 FCR 452.

<sup>29</sup> Clause 3.2 of which required NAB to "act fairly and reasonably towards [Mr Dillon] in a consistent and ethical manner".

<sup>30</sup> See Transcript, P-2838.

<sup>31</sup> Mr Dillon's witness statement, [48]: WIT.0001.0045.0001 at .0009.