

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

THIRD ROUND OF PUBLIC HEARINGS: LENDING TO SMALL AND MEDIUM ENTERPRISES

**SUBMISSIONS OF NATIONAL AUSTRALIA BANK LIMITED (NAB) – NATIONAL MUSIC
CASE STUDY¹**

A. INTRODUCTION

- 1 NAB has had a longstanding banking relationship with Mr and Mrs Dillon and National Music Pty Ltd (**National Music**).² Mr Dillon commenced banking with NAB in 1992, and National Music became a NAB customer on 25 August 2003.³ Mr and Mrs Dillon purchased National Music in October 2003⁴ and are currently the directors and majority shareholders of the company.⁵ As Mr Dillon observed in his evidence, NAB has supported and continues to support National Music, including through some difficult times for the company.⁶
- 2 On 30 April 2015, Mr Dillon and his wife sold their property known as Goanna Downs.⁷ Goanna Downs *directly* secured the Dillon’s personal borrowings and *indirectly* secured (by supporting a personal guarantee and indemnity)⁸ the substantial borrowings of National Music.⁹
- 3 By his evidence, Mr Dillon made three principal allegations:
- (a) Between March 2015 and April 2015, NAB placed pressure on Mr Dillon to sell Goanna Downs.¹⁰ Allied to this allegation was Mr Dillon’s evidence to the effect that the financial position and performance of National Music was fundamentally healthy and did not necessitate the sale of the property.¹¹
 - (b) In about March 2015, before he sold Goanna Downs, NAB misled Mr Dillon in relation to the application of the proceeds of sale.¹²
 - (c) NAB behaved unilaterally and unreasonably in reducing National Music’s facility limits following the sale of Goanna Downs.¹³
- 4 The proposed findings principally rely on the following alleged conduct, which is said to potentially ground findings of misleading or deceptive conduct, a breach of cl 3.2 of the Code of

¹ Filed by NAB pursuant to the grant of leave given by the Commission pursuant to paragraph 1(d) of the order granting leave to appear dated 15 May 2018 and in response to Counsel Assisting’s invitation to provide written submissions in respect of the proposed findings arising from the National Music case study. Throughout these submissions, the case study will be referred to as the NAB case study.

² National Music is a musical instrument wholesale business based in Brisbane (Exhibit 3.136, WIT.0001.0045.0001, Statement of Ross Alan Dillon dated 28 May 2018, with exhibits tendered as exhibit 3.136.1-3.136.24 (**Dillon Statement**) at [3]). The business imports musical instruments, and in particular guitars, violins, stringed accessories, stands and electronic devices for guitars from overseas and it employs representatives who sell those instruments to music stores nationally (Dillon XN T2827.38-44).

³ Exhibit 3.140, WIT.0001.0046.0001, Statement of Ross Hugh McNaughton dated 22 May 2018 (as amended), with exhibits tendered as exhibits 3.140.1-3.140.144 (**McNaughton Statement**) at [62]-[63].

⁴ Dillon Statement at [3].

⁵ McNaughton Statement at [63]. Michael McMahon was also director of National Music until April 2017 (McNaughton Statement, tab 36, NAB.005.368.0001 at .0003).

⁶ Dillon XN T2877.24-27.

⁷ Dillon Statement at [25].

⁸ McNaughton Statement, tab 53, NAB.005.342.0561.

⁹ As at 29 April 2015, the total facility limits (for the National Music facilities indirectly secured by Goanna Downs) was \$1,919,750 and the total balances on those facilities was \$1,876,679.45 (see McNaughton Statement at [142]).

¹⁰ Dillon Statement at [22] and [25].

¹¹ Dillon Statement at [5]; Dillon XN T2831.18-26; T2831.31-37.

¹² Dillon Statement at [21].

¹³ Dillon Statement at [29], [32] and [34] to [38].

Banking Practice, conduct falling below community standards and expectations and/or a failure to adhere to NAB's policies:¹⁴

- (a) *First*, by failing to inform Mr Dillon that the intentions he had expressed to NAB in respect of the proceeds of sale would not be possible because NAB would require either all of the surplus to reduce the debts of National Music or an alternative proposal of security from Mr Dillon.¹⁵
- (b) *Secondly*, by representing to Mr Dillon that NAB was entitled to use the proceeds of sale to reduce the debts of National Music in circumstances in which NAB now acknowledges that it did not have the legal right to do so.¹⁶

5 For the reasons that follow in this submission, there is no basis in fact for the allegations raised or the proposed findings. In summary, that is so for the following reasons.

6 *First*, there is no contemporaneous or corroborated evidence that NAB placed any pressure on Mr Dillon to sell Goanna Downs. In fact, the only available evidence is to the contrary. Mr Dillon first listed Goanna Downs for sale in 2010 as part of a strategy to reduce National Music's debt. Thereafter, he placed it on the market in 2011 and 2012. When he placed it on the market and sold it in 2015, he did so voluntarily and without reference to NAB.

7 *Secondly*, in 2015, Mr Dillon did not advise NAB of his intentions regarding the use of the proceeds of sale until *after* Goanna Downs had been sold. Thereafter, his relationship banker, Shaun Bassett, promptly consulted Margaret Moynahan, of NAB's Strategic Business Services (SBS), who had conduct of the National Music file at that time, and advised Mr Dillon of its position. Further, even if Mr Dillon had advised NAB of his intentions for the proceeds, NAB would realistically not have been able to provide definitive advice regarding the proceeds in advance of the actual sale and without confirmation of the sale price.

8 *Thirdly*, it was necessary to reduce facility limits on those National Music facilities indirectly secured by Goanna Downs because there was no replacement security available or offered. Failure to reduce the limits would have left National Music dangerously overleveraged, at risk of being unable to service its facilities. NAB gave National Music the choice of how the facilities collateralised by Goanna Downs were to be reduced. National Music's accountant submitted the proposal which was then approved by NAB.

9 As allegations of misleading or deceptive conduct are context-dependent, it is necessary to carefully evaluate the full chronology of National Music's dealings with NAB. Much of Mr Dillon's evidence – which depended on his largely unassisted recollection of events up to eight years ago – is not consistent with the contemporaneous or near contemporaneous documents. Whilst NAB does not, of course, criticise Mr Dillon's recollection (and NAB's Senior Counsel acknowledged this when questioning Mr Dillon),¹⁷ it was apparent from his evidence that his memory of the key events is limited and that he was not always a direct participant in the affairs of National Music.¹⁸ Furthermore, it is noteworthy that Mr Dillon's evidence was given without the

¹⁴ Senior Counsel Assisting Closing Address T3056.24-40.

¹⁵ Senior Counsel Assisting Closing Address T3056.25-28.

¹⁶ Senior Counsel Assisting Closing Address T3056.28-31.

¹⁷ Dillon XXN T2849.1-3.

¹⁸ Mr Dillon stepped back from the business after the first year of operation to semi-retire to Goanna Downs; he became more involved in 2015 after moving to Melbourne and from 2016 took over full-time management of the business (Dillon XN T2828.1-5). By way of example, Mr Dillon was unable to recall the following: the Johnston Rorke report of 3 March 2010 (Dillon XXN T2844.18-21; T2844.28-30; T2845.42-43); that his accountant, Mr Fischer, undertook the Johnston Rorke report (Dillon XXN T2844.23-24); that he (Mr Dillon) prepared a written response to the Johnston Rorke report (Dillon XXN T2846.34); putting Goanna Downs on the market for sale in 2010 (Dillon XXN T2841.37-39; T.2847.11-12; T2848.22-25; T2848.45-47; T2849.9; T2850.20-38); providing a commitment to NAB to apply virtually all of the proceeds of sale to debt reduction as recorded in eBL 25 dated 1 September 2010 (Dillon XXN T2847.14-16; T.2851.24-25); the details of any conversations with Mr Bassett between 2

benefit of having seen the substantial volume of material exhibited to Mr McNaughton's witness statement.¹⁹ Where Mr Dillon's recollection is contradicted by more contemporaneous documents, the documents should be preferred.²⁰

10 Having regard to those matters and the factual matters summarised in Section B below, it is respectfully submitted that the following findings should be made:

- (a) From early 2010, National Music was experiencing cash flow difficulties while managing high levels of bank debt. Mr Dillon voluntarily placed Goanna Downs on the market in early 2010 for the express purpose of reducing bank debt.
- (b) Goanna Downs was sold in April 2015, five years after it was first put on the market. At that time, Mr and Mrs Dillon were expecting to become grandparents and were intending to move to Melbourne and rent so that they could be closer to their family.
- (c) Goanna Downs was sold voluntarily; NAB was not involved in the sale process at any stage between 2010 and 2015 and did not pressure the Dillons to sell.
- (d) Mr Dillon understood:
 - (i) that Goanna Downs was held as security (directly and indirectly) for both Mr and Mrs Dillon's personal borrowings and National Music's facilities; and
 - (ii) that without the provision of replacement security National Music could not sustain its level of borrowing in 2015.
- (e) Mr Dillon's intentions regarding the application of the proceeds of sale changed a number of times between 2010, when Goanna Downs was first put on the market, and 2015, when it was ultimately sold. Importantly, in 2015 Mr Dillon did not advise Mr Bassett of his admittedly uncommunicated intention to retain a portion of the sale proceeds to purchase a new home. Further, Mr Bassett did not provide any assurance or make any representation in that regard, or otherwise with respect to the application of the proceeds should the property sell.
- (f) NAB specifically asked the management of National Music whether alternative security could be provided to replace Goanna Downs and support its borrowings; no further security was proffered.
- (g) In circumstances where neither Mr Dillon nor National Music provided any replacement security following the sale of Goanna Downs, it was both necessary and commercially obvious that the balance of the proceeds of sale (after discharging Mr and Mrs Dillon's personal debt) would need to be applied to National Music's facilities to reduce its debt and NAB's exposure, and a corresponding reduction in the limits of the facilities formerly collateralised by Goanna Downs would be required.
- (h) NAB reduced National Music's facility limits in the manner proposed by National Music.
- (i) In all the circumstances, there is no proper basis upon which the proposed findings can be made.

March 2015 and the sale of Goanna Downs, in which Mr Dillon alleged that Mr Bassett placed pressure on him to sell Goanna Downs (Dillon XXN T2866.24-25); how he (Mr Dillon) advised Mr Bassett that Goanna Downs had been sold (Dillon XN T2834.9-10); the details of what was discussed at the meeting of 4 May 2015 (Dillon XN T2835.44-45; T2836.1-12; Dillon XXN T2868.24-27); whether he (Mr Dillon) raised any concerns regarding the reduction of the trade refinance facility (Dillon XN T2838.14-18).

¹⁹ Indeed, Mr Dillon only received a copy of Mr McNaughton's statement the night before giving evidence, and even on his second day of giving evidence he had not read the statement in its entirety (Dillon XXN T2842.29-35 and T2859.8-11).

²⁰ *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751 per Beach J at [933]-[934] citing *Evans v Braddock* [2015] NSWSC 249 per Hallen J at [74]; and *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 per Jagot J at [1248].

B. THE KEY EVENTS AND MATTERS OF CONTEXT

B.1 Goanna Downs and National Music's Facilities

- 11 On 17 May 2005, Mr and Mrs Dillon purchased Goanna Downs,²¹ with the assistance of a home loan provided by NAB which was secured by a registered mortgage over Goanna Downs.²² Within 18 months of its purchase, Mr and Mrs Dillon developed Goanna Downs into a specialised broodmare operation and rebuilt the residence on it (in which they lived).²³ Over the years, Mr Dillon took substantial drawings (and in excess of \$500,000) from National Music's funds for the upkeep and servicing of Goanna Downs.²⁴
- 12 In addition to the Dillons' personal borrowings (a \$1.15 million portfolio facility which included the home loan), National Music had an overdraft facility, a trade refinance facility, a market rate facility, a debtor finance facility, an asset finance facility (including a finance lease, a revolving lease and a hire purchase/equipment lease), a bank guarantee facility, a forward foreign exchange limit (forex) facility, and a business card facility with NAB.²⁵
- 13 A number of National Music's facilities are and were secured by a personal guarantee and indemnity provided by Mr and Mrs Dillon.²⁶ In September 2005, NAB approved a limit increase and a new overdraft facility for National Music on the basis that Mr and Mrs Dillon's personal guarantee and indemnity be supported by the mortgage over Goanna Downs.²⁷ Thus, National Music could not have increased its facilities at that time (and subsequently continue to increase its facilities) without Goanna Downs, or a replacement security of similar value, supporting Mr and Mrs Dillon's personal guarantee and indemnity.
- 14 At the time that Goanna Downs was sold on 30 April 2015, it was direct security for Mr and Mrs Dillon's portfolio facility and indirect security for five of National Music's facilities.²⁸ That is, the mortgage over Goanna Downs: secured the portfolio facility; and supported (or *indirectly secured*) a personal guarantee and indemnity provided by Mr and Mrs Dillon which secured the following National Music facilities:²⁹ (a) the market rate facility;³⁰ (b) the trade refinance facility;³¹ (c) the business card facility (being company credit cards held by National Music);³² (d) the overdraft facility;³³ and (e) a bank guarantee facility.³⁴ Mr Dillon knew and understood that Goanna Downs was security for these facilities of National Music.³⁵

²¹ McNaughton Statement at [67].

²² McNaughton Statement at [68].

²³ McNaughton Statement, tab 144, NAB.005.477.0001; Dillon XN T2829.43-T2830.5.

²⁴ McNaughton Statement at [66]; McNaughton Statement, tab 43, NAB.005.321.0073 at .0078. See also the repatriation memo dated 17 May 2011 prepared by David Knight in which Mr Knight noted that "*approx \$500K of company money was used on improvements to the NSW horse property known as Goanna Downs*" (McNaughton Statement, tab 84, NAB.005.370.0001 at .0001-2). See also a notation made by Mr Matthews in March 2010 that the "*broodmare operations of 'Goanna Downs' are break even in relation to covering operating costs and payment of leasing costs of 2 vehicle [sic] used on the property, but financed through National Music*" (McNaughton Statement, tab 65, NAB.005.379.0123 at .0123).

²⁵ McNaughton Statement, tab 128, NAB.134.006.4838; McNaughton Statement at [142]; Dillon Statement at [8]-[9].

²⁶ McNaughton Statement, tab 53, NAB.005.342.0561; see paragraph 14 below.

²⁷ At the time, National Music applied: (a) to increase the limit in respect of the documentary letter of credit by \$300,000; and (b) for an overdraft facility of \$60,000. See McNaughton Statement at [71].

²⁸ As at April 2015, National Music held eight facilities with NAB (see paragraph 12 above and also McNaughton Statement at [142]).

²⁹ McNaughton Statement, tab 53, NAB.005.342.0561.

³⁰ McNaughton Statement, tab 46, NAB.005.342.0727.

³¹ McNaughton Statement, tab 47, NAB.005.342.0966.

³² McNaughton Statement, tab 48, NAB.005.342.1964.

³³ McNaughton Statement, tab 49, NAB.005.342.1868.

³⁴ McNaughton Statement, tab 50, NAB.005.342.0577.

³⁵ Dillon Statement at [10]; Dillon XXN T2856.22-31; T2858.38-41. Further, each Business Letter of Offer signed by Mr Dillon in respect of these facilities acknowledged that Goanna Downs secured Mr and Mrs Dillon's guarantee and indemnity: see the documents referred to in footnotes 30 to 34 inclusive.

15 Critically, Goanna Downs was the only “bricks and mortar” security for the facilities referred to in the preceding paragraph. The other securities included a fixed and floating charge which had the effect of securing National Music’s debtors and ageing inventory.³⁶ Debtors and inventory present a tenuous form of security because in the case of enforcement they can usually only be realised for approximately 50% to 70% of their estimated value.³⁷

16 As at 29 April 2015, the limits of the facilities held by National Music and secured indirectly by Goanna Downs were \$1,919,750.³⁸ Put simply, without offering Goanna Downs as security, Mr and Mrs Dillon would not have been able to borrow the funds necessary to support their business and personal needs.³⁹

B.2 Mr Dillon’s decision in early 2010 to sell Goanna Downs to reduce debt to NAB

17 While he said he did not recall doing so, Mr Dillon first placed Goanna Downs on the market for sale in early 2010.⁴⁰ This was a year earlier than the attempted auction of the property referred to in his witness statement⁴¹ and by Senior Counsel Assisting in his closing submissions.⁴² Further, contrary to his recollection that the sale was prompted by a general desire to move to Melbourne to be near family, Mr Dillon did so specifically in order to reduce bank debt and, thereby, to address National Music’s financial predicament.⁴³ At that time, National Music was struggling to achieve profitability and it was experiencing significant cash flow problems which, if not rectified, would result in the failure of the business.⁴⁴

18 In this regard, in early 2010, Kevin Matthews, who was Mr Dillon’s longstanding customer relationship manager of over 18 years,⁴⁵ raised concerns about National Music’s financial performance. As a result, Mr Matthews referred National Music to NAB’s Portfolio Review Group (**PRG**) for review.⁴⁶

19 On 12 January 2010, the PRG review identified, amongst other things, that the first option to address National Music’s poor financial performance was the injection of further capital.⁴⁷ The PRG made a number of recommendations,⁴⁸ including that National Music be referred to SBS and that its business operations be the subject of a high level review by a specialist business advisor.⁴⁹

³⁶ McNaughton Statement, tab 46, NAB.005.342.0727 at .0730; McNaughton Statement, tab 47, NAB.005.342.0966 at .0968; McNaughton Statement, tab 48, NAB.005.342.1964 at .1968; McNaughton Statement, tab 49, NAB.005.342.1868 at .1870; McNaughton Statement, tab 50, NAB.005.342.0577 at .0579; McNaughton Statement at [70] and [158].

³⁷ McNaughton Statement at [158].

³⁸ McNaughton Statement at [142].

³⁹ McNaughton Statement at [78]. So much was acknowledged by Mr Dillon when he gave evidence that without Goanna Downs as security, and given that National Music was struggling, the business would not be able to obtain finance from another bank (see Dillon XXN T2870.30-38).

⁴⁰ Dillon XXN T2841.37-39; T2847.11-12; T2848.22-25; T2848.45-47; T2849.9; T2850.20-38. By 14 April 2010, Goanna Downs had been placed on the market for sale (see McNaughton Statement, tab 68, NAB.005.342.0021 at .0024).

⁴¹ Dillon Statement at [6].

⁴² Senior Counsel Assisting Closing Address T3055.29-33.

⁴³ McNaughton Statement, tab 64, NAB.134.021.0035 at .0038.

⁴⁴ See further paragraphs 19 and 21 below; see also McNaughton Statement, tab 57, NAB.005.418.0039 and tab 62, NAB.005.379.0027.

⁴⁵ McNaughton Statement, tab 82, NAB.134.001.0190.

⁴⁶ McNaughton Statement at [79]. The PRG was established in around 2008 for the purpose of providing NAB bankers with a separate team dedicated to reviewing customer files where the customer relationship banker was concerned that the customer may be exhibiting signs of financial stress. A banker could voluntarily refer a file to the PRG, following which a review would be conducted (on the basis of information already held by NAB) and recommendations would be provided to the banker. The PRG no longer exists (see McNaughton Statement at [80]).

⁴⁷ McNaughton Statement, tab 57, NAB.005.418.0039 at .0041.

⁴⁸ The other recommendations included that: (i) Mr Matthews obtain further financial and management information about National Music; (ii) a trade solutions specialist from NAB review the operation of National Music’s trade facility; (iii) National Music’s sales performance, inventory management, cost reduction and the cessation of discretionary spending be monitored in any action plan; (iv) a stock management specialist review National Music’s practices and advise on optimal stock holding; and (v) National Music’s covenant suite be reviewed (see McNaughton Statement, tab 57, NAB.005.418.0039 at .0041).

⁴⁹ McNaughton Statement, tab 57, NAB.005.418.0039 at .0041.

- 20 Two days after receiving the PRG review, on 14 January 2010, Mr Matthews referred National Music to SBS.⁵⁰ This was National Music’s first referral to SBS. National Music was not accepted into SBS for management (or “categorised”)⁵¹ at that time on the condition that a high level business review be carried out to identify any areas of concern in respect of National Music’s business, and that Mr Matthews undertake the recommendations made by the PRG.⁵²
- 21 Mr Dillon agreed to have the business review undertaken, telling Mr Matthews in the meantime that he proposed to sell Goanna Downs and inject capital into National Music.⁵³ On 3 March 2010, the independent business reviewer, accounting firm Johnston Rorke, delivered its report,⁵⁴ a copy of which was provided to NAB. Nigel Fischer, partner at Johnston Rorke and the author of the report, made a number of pertinent observations and recommendations.
- (a) *First*, during the 2008 to 2010 financial years, the Dillon family drawings had been greater than the business’s profitability could sustain and the current level of drawing was required to support NAB debt external to the business.⁵⁵ Further, the over-drawing coupled with a downturn in trading conditions had left National Music severely undercapitalised.⁵⁶
 - (b) *Secondly*, National Music’s inventory levels were too high with the consequence that it was placing increased pressure on the trade refinance facility (which at that time was nearing its limit of \$1.5 million).⁵⁷
 - (c) *Thirdly*, National Music was not meeting its debt (interest coverage) covenants.⁵⁸
 - (d) *Fourthly*, National Music was heavily funded by bank debt.⁵⁹
 - (e) *Fifthly*, it was strongly recommended that funds be injected into National Music’s business to reduce the expenses associated with bank debt.⁶⁰ In that regard, Mr Fischer noted that he had been advised that “the owner” would contribute capital before the end of the year from the sale of personal assets.⁶¹
- 22 Mr Dillon prepared a written response to the Johnston Rorke report and sent it to Mr Matthews on 4 March 2010, the day after receiving the report.⁶² Mr Dillon did not dispute or challenge the findings or recommendations in the report. In response to the recommendation that funds be injected into National Music to reduce the expense associated with bank debt, Mr Dillon wrote:

“The injection of further capital by the owners is only possible upon the sale of Goanna Downs. This is an expensive property, and we would like to ensure it returns the maximum

⁵⁰ McNaughton Statement, tab 58, NAB.005.436.0003; McNaughton Statement at [83].

⁵¹ At NAB, a facility that is managed by SBS is referred to a “categorised asset” and the process of referring a customer to SBS and SBS taking on the management of the customer’s facilities is referred to as “categorisation” (see McNaughton Statement at [13]).

⁵² McNaughton Statement at [84] and [85]; McNaughton Statement, tab 59, NAB.005.438.0001. National Music was required, however, to be referred back to SBS if its financial performance deteriorated further (McNaughton Statement, tab 66, NAB.005.321.0060 at .0064).

⁵³ McNaughton Statement, tab 60, NAB.005.436.0001.

⁵⁴ McNaughton Statement, tab 62, NAB.005.379.0027.

⁵⁵ McNaughton Statement, tab 62, NAB.005.379.0027 at .0028.

⁵⁶ McNaughton Statement, tab 62, NAB.005.379.0027 at .0042. In his response, Mr Dillon said that his drawings had been addressed in December 2008 and drawings would continue at their “*current restrained levels*”. Further, Mr Dillon noted that “*the wage drawn by J Dillon has ceased*” (McNaughton Statement, tab 64, NAB.134.021.0035 at .0037).

⁵⁷ McNaughton Statement, tab 62, NAB.005.379.0027 at .0028 and .0037. In his response, Mr Dillon accepted that inventory was “*clearly too high*” and an issue that had to be addressed with some urgency (McNaughton Statement, tab 64, NAB.134.021.0035 at .0035).

⁵⁸ McNaughton Statement, tab 62, NAB.005.379.0027 at .0029. In his response, Mr Dillon said that he was not made aware of existing covenants, but that he was “*always happy to do whatever the bank requests we do as long as it is commercially feasible*” (McNaughton Statement, tab 64, NAB.134.021.0035 at .0038).

⁵⁹ McNaughton Statement, tab 62, NAB.005.379.0027 at .0044.

⁶⁰ McNaughton Statement, tab 62, NAB.005.379.0027 at .0044.

⁶¹ McNaughton Statement, tab 62, NAB.005.379.0027 at .0029.

⁶² McNaughton Statement, tab 63, NAB.134.021.0034; McNaughton Statement, tab 64, NAB.134.021.0035.

possible. ***In order to reduce bank debt.*** This will clearly take some time to achieve” (bold emphasis added).⁶³

23 In concluding his written response, Mr Dillon acknowledged that there was an urgent need to address several key issues for National Music’s business and he wrote:

“I feel the only real thing we need a lot of from the bank is time...

*My return to active duty in the business will ensure we do not fall into the same mistakes we have made in the last couple of years. Our reliance on debt driven growth will not reoccur!”*⁶⁴

24 Although Mr Dillon gave evidence that he could not now recall the Johnston Rorke report or his letter in response,⁶⁵ they are critical to placing the subsequent sale of Goanna Downs in its context. Specifically, these events demonstrate that:

- (a) from early 2010 (not 2011), Mr Dillon understood and acknowledged that the injection of capital from the proceeds of sale of Goanna Downs was necessary and intended for the reduction of National Music’s bank debt, which in turn was necessary to ensure the ongoing viability of the business.
- (b) Mr Dillon told NAB that he needed time to sell Goanna Downs. Goanna Downs took another 5 years to sell, during which NAB continued to support National Music (and does to this day). Moreover, when he put the property to auction in 2015, Mr Dillon did so without reference to NAB; NAB was not involved in the sale process and it did not exert pressure on Mr Dillon to sell his property.⁶⁶

25 These matters were not adverted to by Mr Dillon in his evidence or in the summary of evidence relied on by Senior Counsel Assisting in his closing address.⁶⁷ Mr Dillon decided in early 2010 (and not in 2011) to sell Goanna Downs, and he decided to do so to reduce bank debt. Ultimately, Mr Dillon sold Goanna Downs not just because he wanted to move to Melbourne to be close to family and because of health concerns,⁶⁸ but because his business was struggling,⁶⁹ overleveraged and needed to reduce debt.⁷⁰

B.3 Goanna Downs is put on the market for sale (April 2010)

26 Goanna Downs was placed on the market by 23 April 2010 and Mr Dillon initially sought expressions of interest in the range of \$2.8 million to \$3.2 million.⁷¹ In April 2010, Mr Dillon advised Mr Matthews that, if Goanna Downs was sold, he planned to use the proceeds of sale to purchase another property, for \$800,000 to \$1 million, which would be used as security for National Music’s facilities and that the balance would be applied to reduce bank debt (including a significant reduction to the trade refinance facility).⁷² These facts, recorded by Mr Matthews on the National Music file in eBL 23,⁷³ are important because they:

⁶³ McNaughton Statement, tab 64, NAB.134.021.0035 at .0038.

⁶⁴ McNaughton Statement, tab 64, NAB.134.021.0035 at .0039.

⁶⁵ Dillon XXN T2844.18-21; T2844.23-24; T2844.26-30; T2845.42-43; T2846.34.

⁶⁶ See paragraph 35(a) below.

⁶⁷ Senior Counsel Assisting Closing Address T3055.22-T3056.40.

⁶⁸ Cf Dillon Statement at [6]. See Dillon XXN T2860.40-43.

⁶⁹ Dillon XXN T2870.37.

⁷⁰ Dillon XXN T2851.18-21.

⁷¹ McNaughton Statement, tab 65, NAB.005.379.0123 at .0123; McNaughton Statement, tab 68, NAB.005.342.0021 at .0024.

⁷² McNaughton Statement, tab 68, NAB.005.342.0021 at .0024; Dillon XXN T2848.42-T2849.35.

⁷³ An eBL submission is a business credit lending submission prepared and submitted by a customer’s relationship banker in support of a proposed change to a customer’s facilities (McNaughton Statement at [101]). In this case, National Music was seeking an extension of National Music’s market rate facility, and approval for a redraw of funds repaid (McNaughton Statement at [102]); McNaughton Statement, tab 68, NAB.005.342.0021 at .0023). Credit lending submissions are usually approved by a Credit Manager who sits within the Credit Team. If however a file is being managed by SBS, any credit lending submission for the customer is approved by a person who holds a Delegated Commitment Authority within the SBS team (McNaughton statement at

- (a) are consistent with the position taken by NAB in 2015;
- (b) demonstrate that Mr Dillon understood that if part of the proceeds of sale were to be spent on another property, that property would have to be offered as security for National Music's facilities; and
- (c) confirm that the core reason for the sale of Goanna Downs was debt reduction.

- 27 Despite attracting at least two interested parties, Goanna Downs did not sell in April 2010.⁷⁴ By early September 2010, National Music's financial situation had worsened and it was unable to repay amounts due on its market rate facility. It requested NAB to waive three months' of repayments on its market rate facility,⁷⁵ to provide some cash flow relief. That request was set out in eBL 25, prepared by Mr Matthews, a man whom Mr Dillon described as careful and thorough and someone who knew National Music's business "inside out".⁷⁶ In eBL 25, Mr Matthews also recorded that Mr Dillon's plans following the sale of Goanna Downs had changed, and that the Dillons had now "*committed all funds received from the sale of our security, Goanna Downs, to debt reduction – albeit that some \$100k may be retained for personal expenses*".⁷⁷ Mr Matthews quoted a "report" from the Dillons, which stated, "*Be assured we are keener than the NAB to see it sold and our debt levels drastically reduced*".⁷⁸
- 28 This evidence, again not referred to in the closing address, is contrary to the proposition advanced by Mr Dillon in his evidence before the Commission that he would not have sold Goanna Downs if he knew that all of the proceeds would be applied to his personal and business debt.⁷⁹ Contrary to his evidence, Mr Dillon had made a commitment of that very type to his trusted banker, Mr Matthews, in September 2010. Further, and notably, there is no mention in eBL 25⁸⁰ of any plan on the part of the Dillons to purchase another residential property; indeed, such a plan would have been directly inconsistent with what Mr Dillon had told Mr Matthews about applying the proceeds of sale to debt reduction.
- 29 National Music was categorised into SBS on 15 September 2010.⁸¹ Mr Dillon's evidence that neither he nor Mr Knight, the Impaired Asset Manager from SBS allocated to the file,⁸² understood why National Music had been referred to SBS is inconsistent with the contemporaneous documents.⁸³ Mr Knight's file note of his meeting with Mr Dillon and National Music's Managing Director, Mr McMahon, on 20 September 2010⁸⁴ recorded that:

[101]). A Delegated Commitment Authority (or DCA holder) refers to a person who has significant credit knowledge and experience and is approved to make credit decisions within the bank (see McNaughton statement at [27]).

⁷⁴ McNaughton Statement, tab 68, NAB.005.342.0021 at .0024.

⁷⁵ Mr Matthews applied for the repayments to the market rate facility, namely \$200,000 due on 31 August 2010, \$150,000 due on 30 September 2010 and \$100,000 due on 31 October 2010, to be waived pending the sale of Goanna Downs (McNaughton Statement, tab 81, NAB.005.342.0032 at .0034).

⁷⁶ Dillon XXN T2842.1-18. Although Mr Dillon could not recall committing virtually all of the proceeds of sale to debt reduction (as recorded in McNaughton Statement, tab 81, NAB.005.342.0032 at .0034), he accepted that it was unlikely that Mr Matthews had incorrectly recorded what Mr Dillon had told him (see Dillon XXN T2851.23-30).

⁷⁷ McNaughton Statement, tab 81, NAB.005.342.0032 at .0034.

⁷⁸ McNaughton Statement, tab 81, NAB.005.342.0032 at .0035.

⁷⁹ Dillon XN T2838.26-33.

⁸⁰ McNaughton Statement, tab 81, NAB.005.342.0032.

⁸¹ The Strategic Management System (SMS) records (which is the data management system used by SBS as noted in McNaughton Statement at [24]) for National Music's first categorisation note the primary cause for the referral as "*major debts/debt servicing*" (see McNaughton Statement, tab 66, NAB.005.321.0060 at .0060). "*Major debts/debt servicing*" refers to a customer who is, by reason of their financial circumstances, at risk of falling behind in their repayment obligations to NAB (see McNaughton Statement at [106]).

⁸² An Impaired Asset Manager (or IAM) is the SBS banker who has primary carriage of a file while it is in SBS. Typically, an Impaired Asset Manager has more than 10 years of post-qualification banking or accounting experience, with a strong skill set in credit awareness and financial analysis (McNaughton Statement at [24] and [26]).

⁸³ Dillon XN T2829.21-26.

⁸⁴ The file note of the meeting was recorded by Mr Knight two days after the meeting in SMS (McNaughton Statement, tab 66, NAB.005.321.0060 at .0064).

- (a) Mr Knight had advised Mr Dillon of the reason for National Music's referral to SBS, namely that National Music's financial position had deteriorated and there were ongoing concerns regarding its ability to service its commitments going forward; and
- (b) Mr Dillon said that he and his wife had committed to selling Goanna Downs before the end of 2010 as they acknowledged that National Music could not sustain its level of group debt.⁸⁵ Mr Knight also noted that the sale of Goanna Downs was Mr Dillon's only strategy to reduce National Music's debt.⁸⁶

30 Ultimately, Goanna Downs did not sell during the course of 2010. Mr Dillon took the property off the market and re-listed it in January 2011 to go to auction in late March or early April 2011, close to the time of the Easter Yearling Sales.⁸⁷ Goanna Downs went to auction in April 2011, but the auction was cancelled because there was not sufficient buyer interest.⁸⁸ By mid-2011, however, National Music had retained Johnston Rorke to provide ongoing advice regarding the financial management and planning of the business, and its financial performance had started to improve.⁸⁹ As a result, in mid-2011 the National Music file was repatriated from SBS back to the customer relationship banker.⁹⁰

31 Mr Dillon continued to market Goanna Downs voluntarily in 2012,⁹¹ 2013⁹² and again from early 2015. Between mid-2011 and February 2015, Mr Dillon provided one update regarding the sale of Goanna Downs – that update was provided in March 2013 and noted that Goanna Downs was back on the market with a revised sale range of \$2.2 million to \$2.3 million – some two years before Mr Dillon first met Mr Bassett.⁹³ Mr Dillon's relationship banker at that time, Mr Swindells, recorded this in eBL 31, which he prepared on 25 March 2013 in support of an extension of National Music's facilities, that "*from the sale proceeds the client will look to payout the Portfolio Facility ... and [asset finance facility], \$200k will be put back into the business, with the balance of the funds to go towards purchasing another property with a small mortgage (note: no commitment given re funding)*".⁹⁴ Mr Swindells did not specifically refer to the new property being offered as replacement security, but – as Mr Dillon had acknowledged when communicating a similar plan to Mr Matthews in 2010 – this was necessarily implied having regard to the fact that Goanna Downs was security for the Dillons' obligations under the guarantee and indemnity.⁹⁵

B.4 The meeting between Mr Dillon and Mr Bassett on 2 March 2015

32 Mr Bassett became Mr Dillon's and National Music's customer relationship banker in February 2015.⁹⁶ Mr Bassett met with Mr McMahon and Louisa Buchanan, financial controller of National Music, on 18 February 2015.⁹⁷ Mr Dillon was not present at that meeting.⁹⁸ On 2 March 2015, Mr Dillon and Mr Bassett met for the first time at a café in Brisbane.⁹⁹

⁸⁵ McNaughton Statement, tab 66, NAB.005.321.0060 at .0064.

⁸⁶ McNaughton Statement, tab 66, NAB.005.321.0060 at .0064-0065.

⁸⁷ McNaughton Statement, tab 66, NAB.005.321.0060 at .0065.

⁸⁸ Dillon XN T2832.13-15.

⁸⁹ McNaughton Statement, tab 84, NAB.005.370.0001 at .0002.

⁹⁰ McNaughton Statement at [128]-[129]; McNaughton Statement, tab 84, NAB.005.370.0001. The term "repatriation" refers to the customer's facilities and files being moved out of SBS and returned to the customer relationship banker. Following repatriation, the customer file is closed in SBS and SBS does not have further involvement unless the customer is referred back to SBS (McNaughton Statement at [16]).

⁹¹ Dillon Statement at [6].

⁹² Exhibit 3.141, Business Memorandum of increase 25 March 2013, NAB.005.342.0128.

⁹³ Exhibit 3.141, Business Memorandum of increase 25 March 2013, NAB.005.342.0128 at .0148.

⁹⁴ Exhibit 3.141, Business Memorandum of increase 25 March 2013, NAB.005.342.0128 at .0133.

⁹⁵ See paragraph 26 above.

⁹⁶ Mr Bassett's title was Senior Business Banking Manager (see Bassett XN T2879.27-31; McNaughton Statement at [6]).

⁹⁷ McNaughton Statement, tab 85, NAB.134.006.4626 at .4627.

⁹⁸ McNaughton Statement, tab 85, NAB.134.006.4626 at .4627.

⁹⁹ Dillon XN T2831.39-40; Dillon Statement at [21]; McNaughton Statement, tab 85, NAB.134.006.4626.

- 33 It is important to note that Mr Dillon had placed Goanna Downs back on the market *before* he met Mr Bassett for the first time. In setting up the meeting, he volunteered to “*shed some light on the situation with Goanna Downs.*”¹⁰⁰ Mr Dillon gave the following evidence about the 2 March 2015 meeting:
- (a) Mr Bassett was very interested in the sale Goanna Downs and asked various questions regarding the sale process.¹⁰¹ Mr Dillon also said Mr Bassett told him words to the effect that “*I’ve had a look at the file and you need to sell this property [Goanna Downs]... You’ll have to put in around \$200,000 to \$300,000 into the business*”.¹⁰²
 - (b) Mr Dillon indicated to Mr Bassett his desire to put \$200,000 to \$300,000 into National Music and move to Melbourne and purchase a new home to live in with a much smaller mortgage.¹⁰³
 - (c) Mr Bassett said that NAB had no issue with Mr Dillon retaining most of the excess funds generated from the sale of Goanna Downs.¹⁰⁴
 - (d) National Music’s facilities were not discussed at the meeting.¹⁰⁵
- 34 Mr Dillon gave evidence that as a result of that meeting, and other subsequent conversations with Mr Bassett, in which Mr Bassett suggested that NAB was “*very keen to see the property sold*”,¹⁰⁶ he felt pressure from NAB to sell Goanna Downs and ultimately sold the property for a price that was lower than he expected – that is, \$2.2 million – in circumstances where he had earlier received a competing offer for \$2.5 million.¹⁰⁷ However, there are no such other communications between Mr Bassett and Mr Dillon in evidence. And, when asked whether he could recall any details of the further conversations with Mr Bassett prior to the sale, Mr Dillon could not do so.¹⁰⁸ Further, Mr Dillon acknowledged that he and his wife “*also were keen to see the property sold*”.¹⁰⁹ This was, of course, consistent with the sentiments he had expressed to Mr Matthews as far back as March 2010.
- 35 Mr Dillon did not keep any notes of the 2 March 2015 meeting and relied solely on his memory to recall what was said at the meeting.¹¹⁰ His recollection was inconsistent with the near contemporaneous file note¹¹¹ of the meeting prepared by Mr Bassett, the accuracy of which was not challenged by Counsel Assisting in cross-examination (discussed further below). Further:
- (a) As to the allegation that NAB pressured Mr Dillon to sell Goanna Downs, there is no basis to find that Mr Bassett did so, since it was already on the market before the meeting of 2 March 2015.¹¹² Agents had been appointed, an auction date of 23 April had been set, and

¹⁰⁰ McNaughton Statement, tab 85, NAB.134.006.4626 at .4627.

¹⁰¹ Mr Dillon gave evidence that during the meeting of 2 March 2015 Mr Bassett said words to the effect of: What are you doing about the property; How much are you selling it for?; How are you marketing it?; You need to put more money into the business; What are your marketing plans? Have you considered reducing the price? Can we get copies of all the advertising that you are doing to ensure that you are in actual fact trying to sell the property? (see Dillon Statement at [22]; Dillon XN T2831.45-T2832.1).

¹⁰² Dillon Statement at [21].

¹⁰³ Dillon XN T2832.5-8.

¹⁰⁴ In his statement (at [21]), Mr Dillon said that Mr Bassett said words to the effect that NAB had no issue with the retention of most of the excess funds generated by a sale. However, under cross-examination Mr Dillon conceded that he could not recall whether Mr Bassett used the word “most” and that in reality the amount retained from the sale would vary according to the sale price achieved (Dillon XXN T2858.1-7).

¹⁰⁵ Dillon XN T2832.10-11.

¹⁰⁶ Dillon XXN T2865.34-35.

¹⁰⁷ Dillon XXN T2865.24-44.

¹⁰⁸ Dillon XXN T2866.24-27.

¹⁰⁹ Dillon XXN T2865.35-36.

¹¹⁰ Dillon XXN T2858.46-T2859.2; T2862.22-24.

¹¹¹ McNaughton Statement, tab 91, NAB.005.376.1199; Mr Bassett gave evidence that the section below the heading “additional” at .1199 (as set out below) was based on a conversation with Mr Dillon (see Bassett XXN T2885.1-2).

¹¹² Dillon XXN T2866.1-2.

the property was being actively marketed.¹¹³ Further, there is no evidence of any communication between Mr Bassett and Mr Dillon regarding the sale until 22 April 2015, when Mr Bassett emailed Mr Dillon to wish him luck with the auction that day.¹¹⁴ This email exchange does not reflect any sense of urgency or pressure on Mr Bassett's part to sell Goanna Downs. In any event, the only statements attributed by Mr Dillon to Mr Bassett from their 2 March meeting were consistent with Mr Bassett expressing *interest* in the sale process, as opposed to *pressuring* Mr Dillon to sell for a price Mr Dillon was unhappy with. Notably, there is no reference to the alternative offer of \$2.5 million referred to by Mr Dillon in his oral evidence in any of the contemporaneous documents (or, indeed, in Mr Dillon's witness statement). Moreover, the advertised price range for Goanna Downs was \$2.2 million to \$2.4 million,¹¹⁵ and had been so since March 2013.¹¹⁶ Therefore, the \$2.22 million that Mr Dillon ultimately accepted was within the advertised range.

- (b) As to the allegation that Mr Bassett assured Mr Dillon that NAB had no issue with him retaining most of the sale proceeds, there is no basis to find that Mr Bassett, a banker of significant experience,¹¹⁷ would have given that assurance. It also conflicts with Mr Bassett's own unchallenged evidence that he did not do so, and that it was his normal practice to approach discussions with customers such as National Music¹¹⁸ with additional caution.¹¹⁹ As well as Mr Bassett's note of 19 March 2015,¹²⁰ this evidence was consistent with Mr Bassett's much more contemporaneous email of 1 May 2015 whereby Mr Bassett advised Ms Moynahan that he had not discussed debt reduction with Mr Dillon and he (Mr Bassett) had not communicated what NAB's expectations would be upon the sale of Goanna Downs.¹²¹ Even if Mr Dillon had told Mr Bassett that he wished to purchase a property with the proceeds of sale, Mr Bassett would not have made any commitment as to NAB's position because it was not within his credit authority to do so.¹²² Further, and as a matter of practice, Mr Bassett would not communicate matters requiring credit approval absent the approval having been provided.¹²³ As Mr McNaughton confirmed, even though National Music's facilities were indirectly secured by Goanna Downs, credit approval would still be required before the mortgage was discharged – and in fact, Mr Bassett prepared a credit lending submission for that purpose following the sale of Goanna Downs.¹²⁴ Finally, Mr Dillon accepted that Mr Bassett's note of 19 March 2015 did not contain any such assurance.¹²⁵

¹¹³ McNaughton Statement, tab 91, NAB.005.376.1199; McNaughton Statement, tab 144, NAB.005.477.0001; Dillon XXN T2859.39-47-T2860.6

¹¹⁴ McNaughton Statement, tab 102, NAB.134.009.3002; Dillon XXN T2865.21-23.

¹¹⁵ McNaughton Statement, tab 144, NAB.005.477.0001 at .0002.

¹¹⁶ Exhibit 3.141, Business Memorandum of increase 25 March 2013, NAB.005.342.0128 at .0133.

¹¹⁷ When Mr Bassett became National Music's Senior Business Banking Manager he had over 13 years of business banking experience, including as a national head of the real estate banking team at Macquarie Bank (Exhibit 3.137, RCD.9999.0042.0001, Statutory Declaration of Shaun Bassett dated 18 May 2018 (**Bassett Statutory Declaration**) at [3]-[4]).

¹¹⁸ Being a customer with a history of troubled trading with a significant history of increases in overdraft and other facility limits (see McNaughton Statement at [134(c)]; Bassett Statutory Declaration at [15]).

¹¹⁹ McNaughton Statement at [135]; Bassett Statutory Declaration at [15].

¹²⁰ Being the Close Monitoring Action Plan dated 19 March 2015 (McNaughton Statement, tab 91, NAB.005.376.1199).

¹²¹ McNaughton Statement, tab 109, NAB.134.007.9186.

¹²² Bassett XN T2882.15-26.

¹²³ Bassett Statutory Declaration at [11] and [13]; McNaughton Statement at [134(b)]; Bassett XN T2882.24-26.

¹²⁴ McNaughton XXN T2892.41-46; McNaughton RXN T2909.8-22. On 28 May 2015, Mr Bassett prepared eBL submission 40 which sought to discharge the mortgage over Goanna Downs (see McNaughton Statement, tab 117, NAB.005.321.0009 at .0011).

¹²⁵ Dillon XXN T2864.3-5.

36 Mr Bassett's note of the 2 March 2015 meeting, prepared just two and half weeks later, was recorded within a close monitoring action plan dated 19 March 2015.¹²⁶ The note provided that:

"SBBM [Senior Business Banking Manager] has met with Ross and client has advised that the property was recently put back on market with a different agent (Sydney based) and a different marketing strategy (including going to [sic] Auction – 23rd April – which has not been adopted before). Bottom price willing to accept circa \$2.2M - this has moved down substantially from \$2.7-2.8M he has asked in the past. Currently with a Sydney agent chasing Sydney money. He has already paid \$20k in marketing fees.

Further, he holds a Moolloollaba [sic] unit in partnership with another couple - this is going on market in late March / early April. Plan is to sell this property for circa \$800k-\$1,000k and deposit his half into a trust which will on loan some funds to National Music. Upon selling of Goanna Downs he will inject circa \$200-400k in to National Music and payback the corresponding amount lent by the trust.

*He is currently motivated by health (wife also has current health concerns) and having new grandchildren in Melbourne so they want to move to Melbourne and rent. SBBM believes there is serious intent to sell."*¹²⁷

37 Mr Dillon accepted that in the most part this note correctly reflected what he had told Mr Bassett on 2 March 2015.¹²⁸ Critically, contrary to Mr Dillon's recollection, there is no reference in Mr Bassett's note to any intention to purchase a new property following the sale of Goanna Downs; rather, Mr Bassett records Mr Dillon telling him that he and his wife proposed to *rent* in Melbourne.¹²⁹ This detail is important, since while a statement that the Dillons proposed to purchase a house in Melbourne might imply an intention to apply the sale proceeds for that purpose, a statement that they proposed to rent would not, of course, imply anything about the use of the funds. Notably, when Mr Bassett discussed with Mr Dillon his plans for the proceeds on 30 April 2015, *after* the contract of sale had been signed, Mr Dillon made no mention of acquiring another home.¹³⁰ Mr Bassett's contemporaneous email recounting that discussion is the *only* record of Mr Dillon telling Mr Bassett what he proposed to do with all the sale proceeds. Critically, this conversation occurred *after* the Dillons had already signed the contract of sale.

38 The evidence summarised above demonstrates that Mr Dillon's intentions for the proceeds upon sale of Goanna Downs changed in important respects from time to time over the five years between first being placed on the market and its eventual sale.¹³¹ Those plans, at any given time, appear to have depended on: (a) the needs and financial position of the National Music business; (b) the personal circumstances of the Dillons; and (c) the sale price achieved for Goanna Downs. Ultimately, given the passage of time, it seems likely that Mr Dillon confused what he thought he told Mr Bassett on 2 March 2015 with *earlier* conversations he had had with Mr Matthews and / or Mr Swindells, who each recorded – unlike Mr Bassett – that Mr Dillon had in 2010 and then again in 2013, expressed an intention to use the proceeds to buy a replacement property (which could have been substituted as security for Goanna Downs) and otherwise reduce debt.

39 At its highest, and based on Mr Bassett's note of the conversion, Mr Dillon advised NAB that he intended to inject \$200,000 to \$400,000 into National Music, which was consistent with the debt reduction strategy that he had discussed on previous occasions with NAB.¹³² Critically, what Mr Dillon intended to do with the *balance* of the proceeds was, on his account, simply not discussed at the 2 March 2015 meeting and there is no evidence that it was discussed again until after Goanna

¹²⁶ A close monitoring action plan is a documented plan prepared by the customer relationship banker to monitor a customer who may be showing signs of financial stress (McNaughton Statement at [92]).

¹²⁷ McNaughton Statement, tab 91, NAB.005.376.1199 at .1199.

¹²⁸ Dillon XXN T2859.39-T2861.13 and T2862.7-16.

¹²⁹ McNaughton Statement, tab 91, NAB.005.376.1199 at .1199. (See also Dillon XXN T2861.12-35).

¹³⁰ McNaughton Statement, tab 104, NAB.134.007.9169.

¹³¹ See paragraphs 26, 27, 31, 36 above and paragraph 44 below.

¹³² McNaughton Statement, tab 91, NAB.005.376.1199.

Downs had been sold. Mr Dillon agreed, in this regard, that his intentions set out in his witness statement at [23] were not communicated to Mr Bassett.¹³³ As set out in paragraph 66 below, this cannot support the first of the proposed findings proffered by Counsel Assisting.

40 Thus, the contemporaneous documents and Mr Bassett's evidence reveal that the Commission cannot be satisfied that Mr Dillon did advise Mr Bassett that he would require funds to purchase a new home or that Mr Bassett provided the assurance. Rather, the documents and evidence of Mr Bassett suggest that it is far more likely that the content of the discussion on 2 March 2015 was as set out in the close monitoring action plan, the relevant extract of which is set out in paragraph 36 above.

41 It follows that there is no factual foundation for the proposed findings proffered by Counsel Assisting.

B.5 National Music's second categorisation with SBS and the application of the proceeds of sale of Goanna Downs

42 In the period between the auction on 23 April 2015 and the execution of the contract of sale on 30 April 2015,¹³⁴ National Music was referred to SBS (on 27 April 2015) and categorised (on 29 April 2015).¹³⁵ That is, SBS assumed management of National Music's facilities *before* Goanna Downs was sold. Accordingly any credit approvals for National Music's facilities were required to be approved by SBS.¹³⁶

43 National Music was referred to SBS at that time because in early April 2015, it had requested a further \$200,000 by way of short term cash flow support until September 2015 to account for another anticipated shortfall.¹³⁷ At that time, National Music was experiencing slower debtor collection, increased stock holdings and lower anticipated sales¹³⁸ and two months earlier it had also breached its interest cover covenant.¹³⁹ Ms Moynahan, who was on secondment from Deloitte, was allocated as the Impaired Asset Manager for the file.¹⁴⁰

44 Mr Bassett received a copy of the front page of the contract of sale from the Dillons' solicitor on 30 April 2015.¹⁴¹ This was the first update in respect of Goanna Downs since Mr Dillon's email one week earlier advising that the property had not sold.¹⁴² As noted above, later that day, Mr Bassett and Mr Dillon had a telephone discussion in which Mr Dillon told Mr Bassett what he proposed to do with the proceeds of sale:¹⁴³ (i) pay out the portfolio facility; (ii) deposit \$200,000 into National Music; (iii) pay out his personal credit cards; and (iv) invest the rest into annuity type

¹³³ Dillon XXN T2861.45-T2862.5.

¹³⁴ Dillon Statement at [25].

¹³⁵ McNaughton Statement, tab 88, NAB.134.007.8867; McNaughton Statement, tab 43, NAB.005.321.0073.

¹³⁶ Usually, credit decisions are made by a Credit Manager who sits within the Credit Team at NAB. If the file is in SBS, a credit lending submission will be approved by a DCA holder within the SBS team (McNaughton statement at [101]).

¹³⁷ McNaughton Statement, tab 90, NAB.005.342.0245 at .0247; Bassett XN T2880.23-25. The credit partner who assessed the request (which was made via a credit lending submission prepared by Mr Bassett) recommended the referral to SBS (McNaughton Statement, tab 88, NAB.134.007.8867; McNaughton Statement, tab 89, NAB.134.007.8864; McNaughton Statement, tab 90, NAB.005.342.0245). National Music had previously sought short term assistance to alleviate cash flow shortfalls, see for example McNaughton statement, tab 68, NAB.005.342.0021 at .0023 and paragraph 27 above.

¹³⁸ McNaughton Statement, tab 90, NAB.005.342.0245 at .0247.

¹³⁹ McNaughton Statement, tab 90, NAB.005.342.0245 at .0249. An interest cover covenant is a non-monetary covenant. A breach of a non-monetary covenant may be an indicator of potential problems with the performance of the customer's business (McNaughton Statement, tab 5, NAB.005.191.0016 at .0017).

¹⁴⁰ McNaughton Statement at [143].

¹⁴¹ McNaughton Statement, tab 103, NAB.134.009.2526.

¹⁴² McNaughton Statement, tab 102, NAB.134.009.3002; Dillon XXN T2865.16-22.

¹⁴³ The telephone discussion is referred to in Mr Bassett's email of 30 April 2015 to Ms Moynahan in which he forwarded the signed contract of sale (McNaughton Statement, tab 104, NAB.134.007.9169). Mr Dillon could not recall the discussion, however he did not deny that it occurred (see Dillon XXN T2867.35-40).

investments to enable Mr Dillon to reduce his drawings on National Music.¹⁴⁴ As noted above, there was no mention of using the proceeds to acquire a new home or anything else which could have been offered by way of replacement security for Goanna Downs.

- 45 Consistent with his usual practice,¹⁴⁵ Mr Bassett did not provide any assurance but rather sought approval, in this instance from Ms Moynahan because the file was now in SBS, before communicating NAB's position to Mr Dillon. Ms Moynahan responded to Mr Bassett's email on the afternoon of 30 April 2015.¹⁴⁶ This is the first evidence of any 'decision' being taken by NAB that the sale proceeds should be applied to reduction of debt. There is no evidence that such a decision was taken – and therefore could or should have been communicated to Mr Dillon – prior to him entering into the contract of sale. Indeed, no decision *could* have been taken by NAB with regard to the application of the sale proceeds until: (a) it was clear that the property had, after five years, in fact been sold; and (b) it was clear what sale price had been achieved. Any decision on the application of the sale proceeds necessarily had to have regard to the *actual* circumstances which prevailed at the time of the sale.
- 46 Ms Moynahan noted¹⁴⁷ that NAB was currently funding National Music's cash flow through the trade refinance and debtor facilities, that National Music had applied for a further \$200,000 in cash flow assistance, and that “[o]ur primary exit following the settlement of the property will be inventory and debtor collections”. Her email reflected the proposal by Mr Dillon for the sale proceeds, which did not include any replacement security following the sale of Goanna Downs. That being so, it is hardly surprising that Ms Moynahan took the view that the net sale proceeds should be applied to NAB debt.¹⁴⁸ As Mr McNaughton pointed out, having regard to the level of borrowing by National Music, supported by the guarantee and mortgage over Goanna Downs, and in the absence of a proposal to provide replacement security, this was the only viable course.¹⁴⁹
- 47 On 1 May 2015, Mr Bassett telephoned Mr Dillon to provide NAB's response to Mr Dillon's proposal in respect of the proceeds of sale. NAB does not dispute Mr Dillon's evidence that he was told during the discussion that National Music had been referred back to SBS and that Mr Dillon would be required to apply the entirety of the proceeds of sale to reduce his personal debt and National Music's facilities.¹⁵⁰ So much is reflected in the contemporaneous email records during this period.
- 48 After reviewing National Music's financial reports and updates,¹⁵¹ Ms Moynahan and Mr Bassett, met with Mr Dillon, Mr McMahon and Ms Buchanan on 4 May 2015 to discuss National Music's request for further funding and the recent sale of Goanna Downs. Mr Dillon gave evidence that he did not remember much detail about who said what at the meeting,¹⁵² but that Ms Moynahan said that National Music's facility limits would have to be reduced because there was less security following the sale of Goanna Downs.¹⁵³
- 49 On 5 May 2015, Ms Moynahan sent an email to Mr Dillon, Mr McMahon and Ms Buchanan confirming what had been discussed the day before. Ms Moynahan made some observations about

¹⁴⁴ Mr Dillon gave evidence that he could not remember speaking to Mr Bassett following the sale of Goanna Downs; notwithstanding Mr Dillon denied that Mr Bassett's email to Ms Moynahan reflected what Mr Dillon had told Mr Bassett about his plans in relation to the proceeds of sale (Dillon XXN T2867.5-T2868.6).

¹⁴⁵ Bassett Statutory Declaration at [11]; Bassett XN T2882.20-26.

¹⁴⁶ McNaughton Statement, tab 105, NAB.134.007.9166.

¹⁴⁷ McNaughton Statement, tab 105, NAB.134.007.9166.

¹⁴⁸ McNaughton Statement, tab 105, NAB.134.007.9166.

¹⁴⁹ McNaughton XXN T2902.41-T2903.9; T2904.16-27; McNaughton Statement at [194].

¹⁵⁰ Dillon XN T2835.18-34.

¹⁵¹ McNaughton Statement at [148]; McNaughton Statement, tab 96, NAB.134.007.9212; McNaughton Statement, tab 97, NAB.134.007.9216; McNaughton Statement, tab 98, NAB.134.007.9217; McNaughton Statement, tab 99, NAB.134.007.9218; McNaughton Statement, tab 100, NAB.134.007.9190; McNaughton Statement, tab 101, NAB.134.007.9195.

¹⁵² Dillon XN T2836.11-12.

¹⁵³ Dillon XN T2836.1-12.

National Music's financial position, which reflected what was set out in its most recent accounts,¹⁵⁴ including that there were “*no other security assets on the balance sheet, i.e. bricks and mortar, plant and equipment*”.¹⁵⁵ She explained that NAB would require that the entirety of the proceeds of sale be applied first to Mr and Mrs Dillon's personal debt with the balance to be applied to National Music's facilities and the remaining shortfall of \$257,000 to be rolled into National Music's facilities.¹⁵⁶ She recorded that during the meeting, National Music also confirmed that a \$100,000 increase in the overdraft facility could be sufficient (despite initially seeking further funding of \$200,000).¹⁵⁷ She noted that Mr Dillon had indicated that he was willing to provide \$1.958 million to NAB from the net sale proceeds of \$2.12 million.¹⁵⁸

- 50 Mr Dillon's evidence was that he, Mr McMahon and Ms Buchanan were “*in an absolute state of shock*” as a result of the meeting.¹⁵⁹ However, the email correspondence sent in response to Ms Moynahan's email of 5 May 2015 is bereft of any expression of that kind. Mr McMahon's response thanked Ms Moynahan for the information and for her time during the meeting.¹⁶⁰ Mr Dillon responded later that afternoon and he, too, thanked Ms Moynahan for her email and noted that “*I fully accept your analysis of our situation*”.¹⁶¹ Moreover, as Mr Dillon expressly recognised in his evidence the relevant context in which decisions were being made, was that no other bank would have lent to National Music in the absence of security¹⁶²
- 51 While Mr Dillon initially misunderstood and thought that NAB had accepted his proposal¹⁶³ to apply \$1.98 million of the sale proceeds to facilities held by National Music (ie, all of the proceeds save for \$162,000), Ms Moynahan subsequently and promptly clarified that NAB would require the entirety of the proceeds of sale be applied to Mr and Mrs Dillon's personal debt with the remainder to be applied to National Music facilities. She advised Mr Dillon that National Music could *choose* how it wished to restructure its facilities following the settlement of Goanna Downs.¹⁶⁴

B.6 The application of the proceeds of sale and reduction of National Music's facility limits, and NAB's entitlement to do so

Application of proceeds

- 52 Mr McNaughton was cross-examined about NAB's legal entitlement to apply the balance of the proceeds of sale to reduce National Music's debt. He stated that NAB did not have a legal entitlement to apply the proceeds to National Music's debt.¹⁶⁵ This statement was relied upon to found the proposed findings.¹⁶⁶
- 53 However, with respect, the cross-examination, and the reliance on Mr McNaughton's answer to underpin the proposed findings, was misdirected. NAB did not – in 2015 or now – assert or imply that it had a *legal* entitlement to payment of the proceeds in reduction of debt (i.e. NAB could not

¹⁵⁴ See McNaughton Statement, tab 101, NAB.134.007.9195; McNaughton Statement at [148]. Cf Mr Dillon's evidence in his witness statement that Ms Moynahan's summary was “misleading” (Dillon Statement at [31]).

¹⁵⁵ McNaughton Statement, tab 110, NAB.134.009.2614 at .2614.

¹⁵⁶ McNaughton Statement, tab 110, NAB.134.009.2614 at .2615.

¹⁵⁷ McNaughton Statement, tab 110, NAB.134.009.2614 at .2614.

¹⁵⁸ McNaughton Statement, tab 110, NAB.134.009.2614 at .2614-2615.

¹⁵⁹ Dillon XN T2835.44-45.

¹⁶⁰ McNaughton Statement, tab 111, NAB.134.009.2611 at .2611.

¹⁶¹ McNaughton Statement, tab 112, NAB.134.006.4919 at .4919.

¹⁶² Dillon XXN T2870.34-38; Dillon Statement at [29].

¹⁶³ In his email of 5 May 2015, Mr Dillon wrote to Ms Moynahan “*thank you for your preparedness to disburse the sale proceeds as requested*” (underlined emphasis added) (McNaughton Statement, tab 112, NAB.134.006.4919 at .4919). This is inconsistent with and ought to be preferred to Mr Dillon's evidence that he was not asked to make a proposal but “*agreed that they could do what they wanted because they had us under the thumb*” (Dillon XN T2837.15-18).

¹⁶⁴ McNaughton Statement, tab 114, NAB.134.006.4829.

¹⁶⁵ McNaughton XXN T2889.21-T2890.4.

¹⁶⁶ Senior Counsel Assisting Closing Address T3056.13-15.

demand or seize the proceeds). However, as Mr McNaughton explained, that payment to NAB was the only practical course if NAB was to continue to support National Music,¹⁶⁷ and as explained in paragraph 54 below, payment to NAB was the only practical course if NAB were to discharge its mortgage over Goanna Downs. Goanna Downs was the only “bricks and mortar” security which supported – directly or indirectly – National Music’s facilities. Upon the sale of Goanna Downs, there were realistically only two available options to National Music: (a) Mr Dillon could proffer alternative security which could support the guarantee and indemnity, and collaterally the borrowings of National Music; *or* (b) National Music could pay down its facilities, with a corresponding reduction in its facility limits. Mr Dillon understood that Goanna Downs was security for both their personal loan and some of National Music’s facilities¹⁶⁸ and that National Music’s borrowing was subject to the provision of adequate security.¹⁶⁹ Mr Dillon also acknowledged that once Goanna Downs had been sold, he did not offer any replacement security to secure the approximately \$2 million of facilities previously secured by Goanna Downs.¹⁷⁰

- 54 Further, and as a matter of practicality and NAB’s contractual rights under its security arrangements with the Dillons, NAB would not (and could not) have agreed to discharge the mortgage over Goanna Downs unless Mr Dillon provided alternative security for the guarantee and indemnity¹⁷¹ *or* he agreed to an appropriate reduction of the exposures formerly collateralised by the mortgage.¹⁷² Pursuant to clause 12(b) of the guarantee and indemnity,¹⁷³ NAB could keep its security over Goanna Downs so as to secure the indemnity proffered by the Dillon’s pursuant to clause 10.1 of the guarantee and indemnity.¹⁷⁴
- 55 As National Music did not offer any replacement security, the only viable option was to apply the proceeds of sale to reduce National Music’s debt.¹⁷⁵ If National Music – which, according to the evidence and as acknowledged by Mr Dillon,¹⁷⁶ had consistently struggled under the weight of its debt – had not done so, it would have become severely overleveraged. Lending to National Music in these circumstances would, in turn, have been inconsistent with NAB’s responsible lending obligations. Further, NAB would have had no viable secondary exit if National Music fell into default. At this time, National Music was struggling financially; hence the need for an additional \$200,000 in cash flow support. It remained heavily reliant on debt to run its business – this was evidenced by the fact that it had an overdraft facility in addition to a trade facility and debtor facility.¹⁷⁷ And, its ability to service those debts remained problematic.¹⁷⁸
- 56 Much was made in cross-examination of the fact that Goanna Downs did not *directly* secure the debts of National Music. However, for the reasons explained by Mr McNaughton, it did not matter whether it constituted direct or indirect security. That is because National Music’s facilities (i.e., the facilities secured by the guarantee and indemnity) had been made available on the basis that

¹⁶⁷ McNaughton XXN T2902.41-2903.9; T2904.16-27; McNaughton Statement at [194].

¹⁶⁸ Dillon Statement at [10]; Dillon XXN T2856.22-31; T2858.38-41.

¹⁶⁹ Dillon XXN T2870.34-38.

¹⁷⁰ Dillon XXN T2871.7-22.

¹⁷¹ McNaughton XXN T2893.13-34.

¹⁷² McNaughton XXN T2903.4-9.

¹⁷³ McNaughton Statement, tab 53, NAB.005.342.0561.

¹⁷⁴ Cf McNaughton XXN T2905.8-10, which did not advert to this clause.

¹⁷⁵ McNaughton XXN T2902.41-2903.9; T2904.16-27; McNaughton Statement at [194].

¹⁷⁶ By letter dated 4 March 2010, Mr Dillon wrote: “*My return to active duty in the business will ensure we do not fall into the same mistakes we have made in the last couple of years. Our reliance on debt driven growth will not reoccur!*” (McNaughton Statement, tab 64, NAB.134.021.0035 at .0039); Dillon XXN T2870.34-38; McNaughton Statement at [193].

¹⁷⁷ McNaughton Statement at [193].

¹⁷⁸ This is exemplified by the reason for National Music’s request for a further \$200,000 (Dillon XN T2833.36-41) and Mr Bassett’s evidence that National Music had a significant history of increases (Bassett Statutory Declaration at [15]).

Goanna Downs supported the personal guarantee and indemnity.¹⁷⁹ Mr Dillon understood that without Goanna Downs or replacement security, National Music could not borrow at the levels that it did.¹⁸⁰

Reduction in facilities

- 57 Following the sale of Goanna Downs, Ms Moynahan invited National Music to submit its proposal as to the application of the proceeds of sale and reduction of National Music’s facility limits.¹⁸¹ Mr Dillon sought advice from his accountant Nigel Fischer (who had authored the Johnston Rorke report in 2010).¹⁸²
- 58 National Music’s options in this regard were clearly articulated in an email from Ms Moynahan to Mr Fischer on 14 May 2015.¹⁸³ Ms Moynahan explained that following the sale of Goanna Downs, National Music’s remaining security (being debtors and inventory) was valued at \$2.5 million, however National Music’s facilities were greater than the value of the remaining security. That is, National Music would be heavily over-g geared unless it provided replacement security or reduced its facility limits and balances. Ms Moynahan expressly asked Mr Fischer whether management wished to consider providing further security.¹⁸⁴ No additional security was offered by National Music.
- 59 Mr Fischer recognised the commercial need for a reduction in the limits of the facilities which had been (indirectly) secured by Goanna Downs. When Ms Moynahan followed him up on 20 May 2015 to see what National Music wished to propose by way of a new facility structure, Mr Fischer responded the same day, advising Ms Moynahan that he had been working with National Music to determine what *additional* facility reduction could be managed by the business.¹⁸⁵ Later that day, Mr Fischer presented, “[o]n behalf of Ross Dillon and National Music”, a proposal to NAB for the application of the proceeds of sale and restructure of National Music’s facilities.¹⁸⁶ Mr Fischer expressed National Music’s appreciation for the support that NAB had provided to the company and confirmed that National Music wished for the support to continue.¹⁸⁷ The proposal included a request that Mr Dillon be reimbursed \$20,000 for his advertising costs for Goanna Downs.¹⁸⁸
- 60 NAB approved Mr Fischer’s proposal within six days,¹⁸⁹ and Mr Fischer thanked Ms Moynahan for the good news.¹⁹⁰ Even after accepting the proposal, NAB was left in a weaker security position – the limits on National Music’s facilities totalled \$2.35 million¹⁹¹ and were secured by debtors and specialised, hard-to-move stock which could not be realised for their full value in the event of enforcement.¹⁹²

¹⁷⁹ McNaughton XXN T2904.39-40; McNaughton RXN T2908.40-T2909.4; see also paragraph 13 above. This is also reflected by the fact that once Goanna Downs (or replacement security) was no longer available to support the guarantee and indemnity, National Music’s risk profile would materially change (McNaughton XXN T2909.11-12).

¹⁸⁰ Dillon XXN T2870.34-38.

¹⁸¹ By email 12 May 2015, Ms Moynahan invited Ms Buchanan to review National Music’s facilities and advise which facility limits could be reduced following the settlement of Goanna Downs (see McNaughton Statement, tab 122, NAB.134.009.2649 and McNaughton Statement, tab 123, NAB.134.009.2650). By email of 14 May 2015, Ms Moynahan asked Mr Fischer to review National Music’s facilities and call her to discuss (McNaughton Statement, tab 126, NAB.134.009.2651 at .2651-2652). By email of 20 May 2015 Ms Moynahan followed up her email of 14 May 2015 and asked that National Music provide a proposal for its facility restructure (McNaughton Statement, tab 126, NAB.134.009.2651 at .2651).

¹⁸² Dillon XN T2837.31-37.

¹⁸³ McNaughton Statement, tab 126, NAB.134.009.2651 at .2651-2652.

¹⁸⁴ McNaughton Statement, tab 126, NAB.134.009.2651 at .2652.

¹⁸⁵ McNaughton Statement, tab 126, NAB.134.009.2651 at .2651.

¹⁸⁶ McNaughton Statement, tab 127, NAB.134.006.4835 and McNaughton Statement, tab 128, NAB.134.006.4838.

¹⁸⁷ McNaughton Statement, tab 127, NAB.134.006.4835 at .4836.

¹⁸⁸ Cf Dillon Statement at [28].

¹⁸⁹ McNaughton Statement, tab 130, NAB.134.006.4842 at .4842.

¹⁹⁰ McNaughton Statement, tab 131, NAB.134.006.4845 at .4845.

¹⁹¹ McNaughton Statement at [209].

¹⁹² McNaughton Statement at [158].

61 The sale of Goanna Downs settled on 12 June 2015.¹⁹³ After paying Mr and Mrs Dillon’s personal debt, the balance of the proceeds of sale were deposited into National Music’s overdraft account¹⁹⁴ and National Music chose where it wished to apply the proceeds of sale. NAB restructured National Music’s facilities according to Mr Fischer’s 20 May 2015 proposal. NAB did not suggest to, or otherwise direct, National Music as to how it ought to restructure its facilities.

C. NAB’S RESPONSE TO THE NAB CASE STUDY

62 NAB regrets that Mr Dillon felt that he was taken by surprise. While NAB accepts that its communications with Mr Dillon after the sale of Goanna Downs could have been clearer, having regard to the events referred to above, NAB considers that the way in which the proceeds of sale were applied and the way in which National Music’s facilities were restructured, was appropriate and commercially necessary, having regard to National Music’s lack of available alternative proposals.

63 It would not be practical or reasonable to impose an inflexible standard on bankers as to the communication necessary in the context of a customer’s voluntary sale of assets. NAB accepts that, depending on the circumstances, it *may* be appropriate to advise or remind the customer of their obligations, how the asset secures their facilities, and that any proposal regarding the proceeds of sale is subject to NAB’s approval.¹⁹⁵ However, given the extended history of Mr Dillon’s attempts to sell Goanna Downs, his awareness that Goanna Downs secured National Music’s debts, the different plans he had at various points in time, and the absence of any explicit statement of his plans for the sale proceeds in 2015, it was not unreasonable – let alone misleading – for NAB not to do so expressly in March or April 2015.

64 This case study illustrates why inflexible standards for communications ought not be imposed. Here, Mr Dillon voluntarily put Goanna Downs on the market and NAB was not involved in the sale process or the eventual sale. Goanna Downs was already on the market before Mr Dillon’s discussion with Mr Bassett on 2 March 2015 and Mr Dillon did not advise NAB that an agreement had been reached to sell the property until after the contract of sale had been signed. Nor did he inform Mr Bassett how he wished to expend the \$2.22 million sale proceeds until after the contract of sale had been executed. The National Music file reflected a commitment on his part to use the proceeds – once the property, which was on the market for the best part of 5 years, eventually sold – to reduce bank debt. In such circumstances, NAB submits that it would not be practical to impose a positive obligation to formulate and articulate a position on the part of NAB in anticipation of matters which were as yet uncertain, and for events which had not occurred.

D. NAB’S RESPONSE TO THE AVAILABLE FINDINGS PROPOSED BY SENIOR COUNSEL ASSISTING

65 **Proposed finding:** NAB might have engaged in misleading or deceptive conduct. First, the bank did not inform Mr Dillon that the intentions he had expressed to the bank in respect of the proceeds of sale would not be possible because the bank would require either all of the surplus to reduce the debts of National Music or an alternative proposal of security from him. Second, the bank represented to Mr Dillon that it was entitled to use the proceeds of sale to reduce the debts of National Music in circumstances in which the bank has now acknowledged that it did not have the legal right to do so.

66 This proposed finding ought not be made for the following reasons.

¹⁹³ McNaughton Statement at [76].

¹⁹⁴ McNaughton Statement at [76].

¹⁹⁵ McNaughton XXN T2899.22-30.

- (a) *First*, the contemporaneous evidence does not allow the Commission to conclude that Mr Dillon expressed intentions in respect of the sale proceeds on 2 March 2015, in the manner alleged. Insofar as Mr Dillon held other intentions, such as those expressed in paragraph 23 of his witness statement, they were not communicated to NAB. The first time Mr Dillon meaningfully conveyed his intentions with respect to the sale proceeds was *after* the contract of sale had been executed.
- (b) *Secondly*, a finding of misleading or deceptive conduct is premised upon an assumption that NAB had formed a disclosable intention prior to Mr Dillon's execution of the contract of sale. However, the evidence discloses that NAB only formed a view as to what ought to occur with the proceeds of sale *after* the contract of sale was executed. Thus, there could be no *disclosable intention* on the part of NAB prior to entry into the contract of sale.
- (c) *Thirdly*, the evidence suggests that Mr Dillon was selling the property in order to reduce bank debt.
- (d) *Fourthly*, Mr Dillon was aware that he needed to provide replacement security,¹⁹⁶ and had previously proffered proposals containing replacement security, so he cannot have been misled in those circumstances and having regard to levels of borrowing by National Music and the absence of other underlying security.
- (e) *Fifthly*, NAB did not represent to Mr Dillon or National Music that it had a legal entitlement to apply the proceeds of sale from the sale of Goanna Downs to National Music's facilities. No such representation emerges from the documents tendered or from the oral evidence. Moreover, the suggestion of such a representation being made was not put by Counsel Assisting to Mr Bassett. As set out above, the application of the proceeds to the reduction of debt was a commercial reality, absent alternative security and consistent with NAB's contractual and legal rights to preserve its security position. Indeed, Mr Dillon had already recognised that commercial reality over 5 years earlier in his dealings with Mr Matthews.

67 **Proposed finding:** NAB's failure to communicate its expectations and intentions to Mr Dillon may also have been a breach of clause 3.2 of the Code of Banking Practice, in that it may have failed to act in a consistent and ethical manner.

68 The proposed finding ought not be made. For the reasons already advanced in this submission, the evidence reveals no inconsistent or unethical conduct on the part of NAB.

69 **Proposed finding:** NAB's conduct also fell below community standards and expectations.

70 NAB refers to paragraphs 66 and 68 above. NAB does not accept that the conduct the subject of this case study fell below community standards. Mr Dillon has acknowledged that NAB had supported National Music, an admittedly struggling business, through tough times.

71 **Proposed finding:** Despite Mr McNaughton's evidence to the contrary, it is open to find that the relevant NAB bankers may not have adhered to NAB's policies which required them to engage earlier with Mr Dillon, to be open and honest with him, and to clearly articulate the bank's position and the basis of the decision.

72 On the assumption that this question refers to the SBS principles¹⁹⁷ which applied to Ms Moynahan, NAB submits that – save perhaps for a possible lack of clarity in her communication of 5 May 2015, which was corrected and does not amount to a breach of the SBS principles – Ms Moynahan's conduct was not wanting or deficient. Upon referral of National

¹⁹⁶ Dillon Statement at [41].

¹⁹⁷ McNaughton statement, tab 19, NAB.005.223.0960.

Music to SBS, Ms Moynahan met with Mr Dillon, Mr McMahon and Ms Buchanan almost immediately, communicated expeditiously and worked with the customer and their accountant following the sale of Goanna Downs.¹⁹⁸ Ms Moynahan invited National Music to submit proposals for the application of the proceeds and restructure of its facilities (including specifically asking whether National Music had any further security to replace Goanna Downs and support its borrowing).¹⁹⁹

D.1 General question arising from the NAB Case Study

- 73 **Question:** When and how much disclosure should a bank provide a director of a business in respect of a decision of the bank's workout division, in this case, the SBS division of NAB, where that decision will affect a customer's use of a personal asset which indirectly secures the obligations of their business to the bank?
- 74 Other than in an enforcement situation, NAB cannot make a decision affecting the use of a personal asset which indirectly secures the obligations of a business to the bank. Any such decision is a matter for the customer. The role of NAB is to understand the range of options available to the customer and if a decision is made by a customer, to then evaluate which of those options remains commercially achievable. If only one option is capable of being pursued (for example, the reduction of debt in circumstances where no replacement security is available), that fact ought to be communicated expeditiously. In the circumstances of the NAB case study, that commercial reality was acknowledged by Ms Moynahan on 30 April 2015 and Mr Dillon was advised the following day. Ms Moynahan and Mr Dillon continued to work together and negotiate a proposal in the weeks that followed.
- 75 In an enforcement context, taking possession of a personal asset used to secure a business loan is an enforcement mechanism of last resort. NAB's practice is to seek to engage with the customer so as to find ways to discharge the customer's liability without having to resort to their personal assets. This typically takes the form of discussions to encourage the customer to organise their affairs in a manner which would allow the customer to discharge their liability in a reasonable time by reference to the assets that the customer wishes to realise first (for example, the sale of an investment property) or by way of refinance. In doing so, the bank also assesses the viability of the customer's proposal having regard to not only the proposal itself but the customer's loan history.

D.2 Opportunity to be heard in respect of any additional adverse findings

- 76 If the Commission intends to make any adverse findings against NAB or any of its current or former employees in connection with this case study, other than those identified by Senior Counsel Assisting in closing submissions, NAB seeks notice of the same and an opportunity to be heard in relation to them.

8 June 2018

W A HARRIS

R G CRAIG

R M BURD

¹⁹⁸ National Music was categorised on 29 April 2015, Mr Dillon was advised on 1 May 2015 and a meeting was held on 4 May 2015. See paragraphs 42 to 48 above.

¹⁹⁹ See paragraphs 57 to 58 above.