

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

SMALL BUSINESS LENDING MODULE

WRITTEN SUBMISSIONS ON BEHALF OF SUNCORP IN RESPECT OF THE LOW CASE STUDY

INTRODUCTION

1. These submissions are filed by Suncorp in respect of the case study concerning Mrs Jennifer Low (**Mrs Low**) and Mr Rien Low (**the Case Study**). The Case Study concerned the making of one (**Business Loan B**) of five business loans made to Mrs Low and her husband (**Mr Low**) as joint borrowers and events occurring after the death of Mr Low.
 2. Counsel assisting the Commission has made the following submissions:
 - i. It “may be open” to the Commission to find that Suncorp failed to comply with clause 27 of the Banking Code of Practice (**the Code**) in “failing to properly investigate the purpose of the loan, in imprudently assessing the affordability of the loan in a way that was dependent on the development property to generate income for repayments, and in failing to control the use of the loan funds”: Tr 3042.19-22.
 - ii. It “may be open to find” that Suncorp “failed to comply with the obligations in clause 3.2 of the Code to act fairly and reasonably in a consistent and ethical manner by conducting its negotiations with Mrs Low about a repayment plan for the loan following the Financial Ombudsman Service (**FOS**) determination in a manner that was unfair and unreasonable”: Tr 3042.22-26.
 - iii. It is open to find that “Suncorp engaged in conduct that fell below community standards and expectations by defending the complaint about the loan in FOS, including by adducing further material to FOS following its recommendation that the loan had been irresponsibly advanced, in circumstances where Suncorp ought to have examined and been aware of the loan approval deficiencies and the irrelevance of the material that was adduced”: Tr 3042.28-34.
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- iv. It is open to find that Suncorp engaged in conduct that fell below community standards and expectations by “demanding repayment of the entirety of the loan within an unreasonable timeframe, in circumstances where Jennifer Low had offered to make regular repayments of the principal in accordance with the loan, by asserting that the loan was void ab initio and should be repaid in priority to other loans with Suncorp, in circumstances where the FOS determination neither rendered the loan void nor required repayment in priority to other loans, and by communicating with the Lows about the loans over a period following Mr Low’s death in a manner that caused Jennifer and Rien Low distress”: Tr 3042.35-43.
3. In summary, Suncorp makes the following submissions:
 - (a) In making “Business Loan B” to the Lows, Suncorp accepts that it did not comply with cl 27 of the Code because it did not sufficiently investigate the purpose of the loan and thereby failed to exercise due care in the application of its own credit assessment methods¹ and engaged in conduct in breach of a widely adopted benchmark.
 - (b) In some specific respects, as identified in these submissions, Suncorp accepts that it did not comply with cl 3.2 of the Code in conducting negotiations with Mrs Low and Rien Low following the first FOS determination and thereby engaged in conduct in breach of a widely adopted benchmark.
 - (c) In some specific respects, as identified in these submissions, Suncorp accepts that its conduct in its dealings with Mrs Low and Rien Low fell below community standards and expectations.
 - (d) Save for the specific lapses identified, Suncorp does not accept that the position it adopted in the course of negotiations with the Lows following the FOS determination was unfair or unreasonable, constituted misconduct or fell below

¹ Properly construed, clause 27 of the Code does not impose a universal or entirely objective standard of care to be exercised by banks in extending credit. Instead, it amounts to a contractual promise to the customer that the bank in question will exercise the care and skill of a diligent and prudent banker in selecting and applying *its own* (“our”) credit assessment methods and in forming its (“our”) opinion about a customer’s ability to repay the facility. No bank will ever be able to form an opinion with absolute certainty that a customer will be able to repay a credit facility. Each extension of credit involves some degree of risk that the customer will default, and a formation of opinion as to the likelihood of default. Each bank will be willing to accept a different degree of default risk and will apply different credit assessment methods which depend upon the bank’s own risk appetite and the terms upon which credit is proposed to be advanced.

community standards. There are a number of matters that the Commission should consider in this context, including:

- i. the terms of FOS' recommendation and determination (Ex 3.73.7.3) (see [24]-[25] below);
 - ii. FOS' then-stated position as to the effect of its recommendation and determination and what would be reasonable for Suncorp to offer or accept (Ex 3.73.16; Ex 3.85.1 at FOS.0028.0001.3483, 3485; Ex 3.85.2 at FOS.0028.0001.4035) (see [4], [39]-[49] below);
 - iii. Mrs Low was a co-borrower (as opposed to a guarantor) under Business Loan B, having signed an application form for the loan, and was a director and shareholder of the company through which the business was operated (Ex 3.75 at [55(a)-(b)]);
 - iv. Mrs Low benefited from the application of the majority of Business Loan B to repay an existing debt (bearing a higher interest rate) in respect of which she was a co-borrower (Ex 3. 3.73.7.3 at FOS.0028.0001.3086-7, 3092-3) (see [20] below);
 - v. Mrs Low had a substantial surplus of assets to liabilities which she quantified in her financial assistance application at \$805,587, including a holiday / investment property and a commercial property (Ex 3.73.1 at p 3; Ex 3.73.4 at FOS.0028.0001.2957-2959; Ex 3.73.7.3 at FOS.0028.0001.3081) (see [14] below);
 - vi. one of the bases upon which Business Loan B was advanced was that the investment and commercial properties could be realised in the event that the Lows ceased to operate the business and/or to earn sufficient income to service the loan (Ex 3.73.4 at FOS.0028.0001.2957);
 - vii. Business Loan B appears to have been procured, at least in part, as a product of deception by or on behalf of the borrowers (Ex 3.85.1 at FOS.0028.0001.3478); and
 - viii. the time value of money (see below [25], [52(e)] and [81(c)]).
4. In his oral evidence, Mr Philip Field of FOS stated that he “would expect [Suncorp] to change their position and now permit Mrs Low to make regular principal repayments

for the life of the loan” (Tr-25534.20-32). His expectation in this regard did not reflect the position of FOS as previously communicated to Suncorp, to Mr Low or to the Consumer Action Law Centre (CALC) (Ex 3.85.1 at FOS.0028.0001.3483, 3485; Ex 3.85.2 at FOS.0028.0001.4035), or Suncorp’s understanding of the FOS Determination. Nonetheless, Suncorp proposes to fulfil that expectation in this individual case and to accept an offer in those terms if now made by Mrs Low. Suncorp adopts this position so as to avoid further distress to the Lows given the potential for their expectations to have been affected by Mr Field’s evidence.

5. For the reasons summarised in paragraph 3(d) above and elaborated upon below, Suncorp does not otherwise accept that the resolution Mr Field proposed under cross-examination constitutes a reasonable or appropriate remedy for the identified breach of the Code. Suncorp considers that FOS or its successor body should provide further guidance as to the appropriate remedy for breach of cl 27 of the Code, following consultation with industry and consumer groups, in light of orthodox principles of contractual remedies.
6. Suncorp’s position otherwise departs from that which was said to be open by Counsel Assisting in the following regards.
 - (a) The evidence does not establish that Suncorp breached cl 27 of the Code by imprudently assessing the ability of the Lows to repay the loan or in failing to control the use of the funds by Mr and Mrs Low.
 - (b) Conduct is not necessarily below community expectations because it causes distress. Suncorp should act fairly, reasonably and compassionately. However, it is not possible prudently to run a business of lending money in a way which avoids causing distress to all persons in all circumstances.
7. In what follows, these submissions first outline the factual background, then addresses the four issues raised in turn, namely:
 - i. non-compliance with cl 27 of the Code;
 - ii. non-compliance with cl 3.2 of the Code;
 - iii. community expectations and the conduct of the First Complaint;
 - iv. community expectations and negotiations following the First Determination.

FACTUAL BACKGROUND

8. Mrs Low was a director and shareholder of Ribro Blasting Co Pty Ltd (“**Ribro**”), as was Mr Low prior to his death. Ribro conducted an explosives business.
9. In 2013, Suncorp made four loans to Mr and Mrs Low: Ex 3.73 [3(a)-(d)]. Those loans were responsibly made: Ex 3.73.4 at FOS.0028.0001.2955-7; Ex 3.73.7.3 at FOS.0028.0001.3080-3081. The Lows had surplus income and two of the loans were made for the purpose of refinancing existing loans at a lower interest rate.
10. In June 2014, Suncorp made a further loan to Mr and Mrs Low, which the documents describe as Business Loan B. Business Loan B had two purposes: \$140,000 was to complete construction of a factory and \$100,000 was working capital for the business: Tr 2496.43-2497.7.
11. In approving Business Loan B, Suncorp failed carefully to consider and validate the purposes to which Business Loan B would be applied: Tr 2497.25-27, Tr 2498.24-27. The specific failures of Suncorp are set out in the oral evidence of Mr David Carter, CEO of Banking and Wealth at the Suncorp Group, at Tr 2498.29-2499.9, and in Mr Carter’s written evidence: Ex 3.75 at [69]-[71].
12. Mrs Low signed various documents in order for her and Mr Low to obtain the loans in 2013 and 2014: Ex 3.75 at [55(b)].
13. On 9 November 2015, Mr Low died: Ex 3.73 at [2].
14. In or around December 2015, Mrs Low applied to Suncorp for financial assistance (**Financial Assistance Application**): Ex 3.73.1. The Application indicated that Mrs Low had assets valued at \$1,761,500, \$900,000 of which comprised an investment property in Caloundra (\$600,000) and non-residential land in Healesville (\$300,000). The Application also stated that Mrs Low had “Rental income after expenses” of \$2,200/mth and indicated that her income was inadequate to service the five loans to Suncorp, in an amount of -\$2,894/mth. The Application sought that Suncorp defer loan repayments for 12 months so that Mrs Low could take financial advice.
15. On 15 January 2016, Suncorp offered to defer Mrs Low’s repayments for four months: Ex 3.73.2. Mr Carter gave evidence as to the purpose of the four month period at Tr 2507.14-24; see also Tr 2508.1-8.

16. In May 2016, Rien Low, on behalf of Mrs Low, made a complaint to FOS in respect of each of the five loans made by Suncorp (**the First FOS Complaint**), seeking total forgiveness of each of the loans: Ex 3.73.3. The initial basis of the First FOS Complaint was that Suncorp should not, acting responsibly, have advanced any of the money. A further basis of complaint not relevant to the Case Study was subsequently articulated: Ex 3.85 at [7(b)].
17. During the course of FOS' consideration of the First FOS Complaint, Suncorp took the position that Business Loan B had been responsibly made: Ex 3.78 and Tr 2499.28-2500.16. Suncorp did not conduct a sufficient examination at that stage into whether Business Loan B had been responsibly made: Tr 2499.43-45.
18. On 22 December 2016, FOS made an initial recommendation in respect of the First FOS Complaint: Ex 3.73.4 (**FOS Recommendation**). The recommendation was that the first four loans were not irresponsibly made, but Business Loan B had been irresponsibly made. The recommendation identified that the following factors were relevant to the irresponsibility of the loan's making (Ex 3.73.4, pp 1-2):
 - Its [Suncorp's] assessment of affordability was dependent on development of the Commercial Property to generate rental or sale income to repay the Loans.
 - It did not make adequate enquiries in 2014 about the purpose of the additional request for funds or the status of construction on the Commercial Property. Had it done so, it would have found the borrowers had not used the Business Overdraft funds for construction as intended.
 - It did not control the use of the Business Loan B funds where it [would have been] prudent to so to ensure completion of the Commercial Property.
19. In his written and oral evidence, Mr Carter agreed with the second of the above reasons. Further in oral evidence, Mr Carter stated that, after reaching that conclusion, he did not spend a lot more time considering the first or third reasons, that the first reason was "not unreasonable" and that he did not necessarily agree with the third reason given that Suncorp "did not have security over the commercial property" (Tr 2502.20-27).
20. The FOS Recommendation recorded that Mrs Low had benefited from the extension of Business Loan B as the majority of the Business Loan B funds were used to repay the balance of a business overdraft on 14 May 2015, which had the effect of refinancing the business overdraft debt at a more favourable interest rate.
21. Suncorp accepted the FOS Recommendation (Tr 2504.17-22), but Mrs Low did not (Tr 2504.13). That triggered a further process before FOS. In that further process,

Suncorp maintained its position that Business Loan B was not irresponsibly made and also placed further information before FOS: Tr 2504.20-26. Some of the further information included Google photos of the commercial property: Ex.3.73.5; Tr 2504.39-2505.3. That information may have been in response to the reliance in the FOS Recommendation upon such photos (at [2.3]), but it was not relevant to whether Business Loan B had been responsibly made: Tr 2505.41-2506.3. Most of the information submitted by Suncorp set out the effect of communications between Suncorp and Mr Low and not Google photos.

22. Rien Low gave evidence that, in or around February 2017, he spoke with an individual from Suncorp who expressed dissatisfaction that Mrs Low was thinking of selling her home and said that Suncorp had the power to cancel the sale if it was not happy with the price: Ex 3.73 at [14]-[15]. Suncorp's written records do not record a conversation to precisely that effect and record that the conversation involved Suncorp relaying information that had been provided to Rien Low by FOS: Tr 2513.45-2514.4.
23. On 23 February 2017, Philip Field, FOS' Lead Ombudsman – Banking & Finance, made a final determination in respect of the First FOS Complaint: Ex 3.73.7 (**the First FOS Determination**). The determination was substantially in favour of Suncorp. Mr Field agreed with the reasons given in the FOS Recommendation: Ex 3.73.7 at p 2.
24. The First FOS Determination was to the following effect (Ex 3.73.7 at pp 3-4):

The Applicant remains liable for the 2013 Loans and the Revised Debt under Business Loan B as set out in section 2.4 of this Determination.

Within 14 days of the Applicant's acceptance of this Determination:

- the FSP must reduce the Business Loan B balance by \$40,066.71 to \$221,945.25 as at 6 February 2017 (**Revised Debt**). It is to cease charging any interest and fees accrued on that account after 6 February 2017. It is also to apply any payments made to that account until the date it applies the Determination to further reduce any outstanding balance.
- having regard to FOS's expectations of the parties set out in section 3.4 of the Recommendation, the Applicant should provide the FSP with a proposal for the repayment of the 2013 Loans and the Revised Debt. This proposal may be to pay the debts by sale of the security property, refinance, or a reasonable payment arrangement accompanied by a Statement of Financial Position and supporting documents. The FSP is to work with the Applicant to attempt to agree on a reasonable arrangement to repay the debts.

If the parties are unable to reach an agreement for repayment of the debts within 30 days of the Applicant's proposal, or if no proposal is provided, the FSP may be entitled to commence recovery action with respect to the debts once the FOS dispute is closed. This may include taking possession of and selling the Home and Investment Property.

If the Applicant does not accept this Determination within 30 days of its issue, then the FSP is not required to comply with it. The FSP will be entitled to commence recovery action with respect to the debts once the FOS dispute is closed. This may include taking possession of and selling the Home and Investment Property.

25. Read fairly, the two bullet points in the First FOS Determination travelled together: the loan was to be reduced and no interest charged; and there was to be a repayment arrangement for the "Revised Debt". While the language of "debt" adopted by FOS may have been legally imprecise, it was not a misstatement of the combined practical effect of the two bullet point rulings and was consistent with the methodology contained in the FOS Recommendation, which sought to determine and then to remedy the Applicant's loss (at [2.4]). To relieve a borrower prospectively of an obligation to pay interest and to permit them to repay only the principal over a period of years would go beyond compensating the borrower for the loss they suffered as a result of being advanced a loan irresponsibly, potentially by a significant margin. The approach could potentially deliver a significant benefit to an applicant, depending, for example, upon the remaining term of the loan and upon future rates of inflation.
26. Mrs Low did not accept the First FOS Determination within 30 days, but, on 27 March 2017, FOS extended the time for acceptance to 30 March 2017: Ex 3.85.1 at FOS.0028.0001.3480. Mrs Low accepted the determination on 30 March 2017: Ex 3.73 at [19].
27. In or around April 2017, Mrs Low sold her residential property in Healesville for a net price of approximately \$800,000: Ex 3.73 at [20].
28. On 2 and 3 May 2017, Suncorp and Rien Low exchanged emails: Ex3.73, Tab 8. In those emails, the following occurred:
 - (a) Rien Low contacted Suncorp indicating that Suncorp had not contacted him in respect of the First FOS Determination.
 - (b) Suncorp replied to Rien Low indicating that Mrs Low had not provided a proposal and current financial information as referred to in the First FOS Determination.

- (c) Rien Low replied requesting information about the five loans.
 - (d) Suncorp replied providing the information requested by Rien Low.
 - (e) Rien Low replied offering (i) to pay the \$800,000 sale proceeds towards the four loans which were not Business Loan B; and (ii) to repay Business Loan B at \$10/week.
 - (f) Suncorp replied requesting that Mrs Low provide a Statement of Financial Position and attaching the applicable FOS form.
 - (g) Rien Low replied querying various parts of Suncorp's email, but undertaking to do his best to obtain relevant information.
29. Some time in or around early May 2017, an individual from Suncorp spoke with Rien Low and said words to the effect that "generally the bank will decide which loans to pay off first" and also said that ordinarily FOS explains that the maladministered loan should be paid off first: Ex 3.79. Rien Low did not give evidence of this conversation. There is otherwise no evidence that Suncorp asserted to Rien Low or Mrs Low that Business Loan B was to be repaid in priority to other loans. As appears below, all offers made by Suncorp to Mrs Low have involved the four interest-bearing loans being paid off first.
30. On or around 9 May 2017, Rien Low contacted Suncorp to indicate that he had concerns about the particular Suncorp representative who had been handling the case: Ex 3.73 at [23]. This is the first complaint of this kind recorded in Suncorp's business records. Suncorp then removed the individual from day-to-day communication with Rien Low, although she remained involved in the matter given her knowledge of it: Tr 2514.41-2515.6.
31. Rien Low gave evidence to the effect that, thereafter, he was contacted by different people from Suncorp, and that two representatives of Suncorp gave him different information: Ex3.73 at [24]-[26]; Tr 2483.43-2484.31. One of those people was a "Darren" who, some time around 22 May 2017, said to Rien Low that Mrs Low would have approximately 6 months to repay Business Loan B: Ex3.73 at [26]; see also Ex 3.73.10. Darren also said that the four interest-bearing loans would be repaid first: Tr 2484.10-16.

32. On 22 May 2017, Rien Low sent an email to a Suncorp representative, Darren Moldrich, requesting that Mr Moldrich put in writing the offer discussed on the phone: Ex 3.73.9.
33. On 26 May 2017, Suncorp sent Rien Low an email indicating that an offer was being drafted and requesting that Rien Low obtain a written authorisation to deal with Suncorp on behalf of his mother: Ex 3.73.11. On 15 June 2017, Rien Low replied indicating that the letter had previously been provided: Ex 3.73.11.
34. On 12 June 2017, Suncorp sent Mrs Low a written letter of offer by mail: Ex 3.73.12; Ex 3.73.13 at SUN.0603.0003.0370 (**12 June 2017 Offer**). The 12 June 2017 Offer relevantly contained the following terms:
 - (a) It was open until 4pm on 19 June 2017: cl 1.
 - (b) The net proceeds of the sale of the residential property were to be applied fully to repay the four loans other than Business Loan B. The surplus funds would be returned to Mrs Low: cll 2-3.
 - (c) Mrs Low had until 30 November 2017 to repay Business Loan B: cl 4.
35. It appears that Mrs Low did not receive that letter containing the 12 June 2017 Offer until 23 June 2017, after the offer was resent by Express Post on 21 June 2017: Ex 3.73 at [29]-[30] and Ex 3.73.13.
36. On 28 June 2017, Rien Low sent an email to Suncorp in effect requesting an extension of the offer and proposing that Business Loan B be “repaid according to the existing pattern of repayments, being \$1,101.88 per calendar month”: Ex 3.73.13.
37. On 29 June 2017, Suncorp sent Rien Low an email rejecting Rien Low’s proposal of 28 June and containing a revised offer. Suncorp’s email stated (Ex 3.73.15, SUN.0603.0002.0271):

Regrettably, what you have proposed is not able to be facilitated by the Bank, as what is being requested is essentially an interest free loan spanning 17 years.

The Bank is content to grant further time of up to 12 months to refinance this facility under the same conditions and can amend the existing offer dated 12/06/17, as you state that you only received this 23/06/17.

38. There was further correspondence between Rien Low and Suncorp on 29 June 2017. Mr Low's position was that Mrs Low's offer of \$1,101.88/mth was reasonable; Suncorp's position was that its offer was reasonable: Ex 3.73.15.
39. On 30 June 2017, FOS wrote to Rien Low stating (amongst other things) that "[g]enerally, where FOS finds that funds were lent irresponsibly, FOS requires the applicant to repay the adjusted debt within three to six months by way of sale of any security property, refinance or a repayment arrangement": Ex 3.73.16.
40. On 30 June 2017, the sale of Mrs Low's home settled: Ex 3.73 at [35].
41. Suncorp's email offer made on 29 June 2017 was formalised in a written letter dated 4 July 2017 (**the 4 July 2017 Offer**): Ex 3.73.18. The 4 July 2017 Offer proposed repayment of Business Loan B by 31 July 2018.
42. On 6 July 2017, Mrs Low (through Rien Low) submitted a further complaint to FOS (**the Second FOS Complaint**): Ex 3.73.17. The Second FOS Complaint concerned Suncorp's failure to agree to the Lows' offers for a repayment arrangement.
43. By at least this time, Mrs Low was being represented by CALC. On 7 July 2017, Mr Field informed a CALC representative that "17 yea[r]s interest free was not reasonable", that 12-18 months should be OK, and 5 years was the outer limit but still probably too long (ie a longer-than-reasonable interest free period). Mr Field noted that Mrs Low had not sold her commercial property and that, if she wished to retain the commercial property, she should probably pay interest: Ex 3.85.1 (FOS.0028.0001.3485).
44. On 13 July 2017, the substance of Mr Field's conversation with the CALC representative was conveyed by FOS to Suncorp (Ex 3.85.2 at FOS.0028.0001.4035).
45. On 19 July 2017, Suncorp sent the Lows a form letter stating that the minimum payment for Business Loan B had decreased, with a new minimum repayment amount of \$792.53 (**19 July 2017 Letter**): Ex 3.73.20. The 19 July 2017 Letter contained Mr Carter's autosignature. Mrs Low and Rien Low understood the 19 July 2017 Letter to constitute an "offer" to reduce repayments on Business Loan B: Ex 3.73 at [41]. However, it was in fact generated automatically, due to a change in the interest rate on Business Loan B: Tr 2519.46-47. At the time, Suncorp did not appreciate the circumstances which led Mrs Low and Rien Low to think that the 19 July 2017 Letter was an "offer": Tr 2519.42-2520.11. While Rien Low described the letter to Suncorp

- as a “letter of offer”, Suncorp had a different understanding of that concept and could not find a letter of offer on its system: Tr 2520.13-38.
46. On 21 July 2017, Rien Low made a further offer of a repayment arrangement to Suncorp, being \$1,191/calendar month without interest: Ex 3.73.19.
 47. On or around 1 August 2017, Rien Low spoke to a Suncorp representative on the phone and informed her that they “had received the offer and were very happy”: Ex 3.73 at [43]. The “offer” referred to was the 19 July 2017 Letter. The Suncorp representative said that she did not know what offer was being referred to: Ex 3.73 at [42].
 48. On 2 August 2017, a representative of Suncorp sent Rien Low an email asking that he provide a copy of the “offer letter”: Ex 3.73, Tab 21.
 49. On 22 August 2017, Suncorp made an offer to Mrs Low (**22 August 2017 Offer**): Ex 3.73, Tab 22. That Offer included: (i) a reduction in Business Loan B to \$200,000; (ii) no interest for 5 years; (iii) the amount of \$200,000 to be repaid by 30 August 2022; (iv) the securing of the loan against the Caloundra unit. While this has been described in the evidence as 5 years’ repayment, it is closer to 7 years from the Financial Assistance Application and more than 8 years since the making of the loan. Mrs Low has not accepted this offer: Ex 3.73 at [51]. The offer stated that “Suncorp is not prepared to entertain any amendments” to the options proposed in it.
 50. The letter incorporating the 22 August 2017 Offer also contained the following statement: “As the FOS Determination concluded that Suncorp should not have approved the credit to Mr and Mrs Low, this meant the Loan Contract was void ab initio”.
 51. On 1 September 2017, FOS organised a telephone conciliation conference involving representatives from Suncorp, Mrs Low and Rien Low. The Suncorp representative about whom Rien Low had previously complained was present on the call: Ex 3.73 at [46]. Mr Carter gave evidence that the Suncorp representative should not have been present: Tr 2527.26-27. During that conference, the Suncorp representative said that the 22 August 2017 offer would be available up until the determination of the Second FOS Complaint at which point the offer would likely be withdrawn: see Ex 3.85.2 at FOS.0028.0001.4055; Tr 2491.32-33.
 52. Mr Carter gave evidence to the following effect concerning what should occur as regards repayment of the principal on an irresponsibly-made loan (see also Tr 2533.25-2534.2):

- (a) When a loan has been irresponsibly-made, the borrower has had the benefit of the funds: Tr 2513.5-6.
 - (b) It is relevant to consider whether the bank has been misled by the borrower as to the purpose of the loan, as to the financial results of the business and the financial data provided: Tr 2513.6-11.
 - (c) There is a practice in the industry, consistent with the expectations of FOS and of other parties who often act on behalf of consumers, that the principal is to be repaid: Tr 2512.28-31.
 - (d) FOS did not believe a repayment period of 17 years was reasonable: Tr 2510.6-8.
 - (e) Repayment of the principal over 17 years is equivalent to a 50-100% write off of the principal: Tr 2512.45-2513.2.
 - (f) Repayment within 6-12 months is consistent with industry practice: Tr 2519.31-34.
53. Mr Carter gave oral evidence that a 17-year interest-free loan was outside what he understood from the records he had seen as part of the matter that CALC would see as reasonable: Tr 2510.6-8. The “records” referred to may be page 51 of Ex 3.85.1. That is a FOS file note of a conversation between Philip Field and “Celia” from CALC on 7 July 2017. The file note states:
- Celia called to discuss her email. I said I thought 17 years interest free was not reasonable. App has sold home but still has commercial property. If she wants to keep the commercial property, probably should pay interest or if she needs time to sell then interest free for 12 – 18 months should be OK.
- Celia asked about five years interest free. I thought that was the outer limit but probably still too long.
54. Mr Carter had understood those records (which were provided to Suncorp two days before Mr Carter gave evidence) as suggesting that CALC believed 5 years to be reasonable. Following Mr Carter’s evidence, CALC wrote to Suncorp to dispute that it held the position attributed to it by Mr Carter and to request clarification of Mr Carter’s evidence. Mr Carter’s evidence should be accepted as honest evidence of his own understanding, but, in light of CALC’s correspondence, Suncorp accepts that is not an accurate understanding of CALC’s position.

55. Mr Carter and Mr Field both gave evidence as to the uniqueness of the Low case: Tr 2519.5; Tr 2551.38.

ISSUE 1: NON-COMPLIANCE WITH CL 27 OF THE CODE

56. Suncorp accepts that, in approving Business Loan B, it did not comply with cl 27 of the Code for the second reason given in the FOS Recommendation. Mr Carter gave evidence to this effect at Tr 2499.28-29 (amongst other places).
57. The evidence does not establish that Suncorp failed to comply with cl 27 of the Code for the first or the third reason given in the FOS Recommendation.
58. As to the first reason, Mr Carter gave evidence that he had not turned his mind to it but that it was “not unreasonable”. There is otherwise no evidence before the Commission in relation to this subject save for the FOS Recommendation itself, which misconceives the effect of cl 27 and appears to conflate it with the statutory responsible lending obligations owed to consumers. In particular, the FOS Recommendation states (at [2.3]): “the FSP was required to consider how they would repay the loans without substantial hardship after the Applicant’s late husband’s retirement” and “the FSP’s assessment of the Applicant’s capacity to repay the Loans without substantial hardship was reliant on the development of the Commercial Property”. This is not an accurate description of the effect of cl 27, which instead required that Suncorp select and apply its own credit assessment methods with due care. The reasoning of FOS does not provide a sound basis for a conclusion of misconduct against Suncorp in this regard.
59. As regards the third reason given by FOS, in addition to the above:
- (a) Clause 27 of the Code is not, in terms, concerned with the terms which a particular loan should incorporate. It is concerned with the methodology applied by the bank in determining whether a loan should be made.
 - (b) The issue addressed in the FOS Recommendation was whether the decision to approve Business Loan B was irresponsible, not whether cl 27 was breached.
 - (c) Suncorp had adequate security for Business Loan B by reason of the Lows’ residential property and investment property.
 - (d) There is no evidence as to what (if any) control over the use of loaned moneys a careful and diligent lender to small business would insist upon. The question as to whether and when lenders should seek to control the use of funds by small

business borrowers raises complex questions which were not explored in the evidence on this Case Study.

ISSUE 2: NON-COMPLIANCE WITH CL 3.2 OF THE CODE

60. The difficulty in responding to the closing submissions of Counsel Assisting on this issue is that no specific conduct of Suncorp was alleged to have breached cl 3.2 of the Code, save that it is said to have occurred during the negotiations with Mrs Low following the First FOS Determination about a repayment plan for Business Loan B.
61. Suncorp accepts that in the following specific respects it did not comply with cl 3.2 of the Code in its dealings with Mrs Low after the First FOS Determination:
 - (a) Suncorp's communications did not consistently display appropriate empathy for the circumstances in which Mrs Low found herself: see Tr 2531.35-44;
 - (b) it was not reasonable for the Suncorp representative about whom Rien Low had previously complained to be present on telephone conciliation conference on 1 September 2017.
62. Suncorp departs from the position said to be open by Counsel Assisting in the following respects.
63. It was not unfair or unreasonable for Suncorp to say to Rien Low, in circumstances where he was seeking discharge of a mortgage securing multiple loans, that generally the bank decides which loans to pay off first, and that ordinarily FOS requires the maladministered loan to be repaid first. In every offer made by Suncorp to Mrs Low, Suncorp provided for the repayment of the interest-bearing loans first. There is no rule that interest-bearing loans must be repaid after a maladministered loan: what is appropriate in each case will depend on the circumstances.
64. It was not unfair or unreasonable for Suncorp, in the 12 June 2017 Offer, to propose that Business Loan B be repaid by 30 November 2017:
 - (a) The repayment date proposed in the 12 June 2017 Offer was more than 3 years after the loan was given and almost 2 years after the Financial Assistance Application.
 - (b) Although Suncorp had been imprudent in making the loan, Mrs Low had had the benefit of it.

- (c) Mrs Low had two investment properties which she had valued at \$900,000 in 2015 and which were sufficient to repay Business Loan B. There is no evidence that Mrs Low was unable to use her two assets as security to obtain a loan which could be used to repay the residue of Business Loan B. It was reasonable for the bank to assume that refinancing was possible having regard to the value of the two assets and the information provided to it that Mrs Low had monthly rental income of \$2,200/mth.
 - (d) The repayment period proposed by Suncorp was consistent with FOS expectations, being at the outer bounds of the 3-6 month conventional period adopted by FOS. That FOS changed its position during the cross-examination of Mr Field does not retrospectively render Suncorp's conduct in reliance on its previous position unfair or unreasonable. Suncorp cannot fairly be said to have engaged in misconduct or conduct falling below community standards in circumstances where Suncorp sought out and then adhered to the expectations of FOS. At the time the 12 June 2017 Offer was made, the offer from Rien Low was to repay the loan at \$10/mth without interest – that is, over 384 years.
 - (e) The 12 June 2017 Offer involved a significant write-off of the loan.
65. It was not unfair or unreasonable that the Lows did not receive the 12 June 2017 Offer until 23 June 2017. The Offer was posted on 12 June 2017; what happened after it was posted is not known. The 12 June 2017 Offer reflected terms that Suncorp had previously outlined orally to Rien Low. After Suncorp learned, on 29 June 2017, that Mrs Low had received the offer late, it made a new (and better) offer and extended the time for its acceptance.
66. It was not unfair or unreasonable for Suncorp to reject the offer of interest-free repayments of \$1,101.88/mth, which entailed repaying the principal over approximately 17 years, involving a write of 50% or more of the loan (depending on the discount rate adopted). As noted above, the effect of the offer would go beyond compensating Mrs Low for her loss, in circumstances where FOS had found Mrs Low to have had the benefit of Business Loan B. There is no rule in such circumstances that the only fair and reasonable repayment period is the initial loan term. That term will always have been agreed between the parties in circumstances where the lender is expecting to receive interest over the term of the loan.

67. It was not unfair or unreasonable for Suncorp to make the 4 July 2017 Offer. That is so for the same reasons as are given in respect of its earlier offers, noting that the 4 July 2017 Offer was more generous as it involved a longer repayment period.
68. It was not unfair or unreasonable for Suncorp not to accept the offer of \$1,191/mth. Although that offer involved repayment of the principal over a slightly shorter period than the \$1,101.88/mth offer, it was reasonable for Suncorp not to accept it for the reasons given in paragraph 66.
69. It was not unfair or unreasonable for Suncorp to send the Lows the 19 July 2017 Letter. The letter was a “form” letter, generated when there is a change to a loan. There had been a change to the minimum repayment amount for Business Loan B because the interest rate on the loan had changed to 0.01% in Suncorp’s systems, being the lowest rate that could then be entered in its computer systems (Tr 2516/1-18).
70. It was not unfair or unreasonable for Suncorp to query Rien Low as to whether an offer had been made. Having now read and seen the evidence of the Lows, Suncorp understands how the 19 July 2017 Letter caused the Lows erroneously to think that Suncorp had decided to offer them a lower interest-free monthly repayment than they had proposed; but the source of that error was not apparent to Suncorp at the time. Without a copy of the 19 July 2017 Letter, which Suncorp requested from Rien Low, it was reasonable for individuals at Suncorp not to appreciate that the Lows had construed a system-generated form letter as constituting a decision on the part of Suncorp to offer them a reduction in the loan repayments. Mr Carter accepted that, in hindsight, Suncorp’s concerns about the veracity of Rien Low’s assertion that there was an offer were misplaced (Tr 25.25.26), but they were not unreasonable in the circumstances known to Suncorp at the time.
71. It was not unfair or unreasonable for Suncorp to make the 22 August 2017 Offer. That offer included an offer for repayment of \$200,000 by 30 August 2022, more than 8 years after the funds were advanced. The Offer involved a significant write-off of the principal which was more generous in its terms than that which FOS had informed Suncorp was “probably too long”. It was also not unfair or unreasonable for the 22 August 2017 Offer to state that Suncorp was not willing to entertain amendments, noting that Mrs Low was legally represented and having regard to the desirability of bringing the dispute to an end: note Tr 2526.37-44.

72. It was legally erroneous for Suncorp to state in the 22 August 2017 Offer that the loan contract for Business Loan B was “void ab initio”.² However, the evidence does not establish that that was unreasonable or unfair. Not every mistake as to the true legal position is “unreasonable or unfair” and therefore contrary to cl 3.2 of the Code. Read fairly, the point sought to be made in the 22 August 2017 Offer was that the effect of the two bullet points in the First FOS Determination was that the parties should be restored to the position they were in before the loan was made: Suncorp should not get any interest, but the principal must be repaid or refinanced within a reasonable period. There is no evidence that the statement made in the 22 August 2017 Offer misled the Lows or caused them any distress.
73. It was not unfair or unreasonable for Suncorp to say during the 1 September 2017 conciliation conference that the 22 August 2017 Offer would probably be withdrawn if the Second FOS Complaint proceeded to determination. It was reasonable to think that any further determination would supersede the offer: see Tr 2527.26-39. The evidence does not establish the precise circumstances in which those words were said.

ISSUE 3: COMMUNITY EXPECTATIONS AND THE CONDUCT OF THE FIRST COMPLAINT

74. Suncorp accepts the following matters:
- (a) during the course of the First Complaint, it failed to make adequate inquiries as to the inquiries which had been made into Business Loan B at the time of its approval;
 - (b) had Suncorp made adequate inquiries, it would have revealed that there had been inadequate inquiry into the purpose of Business Loan B;
 - (c) those inquiries should have led Suncorp to concede before FOS that Suncorp had not complied with cl 27 of the Code in approving Business Loan B;
 - (d) the Google Earth photos submitted by Suncorp to FOS were not relevant to the issue of whether Business Loan B was irresponsibly made.
75. The closing submissions of Counsel Assisting do not specify the “further material” submitted by Suncorp that is said to be irrelevant. Suncorp does not accept that all of the material contained in the email at Ex 3.73.5 was irrelevant for all purposes. In

² See Tr 2512.1-9.

particular, those parts of the email at Ex 3.73.5 relating to communications between Rien Low and Suncorp (which comprised the bulk of the email) were relevant to the terms of any ultimate FOS recommendations;

76. Suncorp accepts that its conduct specified in paragraph 74 fell below community expectations.

ISSUE 4: NEGOTIATIONS FOLLOWING THE FIRST DETERMINATION

77. Suncorp has assumed that the only matters before the Commission in respect of this issue are those set out in paragraph 2.iv above.

78. Suncorp accepts that its communications with Mrs Low about Business Loan B over a period following her husband's death fell below community standards and expectations in that it did not consistently display sufficient empathy with Mrs Low and her circumstances.

79. Suncorp also accepts that some of its communications with Rien Low did not display an understanding of his position and that, in so communicating, Suncorp's conduct fell below community standards and expectations.

80. Suncorp does not, however, accept that the other items of conduct specified by Counsel Assisting fell below community standards and expectations.

81. As to demanding repayment of the entirety of the loan within an unreasonable timeframe:

- (a) Suncorp did not "demand" repayment of Business Loan B. It made a number of offers. Save for one which was accepted in principle, those offers have been rejected.
- (b) Suncorp's offers have not been unreasonable or unfair for the reasons given in paragraphs 62-73 above.
- (c) The community is aware that, ordinarily, borrowers must repay loaned moneys. Where there has been deception in the obtaining of the loan, and the borrower has had the use of funds advanced, is not liable for any interest on the loan and is able to repay the loan funds by the sale (or encumbering) of commercial or investment properties, the community would not expect that the lender must write off the vast majority of the loan funds merely because the loan was

imprudently advanced or must relieve the borrower from an obligation to pay interest in a way which has the economic effect of writing off the majority of the loan funds (note Mr Carter's discussion on this issue at Tr 2533/25-2534/2).

82. As to asserting that the loan was void ab initio, this assertion was legally erroneous, as noted above. However, it was broadly consistent with the effect of the two bullet points in the First FOS Determination.
83. As to the apparent assertion that Business Loan B should be repaid in priority to other loans, no such assertion was made to the Lows. It does not fall below community expectations to explain the general practice of a bank to a customer. Suncorp met or exceeded community expectations in ensuring that all offers to Mrs Low provided for the repayment of interest-bearing loans first.
84. As to communicating with Mrs Low and Rien Low in a manner that caused them distress, Suncorp accepts that its conduct had this effect. Suncorp also accepts that its communications, on occasion, showed a lack of empathy. However, Suncorp does not accept that there is a general rule that a bank's conduct falls below community expectations merely because it causes distress. Any default on a loan is likely to be very challenging for those involved: Tr 2529/28-31. Further, the community is aware that lenders sometimes need to make tough decisions in such situations, and that doing so is essential to the prudent conduct of a bank, to the protection of depositors and, more broadly, to the nation's financial stability. The community is also aware that making tough decisions sometimes cause distress. It cannot be the causing of distress per se which means that a bank's conduct has fallen below community expectations.

8 JUNE 2018

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