

Westpac Banking Corporation – General Submissions on Business Lending

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

12 June 2018

TABLE OF CONTENTS

INTRODUCTION	1
A. RESPONSIBLE LENDING	2
<i>Bank's duties</i>	2
<i>Application of National Credit Act provisions to business lending</i>	4
B. GUARANTEES FROM THIRD PARTIES	6
<i>Inadequacies or gaps in the established legal protections</i>	6
<i>Guarantors obtaining independent advice</i>	8
C. BANKWEST'S BUSINESS LENDING BOOK	9
<i>Obligations of a bank that no longer wishes to fund a particular business or industry</i>	9
<i>Valuations and investigative accountants' reports to customers</i>	11
<i>Non-monetary defaults</i>	12
<i>Banks' statements and conduct</i>	14
D. POWER AND COMMUNICATION	16
<i>Incentives for business bankers</i>	16
<i>Cross-collateralisation provisions</i>	18
<i>Disclosure of decisions of a bank's work-out division</i>	18
E. REGULATION AND SELF-REGULATION	19
<i>ASIC's approach to the UCT provisions</i>	19
<i>ASIC's approach to the consumer protection provisions</i>	21
<i>Proposed Banking Code of Practice</i>	22

INTRODUCTION

- 1 These submissions set out the responses of Westpac Banking Corporation (**Westpac**) to the Commission's invitation following the small and medium enterprise lending round of hearings. They accompany separate submissions for each of the three case studies Westpac was involved in as part of the responsible lending, third party guarantee, and power and communication topics.
- 2 At a general level, Westpac agrees with and accepts many of the propositions put by Counsel Assisting in closing submissions. Westpac is of the view the case studies and evidence examined in the hearings demonstrate that:
 - a. there are many reasons why small businesses fail from time to time, and the reasons for those failures can be both internal or external to the company;
 - b. while banks have access to some information relevant to the customer's ability to service the loan and the likely viability of the business (which is often not the same thing) at the time of making financing decisions, and while a bank will do what it can with the information that is available, that information will rarely be sufficient to reach any reliable prediction as to whether a business will succeed, given that that is a prediction into the future;
 - c. the evidence arising from the case studies would not support a finding that there is a need for greater regulation of small business lending or that banks should take on greater responsibility than they currently have when considering whether to extend finance; and
 - d. it is, and should remain, the responsibility of the customer to form its own view as to the reasonableness of taking on debt. The bank's obligation in the lending process is separate and does not displace that responsibility. That is particularly so given the range of reasons a small business can fail, that necessary information often sits outside the control of the bank, and that banks are unable to control the running of a business.
- 3 Of course, in acknowledging the customer's responsibility for making decisions about the appropriateness of taking on debt, banks do and should have responsibilities in the lending process consistent with their prudential obligations and obligations under the Code of Banking Practice (**COBP**). In particular:
 - a. Banks should act honestly with customers and seek to ensure that customers understand their documentation and the nature of the relationship between the bank and borrower.

- b. Prudent and diligent bankers should make reasonable enquiries, on the information available, that customers can repay the loan, and should also consider if that information suggests that the business is obviously not viable.
 - c. When banks accept guarantees, they should take reasonable steps designed to ensure the guarantor understands the nature of the obligation and has taken appropriate advice.
- 4 Westpac's response to the specific questions and issues raised by Counsel Assisting and the Commissioner are set out below.

A. RESPONSIBLE LENDING

Bank's duties

How much responsibility does the borrower and lender bear in assessing the cash flow forecasts and other factors when deciding whether to enter into the loan contract?¹

What are the outer limits, and the content more generally, of a bank's duty to act as a prudent and diligent banker in assessing a business loan application? Should that outer limit of this duty be codified?²

- 5 Counsel Assisting noted that the relationship between small business borrowers and banks is complex.³ Small businesses usually fail or deteriorate due to performance issues, either because of internal or external events.⁴ In light of the complexities, Counsel Assisting submitted that it was not reasonably open to the Commission to conclude that it is necessary or desirable to increase the obligations on banks in relation to the making of loans to small business.⁵ Westpac agrees with this position.
- 6 As noted by Counsel Assisting, small business entrepreneurs are optimistic about the ability of their business to succeed.⁶ However, many small businesses fail for a wide variety of reasons. There is a limit to the degree to which this could be addressed by increased examination, assessment or review obligations at the point of loan origination. Only so much can be known at that time and there is no clear way to know with certainty how a business will fare. Any bank will always be in the position that they can only assess the information that they are provided by the borrower at the time the loan is originated. Westpac submits that banks are not, and should not be, under any obligation to take on responsibilities towards small business customers that are more properly exercised by a financial adviser, accountant, or lawyer.

¹ Transcript 1 June 2018 (Hodge QC), T3034:18-20.

² Transcript 1 June 2018 (Hodge QC and Commissioner), T3034:21-37.

³ Transcript 1 June 2018 (Hodge QC), T3028:4-8.

⁴ Transcript 1 June 2018 (Hodge QC), T3028:10-14.

⁵ Transcript 1 June 2018 (Hodge QC), T3028:40-44; T3034:4-12.

⁶ Transcript 1 June 2018 (Hodge QC), T3034:4-5.

- 7 Westpac proposes to address Questions 2 and 3 put by Counsel Assisting in relation to responsible lending together on the basis that the issues that they raise are interrelated.

Limits and content of the duty to act as a prudent and diligent banker

- 8 Westpac submits that, in relation to small business lending, the duty to act with the care and skill of a diligent and prudent banker requires that the bank:
- a. make reasonable enquiries as to whether the customer is able to repay the loan; and
 - b. satisfy itself that there is not some matter which would be readily apparent to any reasonable banker on the information available showing that the business could not be viable.
- 9 Those matters are expanded on below.

Ability to repay the loan

- 10 The key feature of the duty to act as a diligent and prudent banker is to conduct an assessment as to whether the customer can repay the loan. Westpac requires that its bankers make reasonable enquiries of the customer to obtain the relevant available information, which may include cash flow statements and historical financial records, in order to assess the customer's capacity to service the loan.
- 11 In conducting that assessment, the banker should consider the information in accordance with the bank's policies and in the broader context of risk analysis. A bank is not in a position to independently verify or investigate all of the information provided to it by small business customers, particularly as it is often forward looking and reliant on assumptions that are difficult for banks to test.

Business viability

- 12 In relation to the second limb of the requirement outlined in 8b above, Westpac submits that a diligent and prudent banker should satisfy themselves that there is not some matter that means that it would be readily apparent, on the information available, to any reasonable banker that the business is not, and could not be, viable. That is not to say that banks can or should conduct a full business assessment of the information concerning the business. Banks are not in a position to obtain a full picture of the intricacies of every business opportunity, the competitive forces that might affect a small business, the expertise, financial acumen, diligence or ingenuity of those operating it, or any other factors that may affect business success.
- 13 That said, there will be occasions where it will be plain on the face of the material provided that the financial metrics being assumed by the customer as part of the business plan and projections are unrealistic. In those circumstances, a prudent and diligent banker would raise the issue with

the customer and, where the issue was unable to be satisfactorily addressed, decline the loan application.

Responsibilities of borrowers and lenders

- 14 Westpac accepts that the duty to act with the care and skill of a diligent and prudent banker imposes obligations on the bank to consider aspects of the customer's business. However, it must remain the responsibility of the customer to form its own view of the viability of the business. It would be inappropriate for customers to place any reliance on the bank's extension of credit as a tacit approval of the viability of the business plan.
- 15 It is the responsibility of the customer to ensure that the information provided to the bank is up to date and correct. Banks are usually unable to independently verify all the information provided by a small business customer.

Application of *National Credit Act* provisions to business lending

Should any of the provisions of the National Credit Act which apply to consumer credit contracts also apply to credit contracts with small and medium sized business customers? If so, why and to which small and medium sized business customers? If not, why not?⁷

- 16 The responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) which apply to consumer lending are not readily transferable to lending to small and medium enterprise (**SME**) borrowers. The SME segment differs materially from the consumer segment in a number of respects, which would mean that extending the responsible lending provisions from the NCCP Act to SME lending would likely significantly alter the level of risk assumed by a bank, compared to a small business customer, in the lending decision. That would directly impact both the price and availability of credit for SME businesses.
- 17 Westpac believes that the broader 'responsible lending' obligations in the Code of Banking Practice (**COBP**) (clause 27) and proposed Banking Code of Practice (Chapter 17) are more appropriately adapted to SME lending and should remain the standard. Counsel Assisting, following evidence from the Round 3 hearings, was also of the view that the NCCP Act should not be applied to SMEs.⁸ This has also consistently been the view of the industry, as well as some independent reviewers, such as Phil Khoury.⁹
- 18 There are a number of important differences between lending to SME customers and consumers. In particular:

⁷ Transcript 1 June 2018 (Hodge QC), T3035:10-14.

⁸ Transcript 1 June 2018 (Hodge QC), T3028:40-43.

⁹ Phil Khoury, *Independent Review: Code of Banking Practice* (31 January 2017) (**Khoury Report**), 50.

- a. the SME sector is more complex and varied than the cohort of consumer borrowers. SME borrowers differ significantly in, among other things, size, structure and business aims and approach;
- b. lending to SME businesses is inherently a different risk proposition to consumer lending. SME businesses are ventures that involve the taking on of higher risk by both the borrower and the lender as to the future viability of the borrower business. SME businesses can fail for a range of reasons and predicting the future success of a business is notoriously difficult and more complex than most consumer lending;
- c. where SME businesses fail, there can often be no or very little value left in the business for which the loan is made, which further alters the risk equation associated with business lending; and
- d. the assessment of whether a business is viable and whether a loan should be made to a business is an attempt to look into the future and predict a state of affairs with a significant number of variables that could affect the outcome. The integers in play in assessing consumer loans (income and expense) are much more stable and well understood.

19 Those differences would make it difficult to apply NCCP Act-style obligations to SME lending. For example:

- a. it is not possible to adequately prescribe the types of enquiries that bankers should make given the variety in the nature of businesses and borrowing needs in the SME sector;
- b. financial information provided by SME borrowers (such as cash flow forecasts) is, by its nature, difficult to verify in the manner required by the NCCP Act; and
- c. for reasons discussed above, bankers cannot, and should not be expected to, make detailed assessments of an SME's objectives or plans.

20 As such, extending the NCCP Act to SME lending is likely to make it more difficult for those customers to access credit, and some classes of SME borrowers would likely be unable to obtain finance at all. That is because:

- a. it would be time and resource intensive for banks to comply with NCCP Act obligations in the SME context, particularly the obligation to verify the material used for making a decision to provide the loan. That may make SME lending a less viable proposition for banks, and make it a more onerous process for SME customers;
- b. new SME businesses and SME businesses looking to expand would find it difficult to provide the financial information to satisfy the NCCP Act's requirements, because

they would lack the ability to forecast with sufficient certainty the cash flows generated from the new or expanded business, and would lack relevant historical financial records; and

- c. the cyclical or seasonal nature of many SME businesses means that there would be times that a prospective SME borrower would be unable to demonstrate that their current financial position supports a loan application at times when they need finance.

B. GUARANTEES FROM THIRD PARTIES

Inadequacies or gaps in the established legal protections

Is there any inadequacy or gap in the established protections? If so, what is it? If not, would the protections apply in the case of Ms Flanagan?¹⁰

- 21 There are significant legal and other protections available for guarantors directed towards ensuring that guarantors understand the nature of the obligation that they choose to take on and that their interests are otherwise safeguarded.
- 22 Guarantors are protected by both statutory regimes and the general law against misleading or unconscionable conduct. In NSW, guarantors are also protected by the *Contracts Review Act 1980* (NSW) against unjust contracts. Further, the COBP (and the proposed Banking Code of Practice) contains prescriptive steps that a bank must take in dealing with guarantors for consumers and small business. Broader potential misconduct concerning guarantees is dealt with in both the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) including prohibitions on misleading or deceptive conduct and unconscionable conduct. Guarantees have been the subject of considerable judicial attention including in particular in the *Amadio*¹¹ and *Garcia*¹² cases. The realm of appropriate conduct concerning guarantees is well understood, enforceable and enforced.
- 23 The current legal regime navigates and effectively recognises that individuals have the right to deal with their property as they choose, including by offering guarantees to facilitate access to credit for themselves (via their corporate personalities operating businesses) and their families. Guarantors need to be provided with the information necessary to enable them to make an informed decision about whether to provide the guarantee. Provided the guarantor is of sound mind and the bank can be comfortable that the customer understands the risks associated with the arrangement, banks do not, and should not, interfere with an individual's right to deal with their property as they see fit. In those circumstances, it should not be the role of a bank to interfere with a parent's decision to support a child or family member provided they have made

¹⁰ Transcript 1 June 2018 (Hodge QC), T3040:23-25.

¹¹ *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447.

¹² *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

an informed choice to do so. That said, Westpac agrees that banks should exercise particular caution in satisfying themselves of the matters above with respect to potentially vulnerable guarantors.

- 24 Westpac acknowledges that the enforcement of guarantees can have serious potential consequences for the guarantor. The matters and risks described above are taken into account in Westpac's policies in relation to accepting guarantees from family members. Westpac also recognises the importance of continuing to look for ways to strengthen its policies and processes.

Ms Flanagan

- 25 As identified in Westpac's submission regarding Ms Flanagan's provision of a guarantee concerning a Poolwerx franchise, it is not accepted that the acceptance of that guarantee involved misconduct on Westpac's part. With that said, if there was an impropriety in the acceptance of that guarantee by Westpac, the existing legal regime concerning guarantees and corporate conduct in general would likely ensure that the issue would be appropriately addressed.
- 26 Where there is a dispute as to the appropriateness of a guarantee, guarantors are able to have those issues examined free of charge through the Financial Ombudsman Service (**FOS**) (at which time all enforcement action must be put on hold pending the outcome), and will be able to do so through the Australian Financial Complaints Authority (**AFCA**), once it takes over FOS's work (where the total contract amount is less than \$5 million or if the guaranteed property is the family home, which covers almost all guarantors in the SME lending context). Ms Flanagan had the issues in her dispute examined through FOS. It is not necessary for guarantors to take a bank to Court in order to obtain relief, although, as Dana Beiglari from Legal Aid recognised in her evidence, some disputes are more effectively resolved through court processes.¹³
- 27 Banks also have a range of internal systems mechanisms to identify and resolve any such issues before formal action is required, including general complaint departments, hardship departments and Customer Advocates. Westpac's Customer Advocate is empowered to conduct independent reviews of internal decisions and can make binding decisions in matters of up to \$1 million. Small business customers, as well as individual retail and wealth customers, are able to seek redress through the Customer Advocate. The Customer Advocate has also established a special purpose committee in relation to small business customers as well as vulnerable customers to allow for a dialogue between Westpac and those customers. Each committee includes external stakeholder members.

¹³ Transcript 21 May 2018 (D Beiglari), T2054.45

Guarantors obtaining independent advice

Is it desirable to take steps to increase the likelihood that a third party guarantor of business borrowings will be properly advised and make an informed decision before entering into a guarantee? If so, what might those steps be?¹⁴

- 28 It is desirable for third party guarantors to receive financial and/or legal advice in relation to the decision to enter into a guarantee. With that said, there is unlikely to be any additional need to take further steps to ensure guarantors receive proper advice. Westpac's policies already require that guarantors be advised to obtain independent legal advice to ensure that they understand the nature and effect of the guarantee.¹⁵ The COBP and Westpac's policies also require that guarantors are provided with transaction documents and information in relation to the borrower's financial information. It is not necessary for any additional information to be provided by banks to legal advisers in order for this advice to be effective. All guarantors should be advised by their legal advisers that, if the borrower defaults, the guarantee will be called upon, and that they should not give the guarantee unless they understand and accept that risk.
- 29 The *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*¹⁶ set out requirements for solicitors when providing guarantors with advice.¹⁷ Rule 11 requires the solicitor to, among other things, identify the signatory (r 11.2) and provide evidence of the advice in the form required (r 11.4). Westpac is of the view that it is not necessary to legislate or otherwise prescribe any additional steps.
- 30 Westpac has in place a number of mechanisms for informing guarantors. At a high level, these include:
- a. consistent with the COBP, prominent notice on guarantees to alert guarantors to the risks involved, including a warning that they should seek legal and financial advice on the effect of the guarantee and noting that there are risks involved;
 - b. completion of an 'Interview Checklist', which is completed and signed by the interviewing officer (usually the Business Banker). This checklist includes questions such as whether they:
 - i. gave the guarantor the 'guarantee pack' (containing documents relevant to the guarantee);

¹⁴ Transcript 1 June 2018 (Hodge QC), T3041:12-16.

¹⁵ This requirement is reflected in Westpac's policy as at 2010 (Ex 3.10.5 AW4-5 [WBC.410.001.0215]) and currently (Ex 3.132.12 AW1-12 [WBC.400.043.6682]).

¹⁶ <https://www.legislation.nsw.gov.au/regulations/2015-245.pdf>.

¹⁷ An earlier version of the Solicitors Rules was in force at the time that Ms Flanagan gave the guarantee, though they were relevantly to similar effect.

- ii. interviewed the guarantor and alerted them to the warning on the front cover of the guarantee;
 - iii. recommended that the guarantor obtain legal and financial advice; and
 - iv. informed the guarantor of Westpac's requirements for a statutory declaration witnessed by the solicitor;
- c. completion of a 'Form of Acknowledgement' in the guarantee which is required to be signed by the guarantor and contains a number of questions, such as whether the guarantor obtained independent legal advice and understands the risks involved;
 - d. ensuring that the borrower is not present when the guarantee is signed; and
 - e. warnings in Westpac's policies to staff to exercise caution in particular situations, including 'extreme caution' in the case of parent guarantors.¹⁸

What difficulties will be created for banks or borrowers by steps that require more information to be provided to legal or financial advisors of guarantors before the guarantee is signed?¹⁹

31 Westpac agrees that full and frank disclosure should be made to prospective guarantors of the transaction documents (such as the loan agreement) as well as documents relating to the borrower's financial position. This disclosure is part of Westpac's processes for small business lending.²⁰ Lawyers and financial advisers to the guarantor should request and obtain any information they think is necessary to the provision of their advice. There should be little difficulty in the bank providing primary information relevant to the loan that it has been provided by the borrower to the guarantor's advisers with the borrower's consent. If the borrower refuses to provide that consent, that refusal would likely be relevant to the advice the lawyer or financial adviser would provide.

C. BANKWEST'S BUSINESS LENDING BOOK

Obligations of a bank that no longer wishes to fund a particular business or industry

How, if at all, are banks to deal with circumstances in which, for reasons extraneous to the conduct of the borrower, the bank no longer wishes to fund a particular business or industry? That is, what is the bank to do if, for example, the market has changed such that its security is no longer adequate? What are the obligations, if any, on a bank in those circumstances?²¹

¹⁸ As outlined in Ex 3.10 Witness Statement of Welsh [WBC.900.001.0475]: [66].

¹⁹ Transcript 1 June 2018 (Hodge QC), T3041:16-19.

²⁰ The information provided to Ms Flanagan is at Ex 3.10.29 AW4-29 [WBC.104.001.9183].

²¹ Transcript 1 June 2018 (Hodge QC), T3052:40-45.

- 32 A lender's willingness to lend, or continue to lend, depends on a range of factors, some of which may be outside the direct control of borrowers. Among other things, consistent with its prudential obligations, Westpac has a group-wide risk appetite statement that sets limits on Westpac's exposure to particular industries. Those limits are necessary for sound risk management. Westpac considers that when limits of that nature are approached (or exceeded), the appropriate way for a bank to manage its exposure is to reduce new lending to relevant sectors. If that has any impact on a bank's appetite to continue to fund existing customers, any actions adverse to the customer should only be taken if necessary to protect the bank's legitimate interests, and be consistent with its contractual entitlements. Those entitlements should, of course, be clearly disclosed to the borrower at origination.
- 33 External factors may also affect the risks associated with a particular borrower, such as where market changes cause the value of security to fall or a business to become less viable. If the borrower has not defaulted on a payment obligation, a bank's right to take steps in respect of small business customers will be based on the contractual provisions that have been agreed with the individual customer. Those rights will also be affected by the industry-wide changes to the use of non-monetary defaults, discussed below from paragraph 42. For the reasons outlined in that section, non-monetary default provisions are important in certain circumstances for preserving a bank's position, particularly where the nature of the risk associated with the borrowing alters markedly from that in contemplation at the time the loan was entered into. Action should only be taken where it is necessary to protect the bank's legitimate interests, and a bank should remain open to the possibility of alternative arrangements with customers. The possibility for the bank to take such action should be clearly disclosed to customers. That is Westpac's practice.
- 34 If such protections were completely removed for banks or unduly fettered, it is likely that banks would need to adjust their position at origination and offer loans at shorter tenors, with higher pricing or not at all, so as to manage their exposure to economic and market factors as they change. Such changes would likely have an adverse effect on the access to credit for many small businesses.
- 35 There may be occasions when market changes or industry exposures also mean that a bank is unwilling to renew a borrower's facility when the term expires. Westpac considers that the customer bears some responsibility for the risks associated with the possibility that they will need to refinance. However, Westpac also thinks that it is appropriate to provide a customer with notice periods, consistent with those set out in the proposed Banking Code of Practice, if Westpac declines to renew the contractual arrangement at its agreed termination date, which gives customers time to make alternative arrangements. Westpac's business bankers are required to have periodic discussions with their customers, including in relation to their ongoing needs and intentions, and bankers receive periodic reminders of the imminent expiry of a customer's facility to prompt such discussions.

Valuations and investigative accountants' reports to customers

Is there any reason why valuations or investigative accountants' reports ought not be provided to customers in circumstances in which the reports have been paid for by the customer and the bank wishes to take reliance, at least in part, on such reports? Is there any reason why such transparency obligations should be limited by the size of the loan or limited to providing only parts of the report?²²

Valuation reports

- 36 Westpac supports the general principle that valuations that are paid for by the customer should be provided to them. That principle is set out in the ABA's *Industry Guideline: Appointing property valuers when lending to small business and primary producers* (the **ABA Valuation Guideline**), which was finalised in November 2017, and is reflected in Chapter 24 of the proposed Banking Code of Practice. Westpac also participated in the ABA working group that developed that Guideline, in response to recommendations of the Carnell Inquiry and Khoury Review.
- 37 Westpac's credit policies and processes incorporate the requirements in the ABA Valuation Guideline. Westpac has also extended the ABA requirements across to business lending secured by commercial or agricultural property (that is, not limited it to the small businesses and primary producers covered by the Guideline). The ABA Valuation Guideline and proposed Banking Code of Practice include one exception to the general principle, where enforcement action is underway and the provision of the valuation should be deferred because the information in the valuation is commercially sensitive. Where a valuation has been ordered by a receiver, the decision as to whether and when to provide the report to the customer is a matter for the receiver, rather than the bank.

Investigative accountants' reports

- 38 An investigative accountant is generally appointed to conduct an independent business review where the bank has identified a serious potential risk to the value of its security in continuing to finance a business, which typically occurs following certain requests from the customer, such as to extend a facility or to waive a breach of a loan agreement. Chapter 24 of the proposed Banking Code of Practice sets out general principles of fairness that apply when appointing an investigative accountant.
- 39 Under Westpac's usual security conditions, the cost of any such report is payable by the customer.
- 40 The investigative accountant's report assesses the strength and position of the business, usually having regard to financial factors, the business environment, and management (including the

²² Transcript 1 June 2018 (Hodge QC), T3053:1-5.

experience and qualification of management, and corporate governance). The report might also provide strategic advice to the bank, such as in relation to restructuring or asset realisation strategies.

41 Consistent with the ABA's *Industry guideline: Appointing investigating accountants and insolvency practitioners to small businesses and primary producers*, issued in November 2017, Westpac submits that while the report should generally be provided to the customer, parts of a report may sometimes need to be withheld, depending on the circumstances. Examples could include:

- a. strategic advice or sensitive information such as assessments about the quality of management, the disclosure of which could have a negative effect on the possible resolution of any issues;
- b. information suggesting fraud or illegality by the business; or
- c. an analysis of the security position which revealed the bank's confidential controls or security thresholds.

Non-monetary defaults

Is it appropriate for a bank to take enforcement action when no monetary defaults have occurred and the bank can rely only on non-monetary defaults? Why or why not? Should there be some additional protection for borrowers in these circumstances? Ought the bank be obliged to explain such matters?²³

Non-monetary defaults

42 Westpac supports improvements in the way banks lend to small and medium sized business customers to ensure that customers continue to be informed and have certainty about events of default and the consequences.

43 Following the Small Business Loans Inquiry by the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) and, subsequently, discussions with ASIC and the ABA, Westpac has agreed to make a number of changes to its standard form loan contracts for small business customers. Among other things, the changes include "covenant light" contracts with limited non-monetary events of default.²⁴ Westpac has agreed to make these changes to loan contracts under \$1 million and, in relation to its core business lending products (business loans,

²³ Transcript 1 June 2018 (Hodge QC), T3053:5-9.

²⁴ The non-monetary events of default are limited to: unlawful behaviour; insolvency, other creditor enforcement; misrepresentation; use of the loan for a non-approved purpose; dealing with the loan security improperly or without consent; failing to provide proper accounts; failing to maintain a licence or permit necessary to conduct the business; failing to maintain insurance as required and a change of control of beneficial ownership.

business overdrafts and bank bill business loans) for customers with up to \$3 million total committed exposure with Westpac.

- 44 Lending above that threshold generally involves more complex financing arrangements and requires more sophisticated risk management. In those cases, Westpac places greater reliance on regular monitoring of the performance of the business and the security that supports the loan and requires a broader range of non-monetary events of default, often specific to the type of financing involved.
- 45 Beyond the parameters agreed with the ASBFEO and ASIC, for other levels or types of small business lending, enforcement action should not be restricted to monetary defaults, nor should enforcement action on the basis of non-monetary defaults for small business be entirely excluded. Non-monetary defaults are an indicator that a matter relevant to the bank's assessment of risk associated with a particular loan exposure has been compromised in a potentially serious way, which adversely impacts the borrower's ability to service the loan or signifies a risk of a security shortfall. They are particularly important where the value of the underlying security is susceptible to fluctuation based on the way in which the borrower treats the asset or market forces, such as for property development or specialised finance (such as trade finance and invoice finance).²⁵
- 46 The right to take enforcement action for non-monetary defaults is a matter relevant to the bank's risk appetite and preparedness to lend to small business customers. The right to take enforcement action for non-monetary defaults is necessary to mitigate the bank's risk of a loss and to protect the bank's legitimate interests in the recoverability of its loans. A restriction on the right to take enforcement action for non-monetary defaults would be likely to lead to a reduction in lending or an increase the cost of lending to small business or both. For example, it is likely that there would be a decrease in the appetite to lend on an unsecured or interest-only basis, or an increase in the amount of security required to be provided by borrowers.
- 47 Non-monetary events of default (in particular, financial covenants) have an important role in complying with prudential obligations. For example, Australian Prudential Standard (APS) 220 requires a 'current' assessment of the value of collateral held. Non-monetary events of default, and the ability to act on them, help banks to comply with those requirements.

Protections for borrowers

- 48 Prior to entering into the loan contract, banks should be required to explain the customer's obligations and the risk of enforcement action in the event of a monetary or non-monetary default. This is Westpac's practice, as discussed in more detail below.

²⁵ Ex 3.151 Witness Statement of Kirsten O'Donoghue (Rubric 3-3) dated 18 May 2016 [WBC.900.001.0531]: [35].

- 49 If a monetary or non-monetary default is relied upon to accelerate moneys owing or otherwise seek to restructure the loan, Westpac is required to provide notice under the loan contracts and the customer has the opportunity to remedy some of these defaults. The minimum notice period and the procedures once a loan is placed into default vary depending on the type and size of the loan.
- 50 Westpac's preference is to avoid enforcement action and it is taken as a last resort. It is in both the customer's and Westpac's interests for the customer to be able to overcome their difficulties and continue to meet their financial obligations. However, there are circumstances in which Westpac determines that the appropriate course is to terminate the loan and enforce its security.
- 51 Even once the enforcement action has commenced, Westpac will discuss alternative arrangements with the customer and if a mutually satisfactory alternative can be agreed the enforcement action will not proceed. In Westpac's experience, some customers only meaningfully engage with Westpac, commit to a payment arrangement or apply for hardship assistance after demands or default notices are served.
- 52 The above measures recognise the significant consequences to the borrower of the exercise of such rights. They protect the borrower's interests by ensuring that the borrower understands the mechanism by which a default event might lead to enforcement action and has an adequate period to cure the default, if possible, while also protecting Westpac's legitimate financial interests.

Explanations to customers

- 53 Westpac agrees that banks should explain that a default can occur in the event of a non-monetary default. It is Westpac's practice to explain the loan agreement to customers as part of the document signing process. Events of default are also clearly disclosed in business finance agreements.

Banks' statements and conduct

Is there a disconnection between what the banks are saying in their advertising, their annual reports and their other public documents, and their conduct? If there is a disconnection between them, what, if anything, follows from that?²⁶

- 54 Westpac does not consider that there is any disconnection between the marketing and other general promotional material used by its business bank concerning its relationship with customers and its actual relationship with customers. The public statements of Westpac, in such material, reflect the values which Westpac adopts as a corporate entity committed to serving customers and the community in the services it provides. In addition to its general advertising,

²⁶ Transcript 1 June 2018 (Commissioner), T3053:12-22.

Westpac makes available extensive specific information for customers and prospective customers ranging across all of its products and services. Westpac offers a website for small business customers which provides small business with information and an explanation of the various lending products Westpac makes available for small business.²⁷

55 The kinds of statements contained at a high level by Westpac which are potentially relevant to its relationship with its business bank customers include:

- a. Help, it's what Australians do;²⁸
- b. Better business banking. Helping Victorian business make it;²⁹
- c. Making Australian business stronger;³⁰
- d. SME: Where service means everything;³¹
- e. Westpac Group, We're people helping people;³²
- f. [Westpac's] commitment to helping our customers, communities and people to prosper and grow remains at the heart of everything we do;³³
- g. Customers can trust [Westpac has] their interests at heart;³⁴ and
- h. It's about understanding what matters to [customers], how [Westpac] can help, and make a real difference in their lives.³⁵

56 While Westpac accepts that those statements are intended to give its customers a degree of comfort as to the manner in which it intends to assist them, those statements entirely accord with Westpac's intention in entering into those business relationships and the manner in which it expects its staff conduct their dealings with customers.

57 Those kinds of statements would not induce any reasonable customer to conclude that in providing finance or financial services that a bank would not act in its legitimate commercial interests. Statements of that kind could not be reasonably viewed as suggesting to customers that the bank might be taking on responsibility for the customer's business decisions or that Westpac may not have a legitimate interest in ensuring that it recovers loans made. In Westpac's

²⁷ See, for example, <https://www.westpac.com.au/business-banking/business-loans/small-business-loans/>.

²⁸ <https://www.westpac.com.au/>

²⁹ <https://www.bankofmelbourne.com.au/business>.

³⁰ <https://www.westpac.com.au/about-westpac/careers/sme-business-bank/>

³¹ <https://www.westpac.com.au/about-westpac/careers/sme-business-bank/>

³² <https://www.westpac.com.au/about-westpac/westpac-group/>.

³³ 2017 Annual Report at

https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/ic/2017_Westpac_Annual_Report_Web_ready_&_Bookmarked.pdf.

³⁴ 2016 Annual Report at

https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/ic/2016_Westpac_Annual_Report.pdf.

³⁵ 2015 Annual Report at

https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/ic/2015_WBC_AR2015_website.pdf.

view, customers understand that their loan arrangements are governed by specific terms and conditions in the contract.

D. POWER AND COMMUNICATION

Incentives for business bankers

Should the sales culture for small business reflect that of consumer lending, in that business bankers are discouraged from focusing primarily on financial incentives in their key performance indicators?³⁶

58 Westpac recognises that key performance indicators and remuneration structures can affect the culture of a bank and the behaviour of business bankers, which in turn can potentially have an effect on customer outcomes. Westpac considers the appropriate remuneration model for business bankers is for the majority of the banker's remuneration to be in annual fixed pay with an additional variable reward component which is determined through a balanced scorecard approach. Under the balanced scorecard the banker must meet behavioural, risk and compliance requirements in order to be eligible, regardless of financial performance. If those requirements are met, variable reward should be determined having regard to both financial and non-financial measures.

59 Westpac believes that financial-based key performance indicators as part of determining variable reward and within a balanced scorecard approach, have a role in contributing to a customer-focused service culture by encouraging business bankers to be responsive to customers' needs. Variable reward determined in that manner and when combined with other appropriate controls, rewards bankers for identifying products that meet customers' financial needs, and are common tools for motivating front-line employees in service industries.

Westpac's variable reward framework

60 Taking those matters into account, the variable component of Westpac's reward model for business bankers comprises:³⁷

- a. **Gate Openers.** In order to be eligible to be considered for a variable reward payment, business bankers must meet behavioural and compliance 'gate openers', which requires appropriate conduct. Meeting these gate openers is not contingent on a business banker's financial performance, and a business banker cannot obtain variable reward if the gate openers are not satisfied, regardless of financial performance.
- b. **Scorecard performance.** Business bankers' scorecards include financial measures that currently carry a weighting of 50%. These measures are portfolio-based and do not

³⁶ Transcript 1 June 2018 (Hodge QC), T3055:13-15.

³⁷ Ex 3.28.9 CS4-9 [WBC.107.003.1047 at .1064].

prioritise the sale of one product over another. The other 50% relates to customer-focused measures (including 30% based on customer feedback).

- c. **Manager discretion:** If a banker qualifies for a variable reward by satisfying the gate openers described above, the amount of variable reward is subject to the discretion of the relevant manager. Manager discretion is exercised having regard to, though not bound by, the scorecard measures described above, together with the following additional factors:
- i. **Risk Obligations:** Managers of business bankers are provided with a range of risk-based metrics in respect of each banker that must be considered in determining the banker's final reward;
 - ii. **Behaviours:** Managers are required to take into account the banker's adherence to Westpac's Group Values; and
 - iii. **Individualised goals:** Business bankers may agree personalised goals with their managers, the outcome of which may be taken into account in the calculation of that banker's variable reward.

61 Westpac considers that this model is consistent with the Sedgwick recommendations and represents an appropriate approach to business banker remuneration, including in that business bankers are discouraged from achieving financial key performance indicators at the expense of customers' interests, or by breaching risk and compliance requirements. By moving away from a formulaic approach to determining variable reward, there is manager discretion to reward positive behaviours (specifically, positive risk behaviours), which helps to reinforce a strong risk culture.

62 That variable reward framework is supported by a consequence management framework which makes it clear that misconduct (including breaches of law, or breaches of internal policies or the code of conduct) will be disciplined (including the potential termination of employment).

63 Westpac has made substantial changes to its variable reward approach and the way variable reward is calculated for business bankers to strengthen its service culture and respond to the Sedgwick recommendations. In particular, it has removed all financial-based gate openers, moved from a formulaic to a discretionary approach in determining variable reward, and has progressively reduced the weighting of financial measures in role-based scorecards. It intends to further reduce the weighting of financial measures so as to meet or exceed the requirements of the Sedgwick recommendations by 2020.

Westpac case studies

64 There is no evidence to suggest that variable remuneration or financial measures within scorecards were the cause of any alleged misconduct in the case studies relating to Westpac.

65 In respect to Counsel Assisting's question at T2437 about the Thir case study, there is no evidence to suggest that in classifying the secured property as residential rather than commercial, the business banker altered his behaviour in order to maximise his variable reward. The business banker did not ultimately receive any variable reward payment in respect of the loan in question, and left Westpac in September 2016, before any variable reward would have been due for payment.³⁸

Cross-collateralisation provisions

Should lenders be required to clearly draw the cross collateralisation clauses and their effects to the attention of borrowers? If so, how should this be done?³⁹

66 As discussed above in paragraph 48, Westpac supports the clear disclosure of banks' and customers' rights and obligations at the time of loan origination. It considers that that is appropriately achieved through discussions between the business banker and the customer, and clear disclosures in financing documents.

67 When a small business customer provides security over property, Westpac agrees that business bankers should explain that security. Transaction documentation should also clearly identify what security is offered in support of a particular facility.

68 If banks have a right under the financial arrangements to apply funds received from a small business customer towards any amounts owing by the customer (separate to a right to enforce particular security in support of a debt), that should also be clearly disclosed. For example, Westpac's General Terms Booklet for its BFA Lite product sets out that "[w]e can use any payment we receive to repay any amounts you owe us in any order we choose".⁴⁰

Disclosure of decisions of a bank's work-out division

When and how much disclosure should a bank provide a director of a business in respect of a decision of the bank's work-out division, where that decision will affect a customer's use of a personal asset which indirectly secures obligations of their business to the bank?⁴¹

69 Westpac recognises that actions taken with respect to personal assets that secure small business lending can have serious consequences for customers. While it is sometimes necessary to take those actions, Westpac's approach is to first seek to recover amounts owing from the business assets, and only take action against a guarantor if there is a shortfall.

³⁸ Letter from Gilbert + Tobin to Simon Daley dated 8 May 2018; Ex 3.59 Witness Statement of Welsh [WBC.900.001.0505]: [91]; Ex 3.27.4 CS3-4 [WBC.104.003.8880 at .8882 and .8883].

³⁹ Transcript 1 June 2018 (Hodge QC), T3055:16-18.

⁴⁰ Ex 3.152.2 KO1-2 [WBC.400.052.3983].

⁴¹ Transcript 1 June 2018 (Hodge QC), T3056:44–T3057:2.

Westpac recognises the importance of communicating with customers to the extent. As discussed in paragraph 51 above, Westpac is willing to explore alternative arrangements with a customer at every stage of the enforcement process.

- 70 Westpac agrees that business bankers should treat customers, especially those whose businesses are experiencing financial difficulty, with compassion, and should, where possible, help customers to understand the work-out process and its possible consequences. Westpac does not consider that it is necessary to implement any additional prescriptive requirements. The small business sector is complex and varied and it would be difficult to provide for the range of small business work-out scenarios that might arise.
- 71 This issue is also addressed by clear disclosures as to banks' and customers' rights and obligations at origination, which are designed to help avoid situations where a customer is surprised by steps that a bank may take in a work-out or enforcement scenario.

E. REGULATION AND SELF-REGULATION

ASIC's approach to the UCT provisions

Is ASIC's approach to the UCT provisions appropriate and moulded to the risks of the contraventions and practical resources constraints on ASIC?

Has ASIC's approach been effective in ensuring compliance with the UCT provisions that came into effect in November 2016?⁴²

- 72 ASIC's approach to the UCT regime⁴³ has been effective in expediently ensuring industry-wide efforts to meet the standards of the new regime, and ensuring that the implementation by financial services licensees meets those standards. The nature of businesses and their contractual arrangements with banks are complex and varied across the SME sector. In those circumstances, ASIC's consultative approach in making its understanding of the legislative requirements clear and setting time frames for changes to be made (though strict in requiring conformity) has been significantly more successful than an approach based on confrontation (such as litigating individual cases where there were disagreements as to law's interpretation) would have been. This ensured that the banks with whom ASIC engaged gave close consideration and, where appropriate, altered their approach within a relatively short time period and established industry-wide standards. ASIC has used its relationship and role as a regulator effectively to engage and help ensure that a customer-centric approach has been adopted across the industry.

⁴² Transcript 1 June 2018 (Hodge QC), T3059:4-11.

⁴³ Transcript 1 June 2018 (Saadat), T2989:7-26, T2992:42-T2993:18, T2996: 13-37, T2998: 22-36.

- 73 This is particularly so given the principle-based nature of the provisions which require subjective interpretation. In many instances, reasonable minds can differ as to what the provisions in fact require.⁴⁴ While ASIC can provide guidance on its interpretation of the legislation, only a Court can determine what, in fact, constitutes ‘compliance’.
- 74 Westpac undertook an extensive and detailed review of its business lending agreements prior to the introduction of the UCT with the assistance of external advisers. Following a number of changes to its standard form contracts,⁴⁵ Westpac considers that it was in compliance with the UCT regime from November 2016. After the UCT regime requirements came into force, ASIC identified areas where it wished the banks to go further in terms of their amendments, and commenced a process of engaging with the banks.⁴⁶
- 75 Westpac’s engagement with ASIC included providing copies of its standard form business lending contracts,⁴⁷ participating in a roundtable with ASIC, the ASBFEO and other banks in relation to the UCT requirements,⁴⁸ and having bilateral discussions and meetings with ASIC.⁴⁹ As a result of that engagement, Westpac agreed to not rely on, or to limit its reliance on, certain clauses in its small business contracts until amendments to its contracts could be implemented. Westpac engaged with ASIC in relation to the waiver,⁵⁰ which it subsequently published.⁵¹ The waiver provides retroactive benefits to contracting parties.
- 76 In January 2018, Westpac introduced a simplified small business lending contract for core products, which incorporated the changes resulting from Westpac’s engagement with ASIC.⁵² Westpac’s further discussions with ASIC in relation to the issue of cross-defaults were finalised in March 2018,⁵³ and Westpac has since published an updated waiver to reflect those changes.⁵⁴ These discussions have also occurred in the context of ABA discussions about changes to the COBP,⁵⁵ reflecting an interest in aligning the provisions of the proposed Banking Code of Practice with the changes to small business lending contracts which were under discussion between ASIC and the banks.⁵⁶

⁴⁴ Transcript 1 June 2018 (Saadat), T2988:1-6.

⁴⁵ Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: Annexure C [4], [7]; Ex 3.151.37 KO1-37 [WBC.107.001.8129]; Ex 3.151.43 KO1-43 [WBC.107.001.7788]; Ex 3.151.44 KO1-44 [WBC.107.001.7838].

⁴⁶ Ex 3.168 Joint media release of ASIC and ASBFEO dated 09/03/2017 [ASIC.0506.0003.2018]; Transcript 1 June 2018 (Saadat), T2999:7-22.

⁴⁷ Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: Annexure C [2], [7].

⁴⁸ Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: Annexure C [21]-[24].

⁴⁹ Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: Annexure C [25] ff.

⁵⁰ Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: Annexure C [34], [37]-[38].

⁵¹ Ex 3.151.4 KO1-4 [WBC.400.052.1831]; Ex 3.151.5 KO1-5 [WBC.107.002.1562].

⁵² Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: [11]-[18].

⁵³ Ex 3.151 Witness Statement of O’Donoghue [WBC.900.001.0531]: Annexure C [44]; Transcript 31 May 2018 (O’Donoghue), T2934:41-T2935:3; Transcript 1 June 2018 (Saadat), T3002:39-44.

⁵⁴ www.westpac.com.au/business-banking/business-loans/small-business-loans/finance-contract-changes/.

⁵⁵ Transcript 1 June 2018 (Saadat), T2967:21-22.

⁵⁶ Transcript 1 June 2018 (Saadat), T3007:1-10.

ASIC's approach to the consumer protection provisions

Is ASIC's approach to the consumer protection provisions under the ASIC Act appropriate and moulded to the risks of the contraventions and practical resources constraints on ASIC?

Has ASIC's approach been effective in ensuring compliance with the consumer protection provisions of the ASIC Act generally?⁵⁷

- 77 ASIC's role as a regulator is not only to ensure that financial service providers comply with the law, using enforcement powers where appropriate and necessary, but also to provide appropriate guidance to financial services providers, with a view to consumer protection and standards of practice. This is particularly the case where financial service providers are adapting to changes in law and where such changes depend on matters of interpretation, which may differ among financial services providers and ASIC. Such regulatory engagement can assist industry participants to ensure their conduct is in accordance with the regulator's expectations, eliminating or minimising conduct that may be adverse to consumers or constitute potential breaches of the law. Westpac also recognises that there will be certain instances where the complexity of the issue and a legitimate disagreement as to the interpretation of the law or underlying facts means that court-based enforcement action and litigation may be appropriate.⁵⁸
- 78 Westpac thinks that the general approach currently taken by ASIC to the consumer protection provisions under the ASIC Act is appropriate. It reflects the strategic regulation model outlined in the evidence before the Commission, whereby ASIC considers the appropriate response to potential breaches of law on a case by case basis.⁵⁹ ASIC has outlined its approach to deciding appropriate regulatory and enforcement outcomes, including considering the nature and seriousness of the suspected misconduct; the conduct of the person or entity after the alleged contravention; the strength of ASIC's case; the expected level of public benefit; any mitigating factors; and general and specific deterrence.⁶⁰
- 79 In Westpac's experience, the use of facilitative and/or consultative approaches can be an effective tool, enabling ASIC to achieve outcomes with financial services providers.⁶¹ Other regulators also adopt consultative processes in some cases, including the ACCC. Evidence was given that wherever possible, it was the ACCC's view that breaches of law should be prevented by early engagement with relevant industry participants.⁶² In Westpac's view, such an approach is appropriate to achieve cross-industry results in a timely and cost-effective way.

⁵⁷ Transcript 1 June 2018 (Hodge QC), T3059:4-11.

⁵⁸ Westpac notes that ASIC has commenced 23 proceedings since 1 January 2008 in regards to consumer protection breaches. See Ex 3.171 Witness Statement of Mullaly [ASIC.0800.0005.0001]: [29].

⁵⁹ Ex 3.171 Witness Statement of Mullaly [ASIC.0800.0005.0001]: [10].

⁶⁰ Ex 3.171.1 TM-1 [ASIC.0800.0003.0001].

⁶¹ Transcript 1 June 2018 (Saadat), T2996:24-27.

⁶² Ex 3.160 Witness Statement of Gregson [WIT.0001.0049.0001]: [4.1].

Proposed Banking Code of Practice

Is the proposed code, whether or not it is approved by ASIC, adequate to address any residual concerns about the coverage of obligations imposed on the banks?⁶³

- 80 The proposed Banking Code of Practice contains a number of new and expanded commitments by its adherents to protect small business borrowers (in addition to the general commitments in the Code), which were informed by the Khoury Review, the Carnell Inquiry, and the consultations between the ABA, ASIC and the major banks in relation to the UCT provisions.
- 81 The proposed Code contains a number of prescriptive promises governing the subscribing banks' contractual arrangements with small businesses and includes a new part dedicated to lending to small businesses (Part 6). These include specifying the non-monetary events which may be relied upon to trigger default and the remedy periods applicable to any such events.⁶⁴ Material adverse change clauses may not be relied on as an event of default in any standard form small business lending contract.⁶⁵ Banks will also be prohibited from using financial indicator covenant clauses in standard form small business lending contracts, other than in certain specialised finance contracts.⁶⁶ In addition, a small business borrower must have a reasonable period of time to remedy a remediable non-monetary default,⁶⁷ with a standard 30 days' remedy period for defaults.⁶⁸ Small business borrowers must also be given at least 3 months' notice of a bank's decision not to extend a loan.⁶⁹
- 82 While the substantive effect of these aspects of the proposed Code is addressed in Westpac's standard loan terms for small business customers governed by the UCT provisions,⁷⁰ the inclusion of these provisions in the proposed Code sets standards that will apply across the industry. As a result, the outcomes of the engagement of the major banks with ASIC with respect to the UCT provisions, as contained in the proposed Code, will be extended to all subscribing ABA banks, and will ensure that a larger number of small businesses receive these protections.⁷¹
- 83 The Code also extends the protections relating to UCT provisions beyond the thresholds required by law,⁷² applying to small businesses falling within the definition of 'small business' in

⁶³ Transcript 1 June 2018 (Hodge QC), T3059:11-14.

⁶⁴ Ex 3.144.5 AB-1 Tab 5 [ABA.002.001.0211]: cl 80.

⁶⁵ Ex 3.144.5 AB-1 Tab 5 [ABA.002.001.0211]: cl 84; Transcript 31 May 2018 (Bligh), T2919:9-11

⁶⁶ Ex 3.144.5 AB-1 Tab 5 [ABA.002.001.0211]: cl 85.

⁶⁷ Ex 3.144.5 AB-1 Tab 5 [ABA.002.001.0211]: cl 81.

⁶⁸ Ex 3.144.5 AB-1 Tab 5 [ABA.002.001.0211]: cl 75.

⁶⁹ Ex 3.144.5 AB-1 Tab 5 [ABA.002.001.0211]: cl 86.

⁷⁰ Ex 3.151 Witness Statement of O'Donoghue [WBC.900.001.0531]: [48], [53].

⁷¹ Transcript 31 May 2018 (Bligh), T2921:44-45.

⁷² Transcript 1 June 2018 (Saadat), T3004:43-45.

the proposed Code,⁷³ a term which is defined more expansively than the \$1 million upfront payable price definition contained in the UCT provisions.⁷⁴

Would the absence of ASIC approval undermine the effectiveness of the code?⁷⁵

- 84 Westpac will continue to seek, both in its own right and as a member of the ABA, the approval of ASIC for the proposed Code. It considers that approval by ASIC would be important, as a strong signal to customers that the Code has the independent endorsement of the industry regulator, that it provides an approved scheme of consumer protections,⁷⁶ and that it meets ASIC's required standards for approval.⁷⁷
- 85 In the absence of approval by ASIC, however, the Code (which builds on the current COBP, which was not subject to ASIC approval) will continue to stand as a key protection for individual and small business customers and their guarantors and a significant statement of heightened industry commitment, which is, by its terms, incorporated in the bank's contractual obligations to customers. Neither the content of the Code, nor the obligations of subscribing banks that adhere to the Code, are affected by the absence of ASIC approval of the Code. The Code would apply in the same way and deliver the same benefits and protections for customers and their guarantors in any event.⁷⁸

⁷³ Ex 3.144 AB-1 Tab 5 [ABA.002.001.0211]: cl 1.

⁷⁴ Section 12BF of the *Australian Securities and Investments Commission Act 2001* (Cth).

⁷⁵ Transcript 1 June 2018 (Hodge QC), T3059:11-14.

⁷⁶ Transcript 31 May 2018 (Bligh), T2914:8-12

⁷⁷ Ex 3.162.13 MS-13 [ASIC.0900.0002.0088].

⁷⁸ Transcript 1 June 2018 (Saadat), T2967:32-38.