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

HEARING ROUND 4: EXPERIENCES OF REGIONAL & REMOTE COMMUNITIES

ANZ'S SUBMISSIONS ON FINDINGS CONCERNING CASE STUDIES INVOLVING ANZ

1. These submissions are divided into three main sections. The first section focuses on ANZ's conduct in relation to some former Landmark customers. The second and third sections concern ANZ's conduct in relation to some Aboriginal and Torres Strait Islander customers.

A. LANDMARK CASE STUDY

A.1 Evidence received by the Commission

2. The Commission heard evidence in relation to the Landmark case study from (a) Ben Steinberg, Head of ANZ Lending Services – Corporate and Commercial; and (b) Michael Hirst, a former customer of Landmark and ANZ. The Commission also heard evidence during a joint evidence session addressing agribusiness lending from Chris Wheatcroft, Denis McMahon and Warren Day, each of whom also made a witness statement.[1]

3. In addition to his oral evidence, Mr Steinberg made four witness statements, plus a supplementary statement, which were tendered, with other documents, during the course of his evidence.[2]

4. Mr Steinberg was an honest witness who gave considered and responsive answers to questions over three days from Commissioner Hayne, Counsel Assisting, and counsel for the Hirsts. Mr Steinberg made appropriate concessions and, where he considered that ANZ's conduct did not fall below community standards or expectations (**CSEs**) or constitute misconduct, he provided clear and thoughtful reasons based on his careful review of customer files, and his experience and expertise in managing impaired and distressed loans.

A.2 Overview of the Landmark acquisition, issues, and ANZ responses

5. On 1 March 2010, ANZ acquired the loan book of Landmark Financial Services.[3] The loan book comprised 7,124 loans (involving approximately 4,500 customers), with an estimated value of $2.298 billion.[4] Prior to the acquisition, ANZ undertook a program of due diligence which involved, among other things, a review of legal, financial, credit and other aspects of the Landmark loan book.[5] ANZ wrote to the Landmark customers on two occasions to inform them of the proposed acquisition,[6] and again on about 5 March 2010, following the acquisition.[7]

6. At the time of acquisition, 113 of the 7,124 Landmark loans (1.6%) were identified as 'impaired' and a further 320 loans (4.5%) were classified as 'high risk'. Those numbers increased over time. As at 1 July 2013, 419 former Landmark loans were impaired loans (7.8%) and 631 were high risk loans (11.7%).[8] Between 2010 and 2017, ANZ received

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1 Witness statement of Chris Wheatcroft (Exhibit 94.4) (WIT.0001.0058.0001) (the **Wheatcroft Statement**); witness statement of Denis McMahon (Exhibit 94.2) (WIT.0001.0059.0001) (the **McMahon Statement**); witness statement of Warren Day (Exhibit 94.6) (ASIC.0800.0004.0001).

2 Witness statement of Ben Steinberg in response to Rubric 4-01 (Exhibit 94.8) (ANZ.999.010.0069) (the **Steinberg 4-01 Statement**); Witness statement of Ben Steinberg in response to Rubric 4-17 (Exhibit 4.20) (ANZ.999.010.0046) (the **Steinberg 4-17 Statement**); Witness statement of Ben Steinberg in response to Rubric 4-20 (Covering statement: (Exhibit 4.9) (ANZ.999.010.0070); Annexure A: (Exhibit 4.9A) (ANZ.999.011.0073); Annexure B: (Exhibit 4.9B) (ANZ.999.011.0096); Annexure C: (Exhibit 4.9C) (ANZ.999.011.0001); Annexure D: (Exhibit 4.9D) (ANZ.999.011.0020); Annexure E: (Exhibit 4.9E) (ANZ.999.011.0046)) (the **Steinberg 4-20 Statement**); Witness statement of Ben Steinberg in response to Rubric 4-38 (Covering statement: (Exhibit 94.10) (ANZ.999.014.0001); Annexure F: (Exhibit 94.10F) (ANZ.999.012.0001); Annexure G: (Exhibit 94.10G) (ANZ.999.013.0001)) (the **Steinberg 4-38 Statement**); Supplementary witness statement of Ben Steinberg in response to Rubric 4-38: (Exhibit 84.11) (ANZ.999.015.0001) (the **Steinberg Supplementary 4-38 Statement**).

3 T3132.32.

4 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0075 [20(b)]; T3301.17.

5 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0075 [21]-[22].

6 T3139.42, T3140.1-5.

7 Steinberg 4-01 statement at .0076 [27].

8 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0078-.0079 [34].

approximately 71 complaints from former Landmark customers; 52 cases were considered by FOS or ANZ's Customer Advocate; 49 accounts were the subject of farm debt mediation; and 19 matters resulted in legal proceedings.[9] As at 1 July 2017, only two complaints, and one legal proceeding, remained unresolved.[10]

7. In about July 2015, ANZ established a taskforce to review former Landmark customer files.[11] All former Landmark files then being managed by Lending Services were reviewed, as well as a number of closed former Landmark files.[12] The process resulted in about 40-50 settlements, involving a mix of debt forgiveness and, in some cases, compensation, with a total cost of about $40 million.[13]

8. ANZ has learned from its experiences, and continues to look for ways to enhance its management of and relationships with agribusiness customers. Steps taken in recent years include:[14] (a) in August 2014, a specialist agribusiness team was established within Lending Services; (b) since December 2014, ANZ has developed assistance packages for customers affected by natural disasters and drought; (c) Lending Services staff engage in more face-to-face farm visits with customers, and farm debt mediations are used more frequently (including in jurisdictions where farm debt mediations are not compulsory); (d) there is a higher degree of oversight and level of authorisation required before enforcement action is taken; (e) valuations and investigative accountant reports are now typically provided to customers; (f) in addition to encouraging customers to obtain legal and financial advice, in some cases ANZ contributes to the cost of customers obtaining advice; and (g) there is an increased focus on finding more tailored and flexible solutions for customers in financial distress. Underpinning many of these changes, and ANZ's approach to customers in difficult financial circumstances, is the Lending Service "Purpose", which was developed in 2015.[15]

9. Mr Wheatcroft said that "*ANZ have been proactive in communicating, negotiating, developing options and offering resolution to clients*".[16] Mr McMahon stated that "*ANZ do regularly visit their customers*", and that ANZ has "*demonstrated a preparedness to offer assistance not previously offered*" as well as "incentives such as leaving the farmer with some assets rather than taking all secured assets".[17]

A.3 Misconduct, CSEs, and clause 2.2 of the Code of Banking Practice

10. In ANZ's submission to the Commission dated 29 January 2018, it set out its understanding of 'misconduct' and 'community standards and expectations', as those expressions appear in the Commission's terms of reference. In its 29 January submission, ANZ accepted that, although industry codes such as the Code of Banking Practice (**CBP**) are an encapsulation of CSEs, for the purposes of its response it treated breaches of the CBP as falling within the meaning of 'misconduct' (as defined in the terms of reference).

11. ANZ also referred in its 29 January submission to CSEs. ANZ has observed that, among other things: CSEs evolve over time; there can be conflicts between what different parts of the community expect; a central community expectation is that ANZ will act in accordance with its espoused values and will do what it has said publicly that it will do; and while ANZ has important commitments to its customers, the community also understands that ANZ has obligations to other groups such as depositors, shareholders, staff and the community.[18]

12. The evolution of CSEs finds its expression in a variety of contexts, including the development of legal values.[19] These changes are analogous to the development of legal

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9 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0079-.0082 [36]-[37].
10 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0079-.0082 [36]-[37].
11 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0091 [60]-[63]; T3128.13-14.
12 T3297.45-47.
13 T3303.1-7.
14 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0090 [57]-[59].
15 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0092 [64]-[66].
16 Wheatcroft Statement: WIT.0001.0058.0001 at .0012 [55].
17 McMahon Statement: WIT.0001.0059.0001 at .0002 [4] and .0014 [105].
18 See also T3281.13-17; 3300.17-30.
19 See, for example, the reference to Cardozo, *The Nature of the Judicial Process* (Newhaven, Yale University Press, 1921) pp 104-105, by the Full Federal Court in *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23].

principle, and the application of established doctrine to meet novel cases, including in light of changed social norms or mores. While there may, therefore, be broad agreement that banks should act fairly and reasonably in a consistent and ethical manner (as reflected in clause 2.2 of the CBP), the community's expectations of what that may require in a particular case is susceptible to disagreement, and change, over time.

13. The fact that ANZ has changed some of its practices in relation to agribusiness customers in recent years (as referred to above) does not mean, without more, that ANZ's previous practices involved misconduct or fell below CSEs. There are at least two reasons why. *First*, obligations which are expressed in broad terms (such as a requirement to act fairly and reasonably) generally allow for a variety of responses. Although one response may be considered preferable to another, both may be consistent with CSEs. For example, while ANZ under current practices might allow additional time for a customer to sell assets to meet repayment obligations, it does not follow that allowing less time under earlier practices fell below CSEs or breached clause 2.2 of the CBP. *Secondly*, changes may have occurred in CSEs since the events in question. Reasons for this may include greater public awareness of the circumstances or effect of particular conduct (since it occurred), the development of different expectations as a result of a particular incident or set of incidents (because it/they occurred), or changes in community attitudes to align with current approaches to such circumstances (if they were to occur today).

14. Clause 2.2 of the CBP as in force at the time of the relevant events (clause 3.2 of the present CBP), has received little judicial consideration. It was applied in *Sam Management Services (Australia) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWCA 320. In the course of a concurring judgment, Young JA stated (at [74]) that the clause was "*fraught with ambiguity*", and went on to say that "*it probably does not operate beyond requiring the bank to act in good faith towards the customer*".

15. Consideration of what constitutes fair and reasonable conduct in clause 2.2 is informed by the balance of the words in that clause, as well as other provisions in the CBP. In this respect, four points may be made. *First*, the obligation in clause 2.2 is not just to act "fairly and reasonably", but to act "fairly and reasonably in a consistent and ethical manner". The words "in a consistent and ethical manner" are core features of the obligation to act "fairly and reasonably". *Secondly*, clause 2.2 requires not only that the bank's conduct be considered in assessing whether its obligations have been met, but also the customer's conduct. Thus, in determining whether the bank has acted fairly and reasonably in a consistent and ethical manner, all the circumstances of the bank's conduct are to be taken into account, which includes its response to conduct by the customer. *Thirdly*, clause 2.2 refers to the contract between the bank and its customer. The terms of the parties' agreement – their rights and duties – provide necessary context for how the obligation in clause 2.2 is to be construed. *Fourthly*, clause 2.3 provides that, in meeting its commitments to a customer, the bank will have regard to its prudential obligations. This may include, for example, the requirement that a bank hold additional capital in respect of impaired or high risk loans, with the concomitant cost to the bank (and indirectly to all customers) of holding additional capital. The effect of clause 2.3 is to preserve the bank's entitlement to act with careful regard to its own interests under the relevant contract.[20]

16. It is further submitted that, when construed in context and in light of all the words of the text, there will be circumstances in which conduct may fall below CSEs, without breaching clause 2.2. In particular, CSEs may require banks, in some circumstances, to do more than act fairly and reasonably in a consistent and ethical manner.

A.4 Findings of conduct falling below CSEs, or misconduct

A.4.1 Conduct ANZ accepts as having fallen below CSEs, or constituting misconduct

17. ANZ acknowledges that certain of its conduct in relation to some former Landmark customers fell below CSEs, or is capable of supporting a finding of possible misconduct by the Commission. In summary, that conduct is as follows:

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[20] *Seeto v Bank of Western Australia Ltd* [2010] NSWSC 922 at [38].

(a) **Acquisition of the Landmark loan book**. The following conduct did not meet CSEs: (i) ANZ's communications with former Landmark customers to explain the systems transfer and integration of customer accounts following the acquisition; and (ii) in connection with the transition of former Landmark customers to ANZ systems: delays in ANZ providing responses to requests for information and funding; the loading of incorrect credit limits on ANZ's system; the charging of incorrect interest rates; and problems associated with opening new accounts.

(b) **Cheesmans**. ANZ's conduct did not meet CSEs by: (i) not accepting reasonable settlement offers in 2012;[21] and (ii) thereby putting the Cheesmans in a position where they may have been required to sell Reuben and Katrina Cheesmans' home.

(c) **Hirsts**. The following matters, taken in combination, resulted in conduct falling below CSEs: (i) not engaging in farm debt mediation at an early stage; (ii) entering into a Deed of Settlement and Release that involved little compromise; (iii) charging higher interest rates from October 2011 when the Hirsts were under financial pressure; (iv) in a meeting in August 2011, the conduct of an ANZ bank manager; (v) not providing valuations to the Hirsts; and (vi) encouraging and granting increased loans to the Hirsts without informing them that ANZ disapproved of their property investment model, or without obtaining updated valuations.

(d) **Handleys**. By failing to seek additional information about Mrs Handley's illness before declining a request to postpone a mediation, ANZ's conduct fell below CSEs. By signing documents as a witness when, in fact, the signature had not been witnessed, an ANZ staff member engaged in misconduct.

(e) **Annexure G to the Steinberg 4-38 statement** (customer name subject to a non-publication direction). ANZ's conduct fell below CSEs insofar as there was an unreasonable delay in making approved funds available to the customer.

(f) ANZ also acknowledges that its conduct in relation to other customers, who were not the subject of case studies, amounted to misconduct:

  (i) **Mr Phillott**. Breaching clauses 2.2 and 25.2 of the CBP in light of: (A) conduct engaged in by Landmark in relation to the original lending to the Phillotts, for which ANZ took responsibility; and (B) the manner of communication with Mr Phillott in requesting debt repayment;

  (ii) **Cashmore Farms Pty Ltd**. Breaching clause 2.2 of the CBP by agreeing significant variations to the customer's loan without clearly communicating the changes in a clear and transparent way, and applying sale proceeds of a residential property to a long rather than short-term loan; and

  (iii) **Other customers**. In relation to the customers referred to in the third entry of the table at paragraph 45 of the Steinberg 4-01 Statement (in respect of whom a non-publication direction has been made), breaching clause 2.2 of the CBP by taking guarantees from the customers' mother and siblings without taking all reasonable steps to ascertain their suitability.

(g) ANZ has also acknowledged that its conduct in relation to other customers, also not the subject of case studies, fell below CSEs:

  (i) in relation to the customers referred to in the second entry of the table at paragraph 43 of the Steinberg 4-01 Statement, ANZ engaged in poor communication and inconsistent practice by applying secured property sale proceeds to reduce principal rather than principal and interest;

  (ii) in relation to the customers referred to in the fourth entry of the table at paragraph 43 of the Steinberg 4-01 Statement, ANZ failed to honour cheques contrary to ANZ's previous commitment; and

[21] Being those identified in Annexure G to the Steinberg 4-38 Statement: ANZ.999.013.0001 at .0017-.0018 [66(b)], [66(d)] and [66(e)].

(iii) in relation to the customers referred to in the fifth entry of the table at paragraph 43 of the Steinberg 4-01 Statement, ANZ engaged in poor communication in relation to the restructuring of loans.

18. ANZ otherwise submits that the possible findings identified by Counsel Assisting ought not be made, for the reasons developed below.

A.4.2 Cheesman case study

The Asset Management Agreement

19. Counsel Assisting submitted that ANZ's conduct fell below CSEs in entering into an asset management agreement (**AMA**) with the Cheesmans with timelines for the sale of the secured property involving two months for the sale of property and, failing sale, vacant possession within seven days.

20. ANZ does not accept that entering into an agreement in those terms is conduct falling below CSEs. Four aspects of the circumstances are relevant. *First*, the Cheesmans were aware that their debt position was unsustainable prior to the acquisition of Landmark by ANZ, and that debt reduction by asset sales was necessary.[22] By 2010, they had incurred annual losses since at least 2007.[23] *Secondly*, the necessary sales were not undertaken by the Cheesmans,[24] and there was a genuine concern within ANZ that they were not fully committed to reducing debt through asset sales, evidenced by, for example, failing to place sufficient assets on the market, or offering some property subject to unattractive 'sale and leaseback' terms.[25] *Thirdly*, the AMA reflected a strategy agreed[26] by the parties,[27] some years after the Cheesmans' initial acknowledgement that it was necessary to sell property and that their debt position had become unsustainable. *Fourthly*, the AMA was entered into after ANZ extended facility terms and funding limits on a number of occasions, and was signed after the Cheesmans obtained legal advice.[28]

21. ANZ submits that in working with the Cheesmans to develop the strategy reflected in the AMA, and in allowing them additional time to remain in control of their property, it acted consistently with CSEs. The time period for the sale of the properties in the AMA should be viewed in the overall context of ANZ's engagement with the Cheesmans to secure the sale of assets and reduction in debt – a process that was ongoing from early 2010. There is no suggestion that the Cheesmans viewed the period of two months as inappropriate in their overall circumstances. ANZ is not aware of any complaint made at the time or since in relation to this timeframe, and no evidence was received by the Commission to that effect.

The request to delay the sale of properties

22. Counsel Assisting has submitted that it is open to the Commission to find that ANZ's refusal to exclude houses from the auction of the Cheesmans' properties was conduct that fell below CSEs. ANZ submits that no such finding should be made.

23. There is insufficient evidence to support a finding that there was no difference in value between the properties with or without the houses. This question was raised by the

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22 This position was communicated by at least 26 May 2008. See Exhibit LMG-2 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.006.0322, being the Landmark letter of variation of that date makes clear that it represents the "maximum level of assistance" and that property sales might be required See also Exhibit LMG 21 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0227, being a diary note recording that in April 2010 the Cheesmans contemplated a sale of property by the end of 2010. This position is repeated in the letter of offer of 13 October 2010. See Exhibit LMG-21 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.004.0054.

23 Exhibit LMG-18 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.002.0119 at .0126.

24 The obligations to conduct a sale by November 2010 was not complied with. See Exhibit LMG-21 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0227.

25 Annexure G to the Steinberg 4-38 Statement: ANZ.999.013.0001 at .0014 [46].

26 Exhibit LMG-17 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.004.0013 at .0015, recital A: "The parties have agreed to enter into this document to reflect a strategy agreed by them".

27 Being Cheesman Family Farms Pty Ltd (in its own capacity and as trustee for the Cheesman Family Farms Trust) and Katrina Cheesman, Reuben John Cheesman, Arthur Cheesman and Rhonda Cheesman. See Exhibit LMG-17 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.004.0013 at .0015.

28 A legal advice warranty was provided. See Exhibit LMG-17 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.004.0013 at .0020 (clause 10).

Cheesmans' accountant,[29] and ANZ obtained preliminary information from a valuer.[30] The banker involved, who considered the issue in 2012, thought it was necessary to find out from the agent, via the customer, whether the reserve price would be materially different with or without the houses.[31] The lack of information was explained to the Cheesmans' accountant, who was to revert to the bank after raising the issues with the Cheesmans.[32] Contrary to the information provided by the Cheesmans, ANZ had been informed that there had been interest in the properties 'as wholes' (including the houses).[33] The real estate agent then "*advised that all three lots had received interest from prospective buyers*" and that he believed that "*the property should be offered in three lots (including house blocks)*".[34] ANZ's position was taken after consideration of that information, and the recommendation from the agent that this was the appropriate course.

24. Because the premise underlying the proposed finding is not supported by the evidence, ANZ submits that the Commission cannot be satisfied that ANZ's conduct fell below CSEs.

Rejection of settlement offers

25. ANZ has acknowledged that, in failing to accept offers of settlement in 2012, its conduct fell below CSEs.[35] Counsel Assisting has suggested that ANZ's conduct in this respect may have constituted a breach of clause 2.2 of the CBP. ANZ submits that no such finding should be made. There is a distinction between conduct falling below CSEs and breaches of the CBP. As stated above, the CBP requires consideration of the conduct of the parties towards each other over time, in light of the particular contractual context.

26. In this instance, it is relevant that Landmark and ANZ had supported the Cheesmans over a long period of time, in the hope that the Cheesmans' farming business could be put back on a profitable footing. For example: (a) there was a long history of requests from Landmark, and then ANZ, to bring the debt position back within acceptable tolerances;[36] (b) there was a long history of forbearance from Landmark and then ANZ – for example, an internal Landmark email of 29 January 2010 sought to avoid a debt downgrade to allow a workthrough plan to be developed;[37] and (c) there was an agreement in 2010 that the Cheesmans' property would need to be sold,[38] yet ANZ continued to respond to the Cheesmans' requests for further extensions, with no sale being made in 2010 or 2011.[39]

27. ANZ acted consistently and ethically in its dealings with the Cheesmans – matters which are at the heart of the obligation in clause 2.2 of the CBP, and which inform the question of whether the conduct in question was fair and reasonable.

28. Clause 2.2 of the CBP also calls attention to the conduct of the customer in determining the content of the bank's obligation to act fairly and reasonably in an ethical and consistent manner. While the Cheesmans were not called to give evidence, there was evidence that they appear to have deposited only $130,000 of $1 million in crop proceeds to reduce their indebtedness to ANZ,[40] in circumstances where the entire crop in question was subject to a crop lien in favour of ANZ.[41] In addition, despite repeated requests from ANZ to account for the entire proceeds of sale of this crop, and to provide other financial

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29 Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.005.0391 is an email from the Cheesmans' accountant noting his clients' concern that the 'houses will make little difference to the sale value'; the customer's concern is noted in the diary note of 31 January 2012 (Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0043 at .00044).

30 Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0043 at .0044.

31 Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0043 at .0045.

32 Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0041.

33 Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0037 at .0037-.0040.

34 Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.033.0037 at .0040.

35 Annexure G to the Steinberg 4-38 Statement: ANZ.999.013.0001 at .0016 [65].

36 Exhibit LMG-2 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.006.0322 is a letter of 26 May 2008 and ANZ.160.006.0319 is a letter of 9 September 2008.

37 Exhibit LMG-20 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0253.

38 Exhibit LMG-21 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.004.0054 at .0058.

39 Exhibit 4.218: RCD.9999.0061.0001 at .0001-.0002 [5]-[7].

40 T3202.44-47; Exhibit LMG-27 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.003.0035; Exhibit LMG-36 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.005.0119.

41 T3200.45-3201.8; Exhibit LMG-15 to Annexure G to the Steinberg 4-38 Statement: ANZ.160.007.0344.

information, the Cheesmans did not do so in a timely way.[42] Reducing indebtedness at the time of this conduct may have avoided future enforcement action being taken.[43]

29. A further matter to which the CBP directs attention in identifying the content of clause 2.2 is the content of the contractual relationship between the parties. There was no legal impediment to the steps taken by ANZ. The Cheesmans had the benefit of legal and other advice in the course of their negotiations with ANZ.[44]

A.4.3 Harley case study

30. Subject to the following submissions, ANZ broadly accepts the factual summary of the Harley case study set out in the document tendered by Counsel Assisting during closing address.[45] ANZ submits, however, that the Commission should not find that ANZ breached CSEs or the CBP in its dealings with the Harleys.[46]

31. The Harleys were experiencing financial distress before they became customers of ANZ in March 2010.[47] They had incurred at least five years' of consecutive trading losses,[48] and had an "*excessively high debt load*".[49] By March 2010, the Harleys knew that they had to sell assets in order to reduce their debt to manageable levels.[50]

32. For approximately four years from the date of acquisition of the Landmark loan book, ANZ provided the Harleys with time in which to sell their assets and to control the manner and circumstances in which they could achieve debt reduction. Forbearance was provided by ANZ in a number of ways, such as: (a) in May 2011, an extension of facilities until March 2012;[51] (b) in March 2012, an extension of facilities until March 2013;[52] and (c) in September 2013, an extension of facilities until 31 March 2014.[53] During this time, ANZ also supported the Harleys by: (a) providing flexibility with and forbearance in respect of interest repayments; (b) inviting the Harleys to put various proposals for asset sales, refinancing and debt restructuring to ANZ for consideration; and (c) permitting the Harleys to meet vehicle finance obligations from their overdrawn account.[54]

33. Contrary to the proposition put to Mr Steinberg in cross-examination, ANZ's decision to take enforcement action was not motivated by the amount of time that the Harleys' file had spent in Lending Services, or to meet any organisational time limits.[55] The reference in an ANZ document to having a 'target' for the period of time in which files should be in Lending Services was a guide only, and was just as concerned with ensuring the efficient rehabilitation of files as it was to 'exiting' files from Lending Services.[56]

34. Further, enforcement action was not taken against the Harleys suddenly or unexpectedly. Enforcement action was ultimately taken in April 2014, approximately 10 months after the issue of a notice of default,[57] and after the Harleys had failed to comply with the 31 March 2014 repayment deadline provided for in the deed executed in September 2013 (**September 2013 Deed**). By that time, the Harleys had been trying for over four years

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42 For example, Exhibit LMG-32 to Annexure G to the Steinberg 4-38 statement: ANZ.160.005.0261 refers to the failure to provide requested financial information and documents, in particular, the Cheesmans' failure to account for the full proceeds of the crop harvest in question.

43 T3202.20-26.

44 Mr Knight, CPA, acted on behalf of the Cheesmans. The Cheesmans gave a warranty in the AMA that they had received legal advice.

45 Exhibit 4.218: RCD.9999.0061.0001 at .0004-.0007 [12]-[24].

46 Such a finding would be at odds with the evidence of Mr Steinberg, whose evidence, it is submitted, ought to be accepted: T3281.7-29.

47 T3230.6-16.

48 T3230.9-10.

49 T3231.12-13; Exhibit LMD-51 to Annexure D to the Steinberg 4-20 Statement: ANZ.023.005.0105 at .0114.

50 Steinberg T3230.12-13; Exhibit LMD-38 to Annexure D to the Steinberg 4-20 Statement: ANZ.023.005.0095 (internal ANZ email observing that "Ongoing serviceability is reliant on asset sales – same plan last three years without any sales being recorded").

51 T3231.41-3232.11; Exhibit LMD-51 to Annexure D to the Steinberg 4-20 Statement: ANZ.800.670.0003.

52 T3239.19-3240.18; Exhibit LMD-53 to Annexure D to the Steinberg 4-20 Statement: ANZ.023.005.0045; Exhibit LMD-12 to Annexure D to the Steinberg 4-20 Statement: ANZ.034.001.0062.

53 T3245.45-46; Exhibit LMD-19 to Annexure D to the Steinberg 4-20 Statement: ANZ.800.644.0421.

54 T3258.1-8; Annexure D to the Steinberg 4-20 Statement: ANZ.999.011.0020 at .0042-0043 [95].

55 T3272.21-23.

56 T3270.22-42.

57 T3242.35-3243.7.

to sell assets in order to reduce their debt, with limited success.[58] In the circumstances, it was reasonable for ANZ to conclude that the Harleys had been provided with sufficient time, through extensions of their facilities and other accommodations, and that a decision needed to be made to have the debt repaid.[59] Mr Steinberg acknowledged that this is always "*a difficult decision to make*", particularly when a customer has experienced ill-health, but that "a*t some point the line in the sand needs to be drawn and the decision needs to be made*".[60] Such a decision is informed by factors such as the cost to the bank of carrying underperforming loans,[61] and the value in achieving certainty after a number of years of forbearance and a customer's failure to meet debt repayment obligations.[62]

35. There are three other matters to be addressed with respect to the Harley case study.

36. *First*, reference was made during the course of Mr Steinberg's evidence that the September 2013 Deed provided the Harleys with only "*one day*" in which to vacate possession of the McAlinden Property (following failure to meet their 31 March 2014 repayment obligation).[63] Taken on its own, ANZ accepts that this would not be a sufficient period of time in which to require a customer to vacate a property. However, the Harleys knew for a period of six months that steps would have to be taken to vacate the premises if a sale of assets did not occur and their debt was not repaid, and they were in a position to order their affairs accordingly.[64] There was no evidence that the Harleys did not or could not manage their affairs in this respect; or that they had sought but ANZ had refused a request for additional time to vacate when the September 2013 Deed was negotiated, in circumstances where both parties were legally represented.[65]

37. *Secondly*, ANZ was entitled to appoint an agent as mortgagee in possession to facilitate a sale of the properties, and ANZ did not breach its obligations under the or engage in conduct which fell below CSEs in so doing. There was no evidence to suggest that the agent did not discharge its obligations in selling the properties, including by obtaining the best price reasonably available,[66] or that ANZ should not have been entitled to rely on the agent acting in accordance with its obligations. It is not open to the Commission to find that the Harleys' properties were sold by the agent "*at a substantial discount*",[67] in the absence of any expert evidence about the market price at the time. The fact of a difference between a property valuation and the price achieved at sale does not, without more, establish any failure by the agent to act in accordance with its obligations. Counsel Assisting's cross-examination of Mr Steinberg regarding this issue was based on valuations carried out in June 2013. The more appropriate comparator, for the property sales in August 2014, is the May 2014 valuations. Volume 2808, folio 934 was valued in May 2014 at $280,000, and sold in August 2014 for $250,000.[68] Volume 1047, folio 427, volume 1063, folio 994 and volume 1245, folio 40 were collectively valued at $800,000 in May 2014, and sold together in August 2014 for $780,000.[69] The difference between the May 2014 valuations and the August 2014 sale prices was thus $50,000 or 4.6% – a difference which does not support a finding that the Harleys' properties were sold at a "substantial" discount.

38. *Thirdly*, ANZ's decision not to agree to the Harleys' request in December 2014 to forgive their entire outstanding debt must also be viewed in context. Following the August 2014 sales, approximately $309,000 residual debt remained.[70] ANZ did not agree with the Harleys' allegation, made in December 2014, that the properties were sold at an

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58 T3246.36-3247.7, T3249.42-3250.11; Exhibit LMD-11 to Annexure D to the Steinberg 4-20 Statement: ANZ.800.678.5198; Annexure D to the Steinberg 4-20 Statement: ANZ.999.011.0020 at .0040 [81]; Exhibit LMD-11 to Annexure D to the Steinberg 4-20 Statement: ANZ023.005.0256.

59 T3252.42-46.

60 T3253.4-6.

61 T3253.12-15.

62 T3253.45-47, T3254.17-25, T3257.16-20.

63 See, for example, T3247.22-T3248.29.

64 T3247.25-32.

65 Exhibit LMD-19 to Annexure D to the Steinberg 4-20 Statement: ANZ.800.644.0421 at .0435.

66 T3273.24-3274.5.

67 T4104.37-39.

68 Annexure D to the Steinberg 4-20 Statement: ANZ.999.001.0020 at .0033-.0034 [60].

69 Annexure D to the Steinberg 4-20 Statement: ANZ.999.011.0020 at .0033-.0034 [60].

70 T3275.33-34.

undervalue.[71] Neither CSEs, nor the CBP, required ANZ to forgive the Harleys' debt in those circumstances. Whilst Mr Steinberg gave evidence that there were certain ways in which the management of the Harleys' file could have been handled differently,[72] this does not, of itself, support a finding of either breach of CSEs or misconduct. ANZ seeks to continuously improve the manner and form of services it provides customers; ongoing change is a part of that process.[73] The fact that a different approach may have been available at the time does not mean that the steps that were taken fell below CSEs or constituted misconduct.

A.4.4 Hirst case study

39. Counsel Assisting submitted in closing address that in the specific circumstances of the Hirsts, by encouraging and granting increased loans, ANZ may have engaged in misconduct by breaching its obligation under clause 2.2 of the CBP. ANZ submits that no such finding should be made.

40. As Mr Steinberg stated in his evidence, there were a number of factors at the time which informed ANZ's decision to provide additional lending. One consideration was that the Hirsts had told ANZ that the Entally Road property was going to be sold to Mrs Hirst's brother-in-law for $2.5 million.[74] A sale of the property, for that amount, would have significantly reduced the Hirsts' debt to ANZ. A further consideration was that, based on a cash flow analysis at the time, and after stripping out revenue from asset sales and paying interest, there would have been a surplus available to the Hirsts.[75] It was fair and reasonable in those circumstances to offer additional lending to the Hirsts, which they then accepted.[76]

A.4.5 Handley case study

41. Counsel Assisting submitted in closing address that ANZ's conduct fell below CSEs in failing to extend overdraft limits to the Handleys in circumstances where it had agreed to extend them, such that the Handleys were charged interest where they should not have been,[77] and in making a series of errors in respect of the overcharging of interest and fees in relation to the Handleys' accounts.[78]

42. Following the purchase of the Landmark loan book, a restructure of the Handleys' lending facilities was going to take place. It was intended that the transfer of accounts from Landmark's technology systems to ANZ be delayed until such time as the ANZ Tailored Business Facility and Variable Rate Commercial Bill facility were drawn on the ANZ system.[79] The Handleys' facilities were transferred on 7 September 2010, before the ANZ account facilities had been properly established. This was a mistake, and ANZ took immediate steps to rectify it.[80] The error was reversed on 14 October 2010, 27 working days after it had occurred.[81] ANZ sent correspondence in November 2010 to all businesses which had had cheques dishonoured because of the error.[82] Additional interest paid by the Handleys was refunded.[83] In addition, in March 2015, there was a miscommunication which meant that an overdraft was not extended in a timely way. An incorrect interest rate was applied between 1 April and 19 April 2015. The issue was identified on 20 April, and immediately rectified.[84]

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71 T3280.4-41; Exhibit LMD-47 to Annexure D to the Steinberg 4-20 Statement: ANZ.800.644.0125.
72 T3229.39-40.
73 T3188.34-42.
74 T3312.25-26.
75 T3312.26-28.
76 The letters of offer accepted by the Hirsts are referred to in the evaluation conducted by the Hon. Susan Crennan AC QC, in Exhibit LME-14 of Annexure E to the Steinberg 4-20 Statement: ANZ.800.610.0370 at .0406-.0407.
77 T4105.15-20.
78 T4105.7-10.
79 Exhibit LMC-43 to Annexure C to the Steinberg 4-20 Statement: ANZ.017.004.2998 at .2998.
80 Exhibit LMC-43 to Annexure C to the Steinberg 4-20 Statement: ANZ.017.004.2998 at .2998.
81 Exhibit LMC-48 to Annexure C to the Steinberg 4-20 Statement: ANZ.017.004.1188.
82 Exhibits LMC-44-LMC-47 to Annexure C to the Steinberg 4-20 Statement: ANZ.017.004.3042, ANZ.017.004.3043, ANZ.017.004.3044, ANZ.017.004.3045.
83 Annexure C to the Steinberg 4-20 Statement: ANZ.999.011.0001 at .0016-.0017 [72]; T3286.34-35: "they [the Handleys] were definitely – definitely charged additional interest…".
84 Exhibit LMC-51 to Annexure C to the Steinberg 4-20 Statement: ANZ.017.004.0354.

43. Each of these were honest mistakes arising from individual errors. Once identified, immediate and effective steps were taken to remedy the effect of the error. There is no suggestion that those steps were not effective. ANZ submits that CSEs must encompass tolerance for honest mistakes when made, particularly when the involve discrete errors, which are promptly recognised and rectified. ANZ accepts that these mistakes should not have occurred, but submits that they do not rise to the level of conduct falling below CSEs.

B.4.6 Annexure B Case Study

44. Counsel Assisting identified two findings as open in respect of this case study.[85] The first is that, by meeting with the customers in October 2011 to discuss their debt reduction options, and then on the same day issuing a default notice, ANZ acted inconsistently and thereby breached CSEs and/or clause 2.2 of the CBP. The second is that, by refusing to accept the customers' January 2012 offer to settle their outstanding debt, and not giving reasons, or inviting further negotiations, ANZ acted inconsistently and thereby breached CSEs and/or clause 2.2 of the CBP. ANZ submits that, in both cases, its conduct did not fail to meet CSEs or breach the CBP.

45. The customers in this case were experiencing financial distress prior to the Landmark acquisition in March 2010.[86] As at March 2010, they had significant debt levels.[87] ANZ worked with the customers on plans to manage their debt burden. For example, in September 2010, ANZ offered them an extension of their facilities on the basis that there be an orderly reduction in debt.[88] The customers refused that offer.[89] In 2011, ANZ did not take enforcement action against the customers, despite the fact that their debt levels consistently exceeded limits,[90] and instead gave them time to refinance or obtain new equity partners.[91] It was only when it became apparent, by September 2011, that the customers were unable to do so, and had not otherwise developed a viable strategy to repay their debt, that the default notice was issued.[92] The customers subsequently observed that they "*very much appreciate[d] how ANZ [had] handled this situation thus far, and acknowledge[d] the timeframes involved*".[93]

46. Mr Steinberg gave evidence that, in his view, where a customer is in default of its obligations, it is fair and reasonable for a bank to issue a default notice in order to preserve its position.[94] Further, at the meeting in question, ANZ representatives "*expressed the seriousness of the position and indicated that it was the last roll of the dice*",[95] consistent with the bank issuing a default notice in respect of the customers' unpaid debt. While Mr Steinberg accepted that ANZ's conduct in attending a meeting and issuing a default notice involved inconsistency,[96] it does not follow that ANZ failed to act fairly and reasonably within the meaning of clause 2.2 of the CBP. The CBP does not impose an obligation on banks to always act 'consistently', but rather, fairly and reasonably in a consistent and ethical manner, in light of the customer's conduct, the bank's conduct, and the parties' contract.

47. In relation to the customers' offer in January 2012 to settle their indebtedness to ANZ for $2 million, Mr Steinberg's evidence was that, in his view, at the time, ANZ was entitled not to accept that offer, even though with the benefit of hindsight it might be said that the offer should have been accepted, subject to acceptable terms.[97] The offer was made by

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85 The customer names are subject to a non-publication direction.
86 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0109 [56].
87 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0109 [58].
88 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0109 [59].
89 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0109 [59].
90 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0110 [62].
91 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0110 [61] and [63].
92 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0110 [64]-[66].
93 Annexure B to the Steinberg 4-20 statement: ANZ.999.011.0096 at .0110-.0111 [69]; Exhibit LMB-41 to Annexure B to the Steinberg 4-20 Statement: ANZ.030.003.0242; see also LMB-43 to Annexure B to the Steinberg 4-20 Statement: ANZ.030.003.0427.
94 T3212.40-42, T3213.1-11.
95 T3212.46-47.
96 T3212.22-23.
97 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0113 [86] and .0114 [93]; T3217.41-42 and T3218.15-23.

the customers following a protracted period of negotiations between the parties;[98] it was made after the parties had exchanged versions of a deed of settlement which ANZ anticipated would be the final version of the agreement;[99] it represented a significant departure from and deterioration in the preceding offers made by the customers;[100] and it was for far less than the amount of the residual debt.[101] Further, at that time, ANZ held security over real property and livestock that possibly exceeded the $2 million offered.[102] In the context of protracted negotiations in which both sides were legally represented, the fact that ANZ did not explain why it did not accept the $2 million offer, or invite a further offer, does not constitute a breach of CSEs or the CBP. There was no evidence, or suggestion, that the customers needed or sought such information, or that ANZ would not have provided it if asked.

48. Further, Mr Steinberg's evidence to the Commission that the offer could have been accepted by ANZ was informed by facts not known at the time of the settlement discussions: in particular, that ANZ would ultimately accept a payment of $1.2 million in settlement of the customers' debt of $7.7 million.[103] The conduct in question has to be assessed not by a hindsight analysis, but prospectively, as at the time when the offer was made and not accepted by ANZ. Not accepting the offer was an available decision that cannot be said to have been inappropriate in the circumstances. It did not involve any breach of CSEs or misconduct.

A.4.7 Reasons for conduct falling below CSEs and misconduct

49. Counsel Assisting submitted that, in relation to the Landmark case study, it was open to the Commission to conclude that the misconduct, and conduct which fell below CSEs, was attributable to a lack of preparation by ANZ before the acquisition of the Landmark loan book, and the culture within Lending Services prior to August 2014.[104] ANZ submits that these findings are not open on the evidence.

50. The instances of conduct falling below CSEs and misconduct in relation to former Landmark customers must be considered in context. The case studies examined by the Commission, and in respect of which findings may be made, involved 12 customer groups. Upon its acquisition of the Landmark loan book, ANZ took on approximately 4,500 new customers, with a total of 7,124 loans.[105] The 12 customer groups thus represent about 0.27% of total Landmark customers. There is no basis for concluding that they are in any way representative of the treatment of the entire loan book as a whole. Further, between 2010 and 2017, ANZ received relatively few complaints from former Landmark customers, and was involved in only a small number of dispute resolution procedures.[106] Lending Services receives, annually, approximately 400-500 new accounts (with approximately 400 or 500 leaving Lending Services each year), amounting to a movement of approximately 3,200 to 4,000 files during the period March 2010 to August 2014.[107] In these circumstances, there is no proper evidentiary foundation from which the Commission could conclude that systemic (cultural or otherwise) issues existed within

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98 T3217.46-3218.19.

99 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0110 [67].

100 In late October 2011, the customers and ANZ agreed that in full and final settlement of the customers' debt, they would apply $150,000 from the proceeds of a cattle sale in October 2011 in immediate reduction of their debt; they would make a further partial payment of $2.5m by 30 June 2012; and ANZ would be entitled to 35% of the net proceeds of legal action the customers had taken in the United States (up to a cap of $6.3m). On 9 November 2011, the customers informed ANZ that they would not be able to meet the terms of settlement agreed in October 2011. They proposed instead that ANZ accept a payment of $3m by 30 June 2012, and 35% of the net proceeds of the United States legal action up to a cap of $4.5m. ANZ rejected this proposal. On 17 November 2011, the customers proposed that $150,000 in funds held in court be released to ANZ in immediate debt reduction; that ANZ receive $2.85m in permanent debt reduction by 30 June 2012, and 35% of the United States legal action proceeds (up to a cap of $6.3m); and in exchange, ANZ would release the securities it held. The parties then exchanged various draft deeds for several months (although none was ultimately executed) (Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0110-0112 [67]-[76]).

101 T3218.1-12; Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0110-0111 [67]-[72].

102 T3219-3220; Exhibit LMB-50 to Annexure B to the Steinberg 4-20 Statement: ANZ.030.001.0294. Mr Steinberg gave evidence that whilst ANZ's prudential requirements provided that non-real property collateral was not taken into account when estimating realisable value, the livestock and other stock over which ANZ held a mortgage in this case was potentially of "considerable value".

103 Annexure B to the Steinberg 4-20 Statement: ANZ.999.011.0096 at .0113 [86].

104 T4106.41-4107.32.

105 See paragraph 5, above.

106 See paragraph 6, above.

107 T3302.24-32.

Lending Services which caused particular decisions or communications to be made which fell below CSEs or amounted to misconduct. There is no evidence upon which the Commission could conclude that the conduct affected a broader customer group.

51. The conduct about which the Commission heard evidence was not uniform or consistent, such as to suggest that particular cultural or systemic issues existed between 2010 and 2014. The conduct was fact specific and not attributable to broader cultural considerations.

52. Nor does the evidence support a connection between any lack of preparation by ANZ to receive new Landmark customers in 2010 and the conduct about which the Commission has heard evidence. When the specific examples of conduct falling below CSEs, or misconduct, are examined – such as a failure to honour a client's cheques; a delay in making funding available; not accepting a reasonable settlement offer; not taking sufficient steps to assess the suitability of a guarantor; or cases of poor communication – the Commission should not conclude that the relevant conduct was attributable to any lack of preparation in 2010.

53. The fact that ANZ has made changes to its culture in both front line and Lending Services[108] does not evidence systemic issues (such as issues relating to culture). Mr Steinberg, who has held positions of leadership within Lending Services since 2001,[109] gave evidence to this effect.[110] That evidence ought to be accepted.

B. KATHERINE BRANCH CASE STUDY

B.1 The evidence

54. This case study concerned a customer who was receiving support from Save The Children (**STC**) at the time that she opened an ANZ account at the Katherine branch on 21 December 2017. The account was opened after the customer completed an "A-Z review" with a bank officer employed at the Katherine branch (the **banker**). The customer did not give evidence.

55. Ms Do, STC Senior Family Support Worker, said that the customer's source of income at the time was government benefits, 50% of which was paid to a "Basic Card" and the remaining 50% of which was paid to the customer's bank account.[111] In mid-January 2018, the fortnightly government benefits paid to the customer's account totalled $728.18.[112] If the customer was receiving that amount in December 2017, plus the same amount to her Basic Card, this is consistent with the information that the customer provided about her income in the A-Z review.[113] Ms Do's evidence was that the customer confidently answered questions about her income and expenses in the A-Z review.[114] This indicates that the customer had some financial literacy skills. There is no evidence to suggest that she did not understand the concept of an overdraft or overdrawn fees. It is likely that she did understand those concepts, as STC had been assisting her with her household budget because she had incurred overdrawn fees of about $200 a month on her bank account with another financial institution before becoming a customer of ANZ.[115]

56. The effect of ANZ opening a Pensioner Advantage account (instead of an Access Basic account) for the customer on 21 December 2017 is that she incurred dishonour fees of $24 during the period to 15 June 2018.[116] Those fees were incurred on four transactions between the customer and a third party that ANZ disallowed due to insufficient funds.[117]

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108 T3301.33-46; Exhibit 14.24: ANZ.800.076.0761 at .0763-.0765.
109 Steinberg 4-01 Statement: ANZ.999.010.0069 at .0072 [1]-[10].
110 T3301.4-31; T3302.1-32.
111 T3989.18-24.
112 Exhibit TCT2-19 to the witness statement of Tony Tapsall in response to Rubric 4-41 (Exhibit 4.204) (ANZ.999.016.0001) (the **Tapsall 4-41 Statement**): ANZ.800.733.0046 at .0047.
113 Exhibit TCT2-18 to the Tapsall 4-41 Statement: ANZ.800.769.0493.
114 Witness statement of Thy Do (Exhibit 4.198) (WIT.0001.0075.0001) (the **Do Statement**) at .0006 [23].
115 Do Statement: WIT.0001.0075.0001 at .0002 [6]; T3989.25-3990.30.
116 Exhibit TCT2-19 to the Tapsall 4-41 Statement: ANZ.800.733.0046. The $24 fees incurred by the customer were refunded on 11 July 2018.
117 27 March 2018 (Exhibit TCT2-19 to the Tapsall 4-41 Statement: ANZ.800.733.0046 at .0052); 10 April 2018 (Exhibit TCT2-19 to the Tapsall 4-41 Statement: ANZ.800.733.0046 at .0052); 23 April 2018 (Exhibit TCT2-19 to the Tapsall

Although an informal overdraft facility could attach to a Pensioner Advantage account at that time,[118] ANZ's process for approving or declining informal overdrafts[119] operated to decline an informal overdraft facility for this customer on these occasions.[120]

57. The Commission has evidence of the banker's recollection and relevant ANZ records,[121] and Ms Do's recollection,[122] as to the discussions and events that resulted in a Pensioner Advantage account being opened for the customer. Exhibit TD-1 to Ms Do's statement is described as containing Ms Do's file notes of her interactions with ANZ on her customer's behalf.[123] It appears to contain extracts from file notes and a hearsay account of certain matters that are now attributed to Ms Do's colleague.[124] Any contemporaneous file notes made by Ms Do of her dealings with and on behalf of the customer are not in evidence.[125] ANZ does not suggest that Ms Do did not endeavour to give an honest account of her recollection of the events, but does submit that her recollection is unreliable. ANZ accepts that the banker has also had some difficulty in recalling the relevant events in detail, given the passage of time.[126] However, ANZ rejects any suggestion that the banker's account is less likely to be truthful or reliable because of the circumstances in which it was given.[127] The Commission should infer that the banker appreciated the importance of telling the truth in those circumstances.

58. The relevant inconsistency between the banker and Ms Do concerns a discussion towards the end of the A-Z review. According to both Ms Do and the banker, Ms Do stated that the customer wanted an Access Basic account.[128] According to Ms Do, the banker replied that she was unable to open Access Basic accounts from the branch and said *"something along the lines of 'the system doesn't allow me to open that account'"*.[129] Although Ms Do's statement said that the banker stated that the Access Basic account was not available to new customers,[130] Ms Do said during her evidence in chief and confirmed during cross-examination that she had no recollection of the banker having said anything to that effect.[131] According to the banker, the banker stated both that the customer had said that she wanted a Visa debit card and that the Access Basic account did not come with a Visa debit card.[132] The banker describes the card requested as a *"pink Visa debit card"*,[133] and Ms Do recalls the customer selecting a pink card.[134] In closing submissions, Counsel Assisting urged the Commission to prefer Ms Do's account to the account of the banker.[135]

59. It is submitted that Ms Do's account should not be preferred for the following reasons:

(a) Ms Do's statement is incorrect in an important respect: she had no recollection of the banker saying that an Access Basic account was not available to new customers.[136] This casts doubt on the reliability of the balance of Ms Do's account of what was said by the banker towards the end of the A-Z review.

4-41 Statement: ANZ.800.733.0046 at .0054); 22 May 2018 (Exhibit TCT2-19 to the Tapsall 4-41 Statement: ANZ.800.733.0046 at .0056).

118 It has not been possible to attach an informal overdraft facility to an ANZ Pensioner Advantage account since 1 June 2018: see Exhibit TCT-12 to the witness statement of Tony Tapsall in response to Rubric 4-13 (Exhibit 4.202) (ANZ.999.012.0030) (the **Tapsall 4-13 Statement**): ANZ.800.772.0089 at .0090.

119 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0043-.0044 [55]-[59A]; Supplementary witness statement of Tony Tapsall in response to Rubric 4-13 and Rubric 4-41 (Exhibit 4.205) (ANZ.999.017.0001) (the **Tapsall Supplementary Statement**) at .0002-.0003 [8]-[16].

120 On each of the four occasions, the transaction is initially recorded in the statement and an overdrawn fee charged. The transaction is then reversed and the overdrawn fee "waived" and re-credited to the account.

121 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0018-.0022 [71]-[90].

122 Do Statement: WIT.0001.0075.0001 at .0005-.0009 [19]-[35].

123 Do Statement: WIT.0001.0075.0001 at .0002-.0003 [8].

124 Do Statement: WIT.0001.0075.0001 at .0002-.0003 [8] and .0003-.0004 [11]-[12].

125 ANZ requested copies of Ms Do's contemporaneous notes on 4 July 2018, however no notes were provided.

126 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0021 [86].

127 Cf T4145.43-45.

128 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0022 [89]; Do Statement: WIT.0001.0075.0001 at .0007-.0008 [30].

129 Do Statement: WIT.0001.0075.0001 at .0007-.0008 [30].

130 Do Statement: WIT.0001.0075.0001 at .0007-.0008 [30].

131 T3998.33-3999.7, 4009.15-17.

132 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0022 [89].

133 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0020 [84].

134 T3998.1-7.

135 T4145.32-41.

136 Do Statement: WIT.0001.0075.0001 at .0007-.0008 [30]; T3998.33-3999.7, 4009.15-17.

(b) It is improbable that the banker said she was unable to open Access Basic accounts, yet (according to Ms Do) the banker said only two days earlier that Ms Do's client would need an appointment in order to open an Access Basic account.[137]

(c) Access Basic accounts are open to new customers and there is no incentive for staff to open Access Advantage or Pensioner Advantage accounts over Access Basic accounts.[138] When the banker proposed that the customer wait and see whether she incurred overdrawn fees before deciding whether to change to an Access Basic account,[139] it is unlikely that the banker did so for any reason other than that the customer requested a Visa debit card, which is not available on an Access Basic account.

60. The question is not whether Ms Do's account or the banker's account should be preferred, but whether the evidence before the Commission supports a finding that the banker told Ms Do and the customer that an Access Basic account was not available to new customers[140] and/or could not be opened from the branch. For the reasons above, the evidence does not support any such finding. For the same reasons, the Commission should not find on the basis of Ms Do's evidence[141] (contradicted by the banker[142] and unsupported by any documentary evidence) that the banker told Ms Do and the customer on 1 March 2018 that the computer would not let her change the customer's account type from the branch.

61. However, ANZ accepts that it was not good enough for the banker to suggest to the customer that she could contact the banker to change the account type if she experienced overdrawn fees nor (on Ms Do's account) to tell the customer that overdrawn fees and dishonour fees *"should not be an issue as long as you don't overdraw your account"*.[143] ANZ considers that the banker should have instead informed the customer of the ability to switch off the informal overdraft facility[144] or explored with the customer whether the Access Basic account without a Visa debit card would have been more suitable to her overall needs if there was a concern about overdrawn fees. One of the key objectives of the A-Z review is to properly understand the customer's needs (not to *"challenge"* a customer's request for a particular product).[145]

B.2 Proposed findings

62. Counsel Assisting has submitted that it is open to the Commission to find that: (a) ANZ failed to make information available in an accessible manner to the customer about banking services that may have been relevant to her; and (b) after ANZ received a request to find details of appropriate accounts available for the customer, ANZ failed to provide details of accounts which were suitable to the customer's needs, and that this conduct constituted a breach of clauses 8(a) and (b) of the CBP and also fell below CSEs.[146] ANZ submits that these findings should not be made. The evidence shows that the customer's social worker had accessed information on ANZ's website about its Access Advantage, Pensioner Advantage and Access Basic accounts, including information about the fees and charges of the three accounts and the fact that the Access Basic account did not incur dishonour or overdrawn fees.[147]

63. Counsel Assisting also submitted that it is open to the Commission to find that ANZ: (a) failed to adequately assist the customer and her sister in meeting identification requirements by failing to notify them of the differing ways in which the identification

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137 Do Statement: WIT.0001.0075.0001 at .0005 [17]; T3994.1-7.

138 T4039.30-31, 4058.6-4060.16; Tapsall 4-13 Statement: ANZ.999.012.0030 at .0040-.0043 [44]-[54] and .0044 [60]-[61]; Exhibit TCT-10 to the Tapsall 4-13 Statement: ANZ.800.634.3162 at .3167.

139 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0022[90]; Do Statement: WIT.0001.0075.0001 at .0008 [31]; T3999.19-21.

140 See the submission made by Senior Counsel Assisting notwithstanding Ms Do's concession: T4146.27-28.

141 Do Statement: WIT.0001.0075.0001 at .0011 [45].

142 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0023-.0024 [97].

143 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0022 [90]; T4057.17-24.

144 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0045-.0046 [71]; Exhibit TCT-16 to the Tapsall 4-13 Statement: ANZ.800.645.0171; Tapsall Supplementary Statement: ANZ.999.017.0001 at .0003 [17]-[19].

145 T4042.16-4043.41; cf T4146.36-42.

146 T4146.1-7, .20-28.

147 Do Statement: WIT.0001.0075.0001 at .0003 [10]; T3991.16-33.

requirements could be met, in breach of clause 8(c) of the CBP;[148] and (b) failed to meet CSEs in that it *"failed to help [the customer] meet identification requirements over the phone"* and failed to take into account geographic barriers that made it difficult for the customer to attend the branch to verify her identity.[149] ANZ submits that no finding of breach of clause 8(c) of the CBP should be made. The banker says that she provided ANZ's "KYC form" listing all forms of acceptable identification, including the identification that may be used by indigenous Australians, but suggested in conversation that a birth certificate and letter from Centrelink could be provided due to her experience that the community forms of identification were not common in Katherine.[150] Ms Do says that she called the Katherine branch and listed the identification that the customer and her sister had available and was told (correctly) that those forms of identification were acceptable.[151] Neither version of events supports the proposed finding. On the banker's version, all ways of meeting the identification requirements were notified. On Ms Do's version, the customer and her sister were advised that the identification listed would be sufficient, and there was no cause for them to be advised about any alternative means of identification.

64. ANZ acknowledges that it may prove difficult for remote customers to attend a branch to verify their identity if they forget their security password and fail security questions over the telephone. ANZ has recently commenced discussions with a third party to explore alternative ways in which those customers might verify their identity.[152] ANZ does not accept, however, that the identification requirements applied in the case study were unduly onerous or fell below CSEs. ANZ issued the customer with a security password of her choice for the purpose of phone identification.[153] The customer was only required to answer additional questions over the phone when she could not remember her chosen security password. Those questions concerned matters including the customer's date of birth and telephone number.[154] The call transcripts show that the customer frequently forgot her chosen password, and that she had difficulty on occasions in answering the security questions designed to identify her without the password. These security requirements are however important and necessary to protect customers from potential fraud.

65. Counsel Assisting submitted that it is open to the Commission to find that ANZ failed to appropriately train its staff who were regularly dealing with Aboriginal and Torres Strait Islander customers to be culturally aware, in breach of clause 8(d) of the CBP.[155] ANZ submits that this finding should not be made. ANZ takes steps to increase staff awareness of the needs of indigenous customers, including by offering online cultural awareness training to all ANZ staff.[156] Further, ANZ staff receive training on the flexible identification requirements for indigenous customers as part of its onboarding process.[157] It is accepted that there is no additional training on the identification requirements for indigenous customers for ANZ staff more likely to deal with indigenous customers and that in the circumstances of the banker's interactions with the customer, ANZ's training on this matter was not effective in that the banker did not expressly refer to the flexible identification requirements for indigenous customers.[158] However, there is no evidence of a lack of cultural awareness training for staff who regularly deal with Aboriginal and Torres Strait Islander customers.

66. Counsel Assisting also submitted that ANZ had failed to effectively train the Katherine branch staff member who conducted the A-Z review with the customer to assist Aboriginal and Torres Strait Islander customers, and that this fell below CSEs.[159] ANZ accepts that

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148 T4146.11-14.
149 T4147.6-14.
150 Tapsall 4-41 Statement: ANZ.999.016.0001 at .00019 [77]-[78]; Exhibit TCT2-16 to the Tapsall 4-41 Statement: ANZ.800.556.1375.
151 Do Statement: WIT.0001.0075.0001 at .0005 [19].
152 T4067.44-4068.29.
153 On one occasion, the customer chose her own first name: Exhibit TCT2-21 to the Tapsall 4-41 Statement: ANZ.800.780.0001 at .0004.
154 T4064.41 – 4065.26; Exhibit TCT2-21 to the Tapsall 4-41 Statement: ANZ.800.780.0001 at .0001-.0004.
155 T4146.14-17.
156 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0035 [19(c)].
157 T4070.9-20.
158 T4070.22-31.
159 T4147.16-20.

the banker's response regarding overdrawn and dishonour fees was inappropriate (regardless of whether the customer was indigenous or not)[160] however the evidence does not establish that this was the result of inadequate training.

67. Counsel Assisting submitted that ANZ's conduct fell below CSEs in that the questions posed in the A-Z review were not appropriate for someone with limited English and limited financial literacy and that the security questions posed for the customer for internet banking were inappropriate.[161] The Commissioner has questioned whether the language involved in identifying a customer's needs invokes an expression of "want", which may then form the basis of the sale of a particular product to a customer.[162] It is submitted that these findings should not be made. Even assuming that the customer had limited financial literacy,[163] Ms Do's evidence is that the customer was confident in answering questions about her income and expenses.[164] Ms Do is critical of the banker for having asked questions about savings goals, but these were reasonable questions to ask in circumstances where Ms Do herself had told the banker that the customer wanted a savings account.[165]

68. Ms Do's evidence is that the customer looked confused and gave vague responses during the A-Z review about what she was saving for, answering *"maybe furniture"*, with a quizzical look.[166] In her statement, Ms Do says that it was *"apparent to me"* that the customer *"did not understand the substance or purpose of these questions"*.[167] In circumstances where the customer has not been called, Ms Do's interpretation of her facial expression does not support a finding that the customer did not wish to or was not able to engage in a discussion about saving. In her evidence in chief, Ms Do merely expressed uncertainty about whether or not the customer had understood the questions.[168] This is another instance in which Ms Do's statement is inconsistent with her evidence in chief. Soon after opening the account, the customer enquired about an ANZ personal loan to buy beds, sheets and blankets.[169] This is consistent with the customer needing, and wanting to save for, furniture. For these reasons, the Commission should not find that the customer was unable to answer questions about her savings goals, that her answer to those questions was confused, or that those questions were inappropriate. Nor should the Commission find that the banker proposed savings of $5,000, as claimed by Ms Do.[170] This is contrary to the banker's recollection and the contemporaneous record of the interview.[171] In any event, it is clear from Ms Do's evidence that the banker did not exert any pressure to save a specific amount, or to establish a direct debit to meet any savings target.[172] No such direct debit was set up.[173]

69. Counsel Assisting submitted that it is open to the Commission to find that ANZ failed to assist the customer to change her account type to an Access Basic account, or to open an Access Basic account on multiple occasions, and that this fell below CSEs.[174] ANZ accepts that this finding is open.

C. GROOTE EYLANDT CASE STUDY

C.1 Informal overdrafts generally

70. ANZ exercises a discretion to extend credit to customers to meet unplanned, short term borrowing needs in circumstances where a transaction would otherwise be declined for

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160 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0022 [90]; T4057.17-24.
161 T4147.1-4.
162 T4147.22-42.
163 See [55] above.
164 Do Statement: WIT.0001.0075.0001 at .0006 [23].
165 T3995.30-34; Do Statement: WIT.0001.0075.0001 at .0005-.0006 [21].
166 T3995.40-3996.14; Do Statement: WIT.0001.0075.0001 at .0006 [24].
167 Do Statement: WIT.0001.0075.0001 at .0006 [24].
168 T3995.40-3996.6.
169 Exhibit TCT2-21 to the Tapsall 4-41 Statement: ANZ.800.780.0001 at .0005.
170 Do Statement: WIT.0001.0075.0001 at .0006 [24]; T3996.8-14.
171 Tapsall 4-41 Statement: ANZ.999.016.0001 at .0021 [85]; Exhibit TCT2-18 to the Tapsall 4-41 Statement: ANZ.800.769.0493 at .0496.
172 Do Statement: WIT.0001.0075.0001 at .0006-.0007 [26]; T3996.39-3997.3.
173 T4057.35-40; Tapsall 4-41 Statement: ANZ.999.016.0001 at .0021 [85]; Exhibit TCT2-19 to the Tapsall 4-41 Statement: ANZ.800.733.0046.
174 T4146.44-4147.1.

insufficient funds. ANZ will provide such credit to a customer if, at the time the credit is required, the customer "passes" exclusion criteria that are based on account and account-holder attributes. If an exclusion criterion is triggered, ANZ will decline to extend credit by way of an informal overdraft except in very limited circumstances.[175] The exclusion criteria applied by ANZ are detailed and subject to ongoing review. Among other matters, they generally preclude informal overdrafts: (a) on certain types of accounts (including the Access Basic account and, from 1 June 2018, the Pensioner Advantage account); and (b) where a customer has "opted out" of having the facility by submitting a form or making a request in branch or over the phone.[176] More recently, exclusion criteria have been introduced to apply to customers who receive more than a specified proportion of their income from Centrelink or who have received unemployment benefits within a specified prior period.[177]

71. ANZ notifies its customers of the possibility that an informal overdraft may become attached to an account via clause 2.19 of its Terms and Conditions.[178] The fees and charges that apply to the use of an informal overdraft are specified in the Terms and Conditions and also in the Fees and Charges booklet that forms part of ANZ's Terms and Conditions.[179] ANZ customers are charged interest, but not fees, on overdrawn amounts less than $50.[180] On overdrawn amounts of more than $50, customers are charged a fee of $6 per business day that the overdrawn amount remains above $50, up to a maximum total fee of $60 per month.[181] ANZ has about 2,160 retail customers on Groote Eylandt, who hold about 5,260 ANZ retail accounts.[182] As at 23 May 2018, informal overdrafts were attached to 179 transaction accounts held by ANZ's retail customers (not limited to indigenous customers) on Groote Eylandt. The average overdrawn amount on those accounts at that time was $6.46. Further, 39% of the accounts had a maximum overdrawn allowance of $50 or less and were unlikely, therefore, to incur overdrawn fees.[183]

C.2 Clients 1 and 2

72. Mr Bowden of Anglicare NT gave evidence of dealings between a Financial Capability worker formerly employed by Anglicare NT (the **FCW**) and two of ANZ's Groote Eylandt customers (**Client 1** and **Client 2**) in relation to informal overdrafts. Mr Bowden's evidence was based on his review of the FCW's case notes and his discussions with the FCW regarding the notes.[184] ANZ's records demonstrate that Mr Bowden's evidence in relation to Clients 1 and 2 is inaccurate or confused in material respects.

73. **Client 1.** Mr Bowden gave evidence that: (a) Centrelink referred Client 1 to Anglicare NT on 14 December 2017 for assistance; (b) Client 1's account was repeatedly overdrawn and his Centrelink payments were being used to clear the overdrawn amount, leaving him without funds; (c) Client 1 struggled to understand the concept of an overdraft; (d) the FCW alerted Client 1 to the possibility of "opting out" of his informal overdraft and he agreed to this; (e) a month later, on 15 January 2018, the FCW and a Centrelink worker accompanied Client 1 to ANZ's Groote Eylandt agency; (f) at this time, Client 1 had an informal overdraft of up to $1,000; (g) Client 1 signed a form to remove the overdraft but

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175 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0036 [22], .0036 [25A] and .0043 [56]-[58]; Exhibit TCT-12 to the Tapsall 4-13 Statement: ANZ.800.772.0089.

176 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0043-.0044 [58]-[59] and .0045-.0046 [71]; Exhibit TCT-12 to the Tapsall 4-13 Statement: ANZ.800.772.0089; Exhibit TCT-16 to the Tapsall 4-13 Statement: ANZ.800.645.0171; Tapsall Supplementary Statement: ANZ.999.017.0001 at .0003 [17]-[18]; T4078.43-4080.2, T4082.21-4083.8 and T4093.29-45.

177 Exhibit TCT-12 to the Tapsall 4-13 Statement: ANZ.800.772.0089; T4079.13-.28, T4081.23 – 4082.19 and T4093.5-27.

178 Exhibit TCT-11 to the Tapsall 4-13 Statement: ANZ.800.634.1128 at .1153-.1155.

179 Exhibit TCT-13 to the Tapsall 4-13 Statement: ANZ.800.634.0568.

180 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0033 [13].

181 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0044-.0045 [63]-[68]; Exhibit TCT-11 to the Tapsall 4-13 Statement: ANZ.800.634.1128 at .1153 (clause 2.19); Exhibit TCT-13 to the Tapsall 4-13 Statement: ANZ.800.634.0568 at .0577; T.4073.25-4074.26 and T4091.14-24.

182 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0033 [13].

183 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0037-.0038 [27]-[28].

184 Witness statement of Philip Bowden (Exhibit 4.200) (WIT.0001.0076.0001) (the **Bowden Statement**) at .0004 [18]; Exhibit PSB-2 to the Bowden Statement: RCD.0024.0025.0001.

was left with a debt of $600 to pay off in the coming weeks; and (h) the FCW ensured that ANZ only took 10% of Client 1's Centrelink payments each week.[185]

74. ANZ's records demonstrate that Mr Bowden's evidence, as summarised above, is incorrect in the following material respects. *First*, Client 1 signed and submitted a request to ANZ to switch off his informal overdraft facility on 8 December 2017 and ANZ actioned that request on the same day, approximately one week before he is said to have met with the FCW, and over a month before he attended ANZ's agency with the FCW and the Centrelink worker (apparently to sign and submit a form to remove his informal overdraft).[186] *Second*, the assertion that Client 1's informal overdraft had a limit of $1,000 is unsupported by any documentary evidence and must be doubted. Neither Mr Bowden's statement nor the FCW's notes support this assertion. ANZ does not inform its customers of the informal overdraft limits available on their accounts, as those amounts may change from time to time.[187] The only way a customer could know the limit applied to a transaction account from time to time is by reference to the amount in fact overdrawn on the account. Based on the evidence before the Commission, the maximum amount by which Client 1's Access Advantage account was overdrawn was $327.72 on 21 November 2017.[188] *Third*, the documents before the Commission do not support the assertion that, as at 15 January 2018, Client 1 had a "debt of $600" on his account. The Access Advantage account statement shows that Client 1's account had a credit balance of $2.61 from 12 to 17 January 2018.[189] These discrepancies cast doubt over whether the notes that formed the basis for Mr Bowden's evidence even related to Client 1. In any event, ANZ submits that the Commission should reject the aspects of Mr Bowden's evidence that are contradicted by ANZ's records.

75. **Client 2.** Mr Bowden gave evidence that: (a) the FCW met with Client 2 on 30 November 2017 to discuss her income and expenses; (b) at that time, Client 2's ANZ Access Advantage account was overdrawn by $310.00, and the notes state that she had no understanding of the concept of an informal overdraft; (c) the FCW explained how overdrafts work, then Client 2 and the FCW called ANZ to cancel her overdraft; (d) after being told that she needed to attend the branch to do so, Client 2 and the FCW travelled approximately 25 minutes by car to ANZ's Groote Eylandt agency, where Client 2 was told that she could not cancel her informal overdraft at that time because her account was "locked" and that she would need to come back the next day (Friday) after her Centrelink benefit had been paid into the account and the overdrawn amount was cleared; (e) Client 2 wanted to use that payment to purchase food and cigarettes, rather than to clear the overdrawn amount; (f) the FCW went with Client 2 to the bank and assisted her to withdraw 90% of her Centrelink payment, with the remaining 10% being applied to reduce the overdrawn amount; and (g) her account remained "locked" until the overdraft was paid off.[190]

76. Again, almost all material aspects of Mr Bowden's evidence, as summarised above, are incorrect when compared to ANZ's records. In particular, the evidence confuses two distinct processes: the request to remove Client 2's informal overdraft from her Access Advantage account, and the application of the "90% arrangements" to that account.

77. As to the removal of the informal overdraft, Client 2 signed and submitted the relevant form on 29 November 2017. ANZ actioned the request at approximately 8.14 pm on the same day – that is, *before* she met with the FCW on 30 November 2017.[191] As to the 90% arrangements, where an ANZ customer with an overdrawn account is a Centrelink recipient, and the customer requests that these arrangements be put in place, the customer can withdraw up to 90% of his or her Centrelink payment, with the remaining 10% (only) being applied to the overdrawn balance.[192] ANZ's records show that the 90%

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185 Bowden Statement: WIT.0001.0076.0001 at .0004-.0005 [19]-[25]; Exhibit PSB-2 to the Bowden Statement: RCD.0024.0025.0001 at .0003.
186 Exhibit 4.210: ANZ.800.852.0002; T4094.1-5; Exhibit 4.211: ANZ.800.853.0095 at .0103; T4094.18-4095.14.
187 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0044 [65].
188 Exhibit 4.208: ANZ.800.764.3172 at .3187.
189 Exhibit 4.208: ANZ.800.764.3172 at .3190.
190 Bowden Statement: WIT.0001.0076.0001 at .0005-.0006 [27]-[35].
191 Exhibit 4.212: ANZ.800.852.0001; Exhibit 4.217:ANZ.800.856.0731 at .0740.
192 Tapsall 4-13 Statement: ANZ.999.012.0030 at .0046-.0047 [75]-[78].

arrangements were put in place on Client 2's Access Advantage account on 30 November 2017.[193] On 30 November and 1 December 2017, Client 2 attended ANZ's Groote Eylandt agency and withdrew approximately $285 and $193 (respectively), representing approximately 90% of the Centrelink payments she received on each day.[194]

C.3 Proposed findings

78. Counsel Assisting submitted that the Code of Operation (**Code**) is a widely adopted benchmark for conduct and it is open to the Commission to find that ANZ engaged in misconduct by not complying with the Code in requiring customers to "opt in" to the 90% arrangements.[195]

79. ANZ accepts that it does not currently meet the best practice guidelines set out in the Code,[196] in that it does not apply the 90% arrangements unless requested to do so by the customer.[197] The evidence does not support the proposition that the Code is a "*widely adopted benchmark*". None of the statements provided by other banks discuss whether or how those institutions have adopted the Code.[198] Further, Ms Edwards of Financial Counselling Australia gave evidence that the Code was not applied by banks in a systemic way.[199] Nonetheless, ANZ accepts that its failure to comply with the best practice guidelines in the Code constitutes, at least, a failure to meet CSEs.

80. Counsel Assisting also submitted that it is open to the Commission to find that ANZ has inadequate internal systems because, although the Code anticipates that customers who received a defined benefit and have an overdrawn account should be placed on the 90% arrangements, ANZ has no systems for monitoring people who are eligible for those arrangements.[200] ANZ accepts that its systems and processes do not readily allow ANZ automatically to implement the 90% arrangements for people who are eligible. ANZ is presently considering whether these deficiencies can be addressed.[201]

81. Next, Counsel Assisting submitted that it is open to the Commission to find that ANZ may have engaged in misconduct by: (a) failing to provide effective disclosure of information relating to the attachment of informal overdrafts to accounts, and the applicable fees and interest charges in breach of clause 3.1(b)(i) of the CBP; and (b) failing to make that information available in an accessible manner to customers who are members of remote indigenous communities contrary to clause 8(a) of the CBP.[202]

82. ANZ submits that the evidence does not support the proposed findings. Beyond Mr Tapsall's acknowledgment that reading ANZ's Terms and Conditions[203] might be "a difficult prospect",[204] there is no evidence that the Terms and Conditions or Fees and Charges[205] documents are inaccessible to all customers, or to any particular customers, or that ANZ does not provide information to members of remote indigenous communities in an accessible manner. Any findings made on the basis of an implicit assumption that all members of remote indigenous communities suffer from literacy or financial literacy difficulties would be contrary to the warning emphasised by Mr Boyle in his statement and

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193 Exhibit 4.217: ANZ.800.856.0731 at .0740. Refer also to Exhibits 4.213 (ANZ.800.851.0002) and 4.214 (ANZ.800.857.0001), being the call recording and transcript of a conversation between ANZ's Groote Eylandt agency and the ANZ call centre on 30 November 2017.

194 Exhibits 4.213 (ANZ.800.851.0002) (call recording) and 4.214 (ANZ.800.857.0001 at .0002) (transcript) (30 November 2017); Exhibits 4.215 (ANZ.800.851.0003) (call recording) and 4.216 (ANZ.800.857.0004 at .0004) (transcript) (1 December 2017).

195 T4150.20-25.

196 Exhibit TCT-17 to Tapsall 4-13 Statement: ANZ.800.643.0441. The Code expressly states that it is not legally binding at .0442.

197 T4086.7-16.

198 Witness statement of Ms Sian Lewis of the Commonwealth Bank of Australia dated 28 June 2018 (Exhibit 4.220) (CBA.9000.0078.0001); Witness statement of Mr Robert Musgrove of Bendigo and Adelaide Bank dated 14 June 2018 (Exhibit 4.221) (BAB.9000.0001.0001); Witness statement of Mr Anthony Hampton of the Traditional Credit Union dated 19 June 2018 (Exhibit 4.222) (TCU.0003.0001.0001).

199 Witness statement of Ms Lynda Edwards dated 22 June 2018: (Exhibit 4.140) (WIT.0001.0067.0001) at .0005 [29(b)]; T3739.16-3740.8.

200 T4151.10-16.

201 T4087.1-21.

202 T4150.25-38.

203 Exhibit TCT-11 to the Tapsall 4-13 Statement: ANZ.800.634.1128 at .1153-.1155.

204 T4073.12-23.

205 Exhibit TCT-13 to the Tapsall 4-13 Statement: ANZ.800.634.0568 at .0577.

in his oral evidence.[206] The proposed findings should not be made on the basis of Mr Bowden's evidence, based on the FCW's case notes, that Clients 1 and 2 were *"struggling to understand the concept of an overdraft"*.[207] Those case notes are factually incorrect in many respects and should be given no weight by the Commission (see [72] to [77] above). Each client submitted a request to switch off their informal overdrafts to ANZ within one week before being referred to Anglicare (see [73] and [76] above).

83. Counsel Assisting next submitted that it is open to the Commission to find that ANZ may have engaged in misconduct by continuing to charge clients high fees for informal overdrafts in circumstances where the overdraft was not sought by the client and the applicable fees and charges were not readily ascertainable. The finding of misconduct was sought on the basis of a failure by ANZ to act fairly and reasonably towards customers in breach of clause 3.2 of the CBP.[208] Counsel Assisting also submitted that ANZ's conduct in providing informal overdrafts to customers with low incomes with high rates of interest and high fees on an opt-out, rather than an opt-in, basis was contrary to CSEs.[209]

84. There is no evidence to support the proposed findings. In particular:

(a) The proposed misconduct finding relates to *"circumstances where the overdraft was not sought by the client and the fees and charges applicable to the informal overdraft were not readily ascertainable"*. ANZ submits that the Commission should not make a finding in these terms, which do not identify the particular circumstances to which the finding applies (for example, by reference to specific customers, transactions, dates etc). ANZ further submits that informal overdraft facilities do not attach to accounts where they are not *"sought by the client"*. The client or customer seeks the informal overdraft by requesting a transaction against an account containing insufficient funds.[210] This submission applies equally to the proposed finding of conduct falling below CSEs (*"on an opt-out rather than an opt-in basis"*).

(b) The proposed finding regarding conduct falling below CSEs relates to *"customers with low incomes"* to whom informal overdraft facilities are alleged or assumed to have been provided, however these customers are not identified and the concept of *"low income"* is undefined. ANZ's extensive exclusion criteria[211] are generally directed to excluding informal overdrafts for customers with incomes that might be considered low. By way of example only, and in addition to the exclusion criteria discussed at [70] above, overdraft facilities are not available (except in very limited circumstances): (a) where the total credits deposited in the account in the last six months were below a specified amount; (b) where the account was not in a credit position within a specified period; (c) where the account has been overdrawn for more than a specified period; or (d) where the customer has one or more ANZ accounts that was past its due date by more than a specified period.[212]

85. Finally, Counsel Assisting submitted that it is open to the Commission to find that ANZ was insufficiently concerned with placing customers in the most appropriate product and more concerned with revenue enhancement. Counsel Assisting submitted that, by granting informal overdrafts to customers on an opt-out rather than an opt-in basis, ANZ prioritised its own position over that of some of its customers.[213] ANZ submits that the proposed finding should not be made for the reasons in [84] above and, in addition, because there is no evidence that ANZ took steps to place any customer in a particular ANZ product that was not the most appropriate product for the customer for the purpose

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206 See Mr Boyle's evidence at T3720.15-22 and .0011 [25] of his statement (Exhibit 4.138) (ASIC.0800.0007.0001). Mr Boyle's evidence at T3720.36-43 and T3733.25-34 needs to be treated having regard to those warnings and also to the lack of evidence of what proportion of the population of remote indigenous communities is represented by the indigenous people with whom Mr Boyle interacts.

207 Bowden Statement: WIT.0001.0076.0001 at .0004 [21] and .0005 [28].

208 T4150.38-44.

209 T4150.44-47.

210 See for example *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249; [2014] FCA 35 at [198], citing *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53.

211 Exhibit TCT-12 to the Tapsall 4-13 Statement: ANZ.800.772.0089.

212 See the "Account Currently Overdrawn", "Account Credit Turnover" and "Existing ANZ Account Activity" Exclusion Rules at Exhibit TCT-12 to the Tapsall 4-13 Statement: ANZ.800.772.0089.

213 T4150.44-4151.10.

of ANZ enhancing its revenue. To the contrary, the progressive tightening of exclusion criteria for informal overdrafts shown in Exhibit TCT-12 to Mr Tapsall's Rubric 4-13 statement demonstrates that, during the period of time relevant to the three case studies about which the Commission heard evidence, ANZ has taken steps to increase the restrictions on informal overdrafts, which will necessarily reduce rather than enhance revenue from informal overdraft fees.

Date: 13 July 2018

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