

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

**SUBMISSIONS BY ANZ IN RESPECT OF GENERAL QUESTIONS – ROUND 4 HEARINGS**

1. This submission responds on behalf of Australia and New Zealand Banking Group Limited (**ANZ**) to the general questions and issues raised in Counsel Assisting's closing address on 6 July 2018.
2. Some aspects of these questions and issues concerning agribusiness lending have already been addressed at a high level in ANZ's submissions to the Commission dated 29 January 2018 (**January Submission**), 17 April 2018 (**April Submission**) and 18 May 2018 (**May Submission**). This document should be read together with those submissions.

**A. AGRIBUSINESS LENDING**

**Question 1: What does it mean for a bank to act fairly and reasonably towards a customer in a consistent and ethical manner? (T4108:13-15)**

**What does that obligation require of a bank in relation to agribusiness customers in an enforcement context? (T4108:15-16)**

3. ANZ's submissions on findings concerning case studies involving ANZ dated 13 July 2018 address ANZ's understanding of the phrase *to act fairly and reasonably towards a customer in a consistent and ethical manner* (at section B.3 generally and specifically in relation to each of the particular case studies).
4. The answer below considers that obligation in relation to agribusiness customers in the context of potential or proposed enforcement action. First, that obligation is considered where an agribusiness customer is in financial distress. In that context, the following factors are important:
  - (a) open and transparent dealings – explaining why the bank has concerns (including identifying issues) and is making certain decisions;
  - (b) clear communication;
  - (c) affording the customer time and opportunity to propose their own solution to rectify identified issues;
  - (d) appropriate assessment of the viability of the agribusiness and turnaround options and prospects;
  - (e) consideration of whether the customer is meeting its obligations to other creditors (both secured and unsecured) and stakeholders; for instance, is the customer servicing bank debt, but, not paying employees, local creditors/trade suppliers or not complying with its tax obligations?
  - (f) consideration of ANZ/APRA prudential obligations including protections of the rights of depositors; and
  - (g) assessment of the customers' readiness and ability to make the necessary changes to the business.
5. When considering potential enforcement of an agribusiness loan, the following additional factors are important:
  - (a) the primary objective is to work with the customer to address the reasons for the underperformance in their business so that the loan can be rehabilitated to a performing loan (unless the business is clearly not viable).

- (b) if the business cannot be returned to viability, then the objective is to work with the customer to improve the outcome/return for all stakeholders which is usually achieved by a consensual sale/restructuring which avoids a formal appointment.
- (c) enforcement is and should be a last option. However, it is fundamental to lending that such a right is retained and where appropriate exercised.

**Question 2: What weight should a bank give to the interests of the customer when making decisions about agribusiness customers experiencing financial difficulty? (T4108:16-18)**

**How should a bank balance the competing interests of the customer and the bank in that context? (T4108:18-19)**

- 6. Generally when a customer is experiencing financial difficulty, the interests of the customer and the bank are aligned. Both the customer and the bank want the business to be viable and sustainable. The bank's financial objective is to get a return on funds lent to its customer, and this is achieved by the customer servicing the debt (ie paying interest) and repaying the principal over time. The best way to achieve this is from the cash-flow of a viable operation, which allows the bank to retain a long-term customer.
- 7. The bank itself has obligations to its stakeholders, including depositors, lenders and shareholders. Banks also have obligations to regulators, eg APRA, in the management of their loans. There is a natural tension between balancing the interests of the customer and the prudential and statutory obligations that the Bank has to its regulators, depositors and shareholders.
- 8. If the agribusiness is not able to service and amortise the debt, and the property/business needs to be sold, the interests of the bank and the customer are generally aligned as both parties want to maximise the value of the secured assets. The bank so that its loan is recovered, and the customer to ensure they can maximise any remaining equity, or reduce any shortfall owing to the bank. Statutory duties such as the obligation of a controller to obtain the market value for the sale of a secured asset or the best price reasonably obtainable in the circumstances under section 420A of the *Corporations Act 2001* (Cth) (**Corporations Act**) help to maintain this alignment of interest.
- 9. Notwithstanding that there is a general commercial alignment of interest, in a farming context, there may be interests that are in competition (or where there is a difference in alignment) between the bank and an agribusiness customer, including:
  - (a) attachment: a farmer will usually have an emotional and historical attachment to the land. This could be because the family may have held the land for generations and may hope to continue to do so in generations to come, or because of the effort and investment the farmer and their family have made to maintain or improve the land;
  - (b) home: in many cases, the farm will not only be a business but the home of the farmer and their family;
  - (c) income: in most cases, the farm will provide income to the farmer and their family;
  - (d) main security value: in many cases, the main value of the bank's security relates to the farm and the enterprise run on it. Realisation of the main security is in potential conflict with the farmer's interests of attachment, home and income, particularly where the value of the business is less than the indebtedness owed to the bank (in absence of security over the farm and the farming enterprise, finance would be very difficult to source); and

- (e) community: the farmer generally lives in a local community where they have relationships with customers and suppliers. The farmer may be indebted to local creditors as well as the tax office, employees and possibly neighbours.
10. In a situation of financial distress there are also other parties with an interest in the financial performance of the customer. They include other secured creditors, unsecured creditors (such as trade suppliers), employees and statutory creditors (such as the ATO). Where a farmer is also a director of a company, they have an obligation to avoid trading whilst insolvent.
11. In terms of balancing the competing interests between a bank, a customer and the creditors of a customer the weight given to the interests of the various stakeholders will depend on how dire the financial circumstances are. If there is a likelihood of there being equity value in the farming enterprise then there will be a balance between the interests of the customer, the bank and the customer's creditors. The factors set out in paragraph 4 above are relevant to the balancing exercise. If there is no equity in an agricultural enterprise then the economic interest in the assets of the farming enterprise will be those of the creditors (including the bank). Notwithstanding this, the factors set out in paragraph 9 above should be carefully considered when dealing with distressed agribusiness customers.

**Question 3: In what circumstances is it both best for the customer and best for the bank to appoint an external administrator? (T4108:19-21)**

12. It is best for both the agricultural customer and the bank to appoint an external administrator in the following circumstances (which are not exhaustive):
- (a) to allow credit and supply of vital goods or services to be obtained which are necessary for the protection of the business/assets if such supplies are not being provided by employees, contractors or suppliers because the customer has not paid them. The appointment of an external administrator may be required to give unsecured creditors confidence that their debts for new supplies will be paid as the appointees are personally liable for these debts under the Corporations Act and agents for mortgagee in possession are usually indemnified by their appointors;
  - (b) when the farmer is not able to comply with their legal, regulatory or statutory responsibilities without an appointment (eg inability to pay tax debts or the requirement to avoid trading whilst insolvent);
  - (c) where the financial, mental, or physical burden of managing the business has become too much for the farmer;
  - (d) to give the farmer protection of insolvency law to deal with the claims and competing interests of creditors;
  - (e) if the customer's asset/business sale campaign has been unsuccessful and would benefit from an independent vendor;
  - (f) to protect the business from creditors attempting to repossess key assets or threatening the farmer with violence or "taking the law into their own hands"; and
  - (g) when there are animal welfare issues.

**Question 4: Is it appropriate for financial services entities to conduct internal appraisals, as opposed to obtaining independent valuations of farms and other rural property? If so, in what circumstances is it appropriate? (T4114:12-14)**

**Question 5: Is it appropriate for staff involved in origination of the loan to conduct or otherwise be substantively involved with such appraisals? (T4114:14-16)**

**Should there be minimum levels of qualification, skill and experience before a bank employee can be authorised to conduct appraisals? If so, what are the appropriate minimum levels? (T4114:16-18)**

13. ANZ considers that it is appropriate for ANZ to conduct internal appraisals of farms and other rural properties and for ANZ staff involved in origination of the loan to conduct and be involved in such appraisals on the basis set out below.
14. ANZ has a two-step process for internal appraisals of rural properties:
  - (a) *First*, internal appraisals for rural properties can only be submitted by account relationship managers. These relationship managers must have completed an internal training course called 'Property Valuation Principles' in order to be able to submit a rural internal appraisal for assessment. Internal appraisals must be submitted via a prescribed template which mirrors all the standards set down by the Australian Property Institute for the valuation of a rural property by a property valuer.
  - (b) *Secondly*, in the vast majority of cases, the relationship manager must submit the internal appraisal for rural properties for review and approval by ANZ's Agribusiness Property Risk Unit (**APR**) which comprises experienced and formally trained property valuers. The prescribed template in which the internal valuations are submitted allows ANZ's Agribusiness Property Risk Unit to review, check and make a determination of the value to be adopted by ANZ for security purposes. The APR trained property valuers may decide to approve the submitted value, approve an amended value, determine that the property is not suitable for ANZ security purposes or direct that the property be valued by an external valuer. This occurs before the loan is advanced. It is noted that, in a minority of cases, relationship managers can undertake self-approved appraisals on low value rural securities (<\$1m in rural security value in total for the customer). These represent less than 2% of all rural internal appraisals undertaken in ANZ and are subject to a hindsight review process.
15. ANZ has the internal expertise and capability to carry out internal appraisals of rural properties. The valuation of such properties is largely determined by type, size and location. These are factors which ANZ's formally trained valuers and relationship managers are well placed to assess. In this regard:
  - (a) ANZ subscribes to technologies such as satellite imagery of the property, title boundary identification and dimensions, and access to district sales, all of which feed into a meaningful appraisal.
  - (b) ANZ also operates a fully retrievable central database of its internal security appraisals where full descriptions and the basis for the appraisal (including analysed sales) are contained. This provides a strong audit trail. A randomly selected sample of ANZ's internal appraisals is also audited by an independent qualified valuation firm each year.
  - (c) the valuation of rural properties is often closely connected to ANZ's credit assessment of the loan. The valuation is often linked to the property use and production capacity, which matters must be assessed in order to provide finance.

ANZ is well placed to assess these matters due to its direct access to customers. In contrast, external valuers often rely on secondary sources of information.

16. ANZ considers that provided that risk management processes as set out above are in place, it is appropriate for financial institutions to conduct internal appraisals of farms and other rural properties and for staff involved in the origination of the loan to conduct and be involved in the internal appraisals. The safeguard in the ANZ system is the segregation of duties; the staff in APR who approve the appraisal are qualified valuers and not part of the lending division responsible for loan origination (and their remuneration is not dependent on lending targets being met).
17. Further, ANZ considers that customers benefit from ANZ's internal appraisal of rural properties. External valuations of rural property are costly and take considerable time to complete, particularly given the remote location of many rural properties. Conducting appraisals internally can help minimise these costs and enable quicker turnaround of customers' requests.

**Question 6: Should there be a code that sets out the requirements for the conduct of internal appraisals by financial services entities, either in respect of rural properties or more generally? If so, what form should that code take? (T4114:18-21)**

18. ANZ considers that if there were a code it should specify that the person who originates a loan is not able to approve an appraisal and that such approval of the appraisal is to be undertaken by qualified rural valuation experts not involved in the loan origination process (subject to the qualification that appraisals for small value loans may be approved by relationship managers). This is a safeguard ANZ has in place.

**Question 7: If it is inappropriate for financial services entities to conduct internal appraisals of property to be taken as security, what should be done to stop or discourage that practice? (T4114:23-25)**

19. ANZ considers that it is appropriate for financial services entities to conduct internal appraisals of rural property, subject to the safeguards described above being in place.

**Question 8: Are the legislative obligations on financial services entities to provide documents prior to a farm debt mediation such as the obligation in section 21 of the Farm Business Debt Mediation Act in Queensland, sufficient? (T4114:25-27)**

**Should they be extended to oblige financial services entities to provide information on request as well as documents? (T4114:27-29)**

20. ANZ believes that the types of documents referred to in sections 21 and 22 of the *Farm Business Debt Mediation Act* (Qld) are generally sufficient. These sections set out the types of documents to be provided by both the financier and the customer prior to a farm debt mediation. ANZ is also supportive of adding a further category to include the provision of any external valuations held by the financier and any Investigative Accountants reports.
21. The other State Acts are silent on the provision of documents prior to mediation. ANZ is aware that the New South Wales Act is in the process of being amended to provide for the provision of documents as agreed between the parties and the mediator.
22. ANZ has considered the comments of Mr Day and Mr McMahon referring to their experience of banks failing to provide information on arrears and interest.<sup>1</sup> ANZ is

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<sup>1</sup> Witness statement of Warren Day dated 8 June 2018, paragraph 62 and T-3106:41-43, and witness statement of Dennis McMahon dated 19 June 2018, T-3113.

supportive of introducing a requirement for financiers to provide such information on request into the Act.

23. ANZ's experience is that, prior to farm debt mediation, customers rarely ask for any documents or information beyond the types referred to above.
24. ANZ is not supportive of full disclosure of all documents and information as suggested by Mr McMahon.<sup>2</sup> The primary objective of farm debt mediation is to provide an efficient and equitable process for farmers and their financiers to resolve financial difficulty; it is not a dispute resolution or litigious process, where the provision of a wider set of documents and information may be warranted.

**Question 9: Do remuneration and incentive policies that reward bank employees for the volume of loans sold create an unacceptable risk that bank employees will prioritise the sale of loan products over the bank's responsible lending obligations; over the bank's statutory obligations, including to provide loans in a manner that is efficient, fair and honest, and to have in place adequate arrangements to ensure that customers are not disadvantaged by any conflict of interest that may arise in relation to the provision of loans; and over the bank's obligations to act fairly and reasonably towards customers in a consistent and ethical manner? (T4118:24-32)**

25. ANZ agribusiness staff are remunerated on the basis of a balanced scorecard that takes into account a range of measures. Those same measures inform incentive payments. In determining both remuneration and incentive payments both financial and non-financial measures are considered, with an increasing emphasis on customer outcomes and risk and compliance. Generally, no incentive payment is made to an agribusiness staff member with a compliance "flag" in the course of a year. A compliance flag is applied where an agribusiness staff member is found to have engaged in conduct that is inconsistent with ANZ's risk or compliance policies. ANZ considers that this approach assists in ensuring that agribusiness staff do not prioritise loan sales over compliance and customer needs.

**Question 10: To what extent does default interest reflect the cost to financial services entities of carrying impaired loans? (T4122:2-3)**

26. For the purposes of this question, ANZ understands "default interest" to refer to an increase in the interest rate margin charged on a facility where a customer has defaulted on the terms or conditions governing that facility. ANZ rarely charges default interest of that kind to agricultural customers in financial difficulty.
27. From time to time, where a customer with an overdraft facility exceeds the limit of that facility without prior authorisation, ANZ charges a higher interest margin on the amount of the excess drawing (and not the entire balance of the facility). This increased interest rate margin takes into account the increase in risk to the bank.
28. However, the question raises a more general issue in relation to the costs of carrying impaired loans. For the purposes of this question, ANZ understands "impaired loans" to refer to loans where ANZ carries an impairment provision (also called an individual provision or IP - such provisions are calculated in accordance with Australian accounting standards).
29. There is an increased cost to financial services entities of carrying impaired loans. This is because APRA's capital adequacy framework requires that a bank hold a minimum amount of regulatory capital as a proportion of its total risk-weighted assets (**RWAs**). Assets where the risk of loss from non-payment is low, receive a low risk weight, while assets with high exposure to loss, such as impaired loans, receive high risk weights.

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<sup>2</sup> Witness statement of Dennis McMahon dated 19 June 2018, paragraphs 79 to 81.

30. By way of illustration, an agribusiness loan of \$1 million with a one year tenor and an ANZ Credit Risk Rating (CCR) of 10D (impaired with an individual provision) has an APRA RWA of \$1.44m (144%), in addition to an individual provision expense (which will be sized to reflect the likely loss on the loan). This means that ANZ is required to allocate capital against \$1.44m, rather than the \$1 million loan amount. At the time of loan origination, the RWA would have been materially less than \$1m (ie. 100%) given the CCR that would have applied at that point.
31. The total cost of carrying an impaired loan will almost always exceed the amount of any increased interest charged by ANZ. The higher risk of loss on impaired loans results in a high allocation of equity versus debt funding for these exposures and together with the individual provision required results in a higher overall cost of carrying the impaired loan.

**Question 11: Should there be a moratorium on the charging of default interest in respect of farm debts secured by farm debt mortgages during periods when the farm property is affected by natural disaster? If so, how should such a moratorium be implemented? By legislation? By an industry code? Or by some other means? (T4122:3-7)**

32. ANZ is supportive of implementing a moratorium on increasing interest rate margins for farmers during periods when the farm property is impacted by natural disaster. For the moratorium to be triggered there would need to be a sufficient nexus between the cause of the default which prompted the right to charge increased interest and the natural disaster.
33. ANZ considers that any such moratorium should be governed by ANZ policy and not by legislation or by industry code. This would provide ANZ with flexibility to offer a wider range of measures, take into account the particular circumstances and the appropriate duration of support.
34. ANZ also supports and takes measures to assist farmers and communities affected by drought or other external events (such as the 2016 collapse of the dairy industry prices). For example:
  - (a) ANZ implemented a moratorium for customers in crisis through the December 2014 support package offered to farmers in Queensland and NSW impacted by drought which included a 12 month moratorium on increase in interest rates on distressed farms and interest rate relief in cases of extreme distress. This support package was extended by a further 12 months in August 2015.
  - (b) The dairy industry relief package announced by ANZ in 2016 included offers to suspend repayments on loans (for up to three months which may involve interest recapitalisation), waive restructuring fees and provide temporary adjustments to lending limits.
  - (c) In July 2018, ANZ announced a drought support package for customers in all drought-declared areas of Australia until 31 July 2019. This package was primarily focused on NSW and Queensland areas.
35. These measures are supported by ANZ's Disaster Relief and Recovery Policy which governs ANZ's response to disasters and covers the support ANZ can offer to customers, staff and communities impacted by disaster (whether natural or man-made).
36. ANZ takes into account the cyclical nature of climatic and agricultural conditions in its policies. Despite this and similar approaches by farmers and government, we recognise that farmers and rural communities can suffer great hardship in extended adverse conditions.

**Question 12: In what circumstances should the moratorium come into effect? In what circumstances should the moratorium be lifted? (T4122:7-9)**

37. ANZ's view is that its implementation of such a moratorium should be guided by a declaration by the Federal, State or Territory government that a natural disaster event has occurred. Similarly, the lifting of the moratorium should be guided by the Federal, State or Territory government's announcement that the event has ended. As noted above, ANZ considers that a flexible approach is needed to take into account the nature of the events and how they should be managed.

**Question 13: Similarly, should there be a moratorium on the taking of enforcement action in respect of farm property while that property is, or soon after that property has been, affected by natural disaster? If so, how should such a moratorium be implemented? In what circumstances should it come into effect? And in what circumstances should it be lifted? (T4122:11-15)**

38. ANZ supports a moratorium on enforcement action in respect of customers impacted by natural disasters. As noted in response to Question 11 above, ANZ considers that such a moratorium should be governed by ANZ policy and not by legislation or by industry code.
39. Under ANZ's existing policies, a member of the Lending Services Global Leadership Team (ie an experienced senior banker) must approve any decision to commence enforcement action. ANZ considers that this approval process is appropriate to ensure that any prevailing conditions such as a natural disaster or drought will be taken into account when enforcement decisions are being considered.
40. If a moratorium on enforcement action in respect of customers impacted by natural disasters were to be implemented, ANZ considers that there should be some exceptions to a moratorium applying such as:
- (a) instances where there are animal welfare issues which require ANZ to enforce;
  - (b) instances where customers have elected to leave the land or have requested ANZ to enforce; and
  - (c) instances where the customer and the ANZ have reached a consensual agreement that the customer leaves the land in return for a commercially negotiated "exit package".
41. As noted in response to Question 12 above, ANZ's view is that its implementation of such a moratorium should be guided by a declaration by the Federal, State or Territory government that a natural disaster event has occurred. Similarly, the lifting of the moratorium should be guided by the Federal, State or Territory government's announcement that the event has ended.

**Question 14: Should provision be made in the farm debt mediation Acts or another legislative instrument or binding code to facilitate earlier discussion between financial services entities, farmers, and third parties such as rural financial counsellors in cases where farmers face actual or probable financial distress? (T4122:15-18)**

42. ANZ is supportive of measures which further assist in early intervention in relation to financial distress of farmers.
43. In particular, ANZ is supportive of a provision requiring any farmer who is transferred into Lending Services to be invited to attend a meeting with ANZ together with their rural financial counsellor. ANZ proposes that such written invitation would be issued to a farmer within 30 days of the farmer being transferred to Lending Services. As part of the written invitation, ANZ would also provide farmers:

- (a) information as to how they may engage a rural financial counsellor should they not have one; and
  - (b) contact details for the relevant authority which is responsible for farm debt mediation in their State or Territory and the resources of the relevant authority that may be available to them.
44. ANZ is supportive of a provision of the kind discussed above being incorporated into a uniform Farm Debt Mediation Act.

**Question 15: Should there be a uniform Farm Debt Mediation Act? If so, is any of the current Acts in a suitable form for uniform adoption? (T4122:18-20)**

45. For consistency in approach, ANZ supports a national Farm Debt Mediation Act or a uniform adoption which is administered on a state basis for funding purposes.
46. ANZ considers that the New South Wales Act is most suitable for uniform adoption. It was the first Act to be introduced in Australia, it has been updated from time to time, it sets out a streamlined process, it contains a simple standard form Deed, and a 14 day 'cooling off' period after a farmer signs a Deed.
47. Further, there are new amendments to the Act to be proclaimed in September 2018. These amendments will, amongst other things:
- (a) provide for regulations to build farmer resilience (such as farm business skills and professional training programmes);
  - (b) provide for mediators to facilitate the exchange of documents;
  - (c) require mediations to be held in convenient locations for the farmer where possible;
  - (d) recognise farm debt mediation in another state where properties are on the border;
  - (e) provide access to an appeal system;
  - (f) allow complaints against financiers to be taken to AFCA (even after a mediation has taken place); and
  - (g) amend the confidentiality requirement to permit disclosure when persons, property or stock are at risk.

**Question 16: How should banks balance the competing interests of strengthening the long-term relationships with their customers and being prepared to act decisively, where necessary, particularly to safeguard shareholder interests? Commissioner will recall that that was the language of Rural Bank's mission statement in its asset management unit policy. (T4126:15-18)**

48. The balancing of competing interests of strengthening the long-term relationships with their customers and being prepared to act decisively, where necessary, particularly to safeguard depositor and shareholder interests from ANZ's perspective is answered in the response to questions 1 to 3 above.
49. The Commissioner asked in addition, "*parties making submissions to consider whether shareholders, customers, and the public generally would expect banks to abide by a standard described as 'the standard of care and skill of a diligent and prudent banker' in clause 27 of the Code of Banking Practice*". Further, the Commissioner asked "*whether it is the same standard or a different standard that applies in deciding whether to vary the*

*terms of credit (eg, re-price or alter the terms) or in deciding whether, when and how to enforce the credit contract. Whether to enforce, when to enforce, not least how to enforce, seem to raise considerations that may require separate examination".*

50. ANZ submits that the content of the bank's obligations to a customer varies between the time that credit is extended and the time of credit variation or enforcement. That is because at the time of enforcement, other interests (such as the interests of guarantors) may be enlivened. In considering enforcement, the contract will be relevant, as will the factors identified below. It is very rare for ANZ to take enforcement action in relation to an agricultural customer.

### **Whether to enforce**

51. Each situation of financial distress is different. However, at least the following factors are important (whether individually or collectively) for a bank to consider in relation to whether to take enforcement action:
- (a) has the customer had clear communication from the bank regarding its position and been given an opportunity to come up with a plan to rectify their financial position?
  - (b) has the bank given due consideration to any responses and clearly communicated whether the response/proposal is sufficient to allay or address the concerns communicated?
  - (c) has the customer been afforded an opportunity to sell the asset/business itself?
  - (d) has the viability of the agribusiness been assessed?
  - (e) the ability for owners to source funds necessary to continue operating the business;
  - (f) is there a temporary lack of liquidity, which may be overcome through debt or capital equity injections or the sale of assets, or is there an endemic shortage of working capital?
  - (g) is the customer able to continue trading without further funding whilst working through a repayment strategy (eg via sale of asset). This may have a flow on to the consideration of:
    - (i) asset values if the business operations are unable to be maintained;
    - (ii) positions of other stakeholders (eg employees, local creditors/trade suppliers including insurers and statutory bodies, such as the ATO) – are these debts being paid or is their exposure and risk increasing?
    - (iii) animal welfare or missing key planting or harvest timeframes if the customer is unable to source feed, grain, supplies etc.;
  - (h) will the value of the business/assets deteriorate if enforcement action is not taken?
  - (i) does the customer have access to credit from suppliers to enable ongoing trading? External administrators can often obtain credit (due to the statutory personal liability regime which protects suppliers, plus receivers are also ordinarily indemnified by their appointors) in situations where the owners cannot. This can enable ongoing trading (therefore maximising the chances of a going concern sale);

- (j) do other stakeholders have the ability to adversely impact the value of the business (eg repossessing key assets) which can be avoided or mitigated via an external administration?
- (k) legacy debts (including trade suppliers, statutory and tax liabilities) are too significant to enable ongoing trading outside of a formal appointment. In these situations, the company may need the protection of the creditor moratoria provided by external administrations to provide the time necessary to deal with its affairs and or sell its assets;
- (l) is external administration the proper process to deal with competing interests of creditors?
- (m) has the financial and mental burden of managing the business become too much for the director/owner?
- (n) has the customer already unsuccessfully attempted to sell the asset and:
  - (i) the asset is now stale on the market;
  - (ii) unrealistic sale expectations from owner is preventing a sale being effected; and/or
  - (iii) likely buyers do not want to engage with owner (eg likely buyers do not believe the customer is a genuine seller or potentially in situations where likely buyer is the owner's neighbour);
- (o) has customer requested enforcement? Sometimes this occurs for various reasons such as ability for external administrator to continue to trade where they could not, the pressures felt from creditors;
- (p) will the customer work with the bank to maximise the outcome? and
- (q) director/owner disputes harming business decisions or the ability to effect sale (eg disputes within customer/family).

### **When to enforce**

52. Noting the extent to which future conditions may be uncertain, the best practice in relation to the question of when to enforce should consider not only the timing of the enforcement but also the strategy for when the asset should be sold:
- (a) is there an optimal time to enforce and sell the asset/business?
  - (b) consideration of the impact of the timing of enforcement on the customer;
  - (c) can the bank wait until the optimal time to enforce and/or sell the business? (eg animal welfare at risk);
  - (d) will the value of the business/assets deteriorate if enforcement action is not taken immediately?
  - (e) what are the costs to hold the asset/business until the optimal time to sell the asset/business?
  - (f) is it worth funding these costs and carrying the associated operational risks (eg planting crops, harvesting crops) until the optimal time to sell? That is, will the net sale outcome be an overall better return by waiting for the optimal selling period than selling the assets/business sooner and minimising these additional costs?; and

- (g) Who are the likely buyers for the property and what is their intended use for the land. Whilst the assets may be used by the owner for a particular activity (eg, wheat), the likely buyer may want to use it for another purpose (eg, sheep). If this is the case, then a bank would also need to consider whether the costs of continuing to operate the property in its current form (eg, funding the planting of another crop) are going to be recovered by virtue of obtaining a higher selling price for the property. If the likely buyers do not value the existing activity, there is real risk that these additional costs will not be recouped, and understanding this may impact the timing of enforcement.

### How to enforce

53. Once a determination is made that enforcement is required and the timing has been considered, it is important that it is conducted in an empathetic and transparent manner. Best practice entails consideration of the following factors:
- (a) open and clear communication regarding the decision and the reasons for it;
  - (b) whether the customer will be supportive/co-operate – ie can this be done with the customer?
  - (c) ability for the customer to remain on the property during the process (if there is trust and co-operation); and
  - (d) provision of support services – financial counselling and in limited cases, relocation if a decision is made that there is no option other than to exit the property.

<b>Question 17: How should banks balance portfolio growth against the need to monitor and manage their existing clients? (T4126:19-21)</b>
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54. Monitoring and managing existing clients is not mutually exclusive to portfolio growth. If existing customers are satisfied then they may increase their business with or refer new agribusiness clients to the bank. There is a clear relationship between customer satisfaction and portfolio growth, including attrition (loss of existing customers) and acquisition (gaining of new customers).
55. ANZ has a number of strategies in place to ensure that it balances portfolio growth against the needs of its existing customers:
- (a) ANZ considers agribusiness portfolio growth in monthly forums where factors such as emerging risks impacting new and existing clients, industry concentrations and overall performance of the agribusiness portfolios are considered. In addition, ANZ undertakes industry specific reviews as trends emerge to better understand emerging issues within agribusiness industries in Australia; and
  - (b) ANZ reviews its agribusiness business writing strategies (at least annually). These are presented and discussed at ANZ Risk Committees. This includes consideration of ANZ agribusiness risk appetite, growth opportunities, industry issues impacting our customers and overall portfolio statistics. As a result of this review, there is then a policy document created called “Agribusiness Direction of Lending” which provides ANZ agribusiness staff direction on appetite risk for new to bank customers and direction around industry issues such as climate variability and market segmentation.
56. ANZ has in place a risk management framework which includes a combination of independent credit assessment, quality assurance, group credit assurance and internal audit, as set out below:

- (a) independent credit assessment entails ensuring that judgemental credit risk is consistently and appropriately managed and mitigated across all ANZ geographies within approved risk tolerances;
- (b) quality assurance ensures that quality standards established are being met, maintained and enhanced;
- (c) group credit assurance undertakes independent credit related assurance activities; and
- (d) internal audit undertakes audit work in relation to the effectiveness of governance, risk management and internal controls concerning current and evolving risks.

**Question 18: Do banks have appropriate policies in place for dealing with external events that may impact an agribusiness loan portfolio? If not, what should those policies entail? (T4126:23-24)**

57. In answering this question, ANZ has assumed that the question is directed at events that are not categorised as natural disasters or drought (addressed above) but rather is concerned with the impact of industry or regulatory change (such as a ban on live exports) on agribusiness.
58. ANZ considers that it has in place appropriate credit policies and a risk management framework to identify and manage external events that may adversely impact agribusiness customers. For example, in relation to wholesale lending ANZ's Judgmental Credit Requirements provides that when a "Risk Grade Review Event" occurs all applicable assigned risk grades must be reassessed and any changes must be approved as a credit decision. "Risk Grade Review Events" includes external factors such as:
- (a) material changes in the industry (such as tariff reduction, regulatory change, environmental concerns); and
  - (b) a significant adverse event affecting entity operations.
59. In 2016, ANZ revised its Sustainability Framework to ensure it continues to support ANZ's business strategy and is aligned with the Bank's Purpose. This Framework guides ANZ's responses to dealing with customers and communities who are adversely impacted by external events.
60. Where ANZ identifies a particular agribusiness sector which has been adversely impacted by external factors, it takes steps to support its customers. A recent example is the announcement of ANZ's assistance package to the Australian Dairy industry, see paragraph 34(b) above; and early access to term deposits without incurring fees and access to hardship support services.

**Question 19: Should banks be required to contact individual customers when they become aware of misconduct in relation to their accounts? (T4126:24-26)**

61. When ANZ identifies misconduct affecting a particular file and has reason to suspect that the effect of the misconduct may be more widespread, ANZ will generally conduct a scoping exercise for the purpose of understanding:
- (a) the extent to which the misconduct may affect other customer accounts or files; and
  - (b) whether any customers have been adversely impacted by the misconduct.

62. The precise steps undertaken in the scoping exercise will depend on the nature of the misconduct (for example, whether it is system/operations-related or fraud-related) but may include one or more of the following:
- (a) conducting a root cause analysis to determine the underlying cause of the misconduct;
  - (b) analysis of data relevant to the incident; and
  - (c) selecting and reviewing a sample of customer files.
63. Where ANZ identifies through this process that customers have been adversely impacted by misconduct on the part of ANZ, ANZ's policy is to remediate those impacted customers. In undertaking that remediation, ANZ's policy is to communicate with affected customers and where there has been a financial detriment to customers to compensate those customers. Where compensation is given ANZ seeks to explain what the compensation represents and the reason for it, how it will be applied and how the customer might obtain further clarification if required. (An exception occurs where the compensation amount is less than \$15 and the customer does not have an open ANZ account, in which case ANZ will make a community service payment in the relevant amount to an appropriate not-for-profit organisation.)
64. Where ANZ identifies customers whose accounts or files may have been affected by the misconduct, but does not identify any adverse impact, depending on the context ANZ may, but will not always, contact those customers. Contacting customers where no remediation is proposed can in some circumstances risk unnecessary confusion from the customer's perspective. As such, ANZ's view is that a blanket requirement on banks to contact customers in every instance the bank is aware of misconduct affecting the customer's account or file is not required.

## **B. LENDING TO REMOTE AND INDIGENOUS CUSTOMERS**

**Question 20: Is the current regulatory framework in respect of funeral expenses products adequate? In particular, should the framework be amended so that funeral expenses products are not excluded from the definition of financial product by virtue of section 765A(1)(y) of the Corporations Act and regulation 7.1.07D of the Corporation Regulations 2001? (T4135:38-42)**

**Should section 12BAA(8)(o) of the ASIC Act be amended to put beyond doubt that funeral expenses policies are not excluded from the definition of financial product, as applicable to part 2 Division 2 of that Act? (T4136:3-6)**

65. ANZ supports appropriate amendments to the regulatory framework so that funeral expenses products are not excluded from the definition of financial product under the Corporations Act, regulation 7.1.07D of the Corporations Regulations 2001 and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*. ANZ considers that funeral insurance products should be regulated in the same manner irrespective of how they are structured.

**Question 21: Is the current regulatory framework sufficient to minimise the risk of funeral insurance providers using inappropriate sales practices to sell their products to vulnerable people, including Aboriginal and Torres Strait Islander people living regionally or remotely? (T4136:6-9)**

**Is the current regulatory framework sufficient to minimise the risk of sales of unsuitable funeral products to these people, including to avoid the risk of individuals having multiple forms of funeral insurance, and to address the sales of funeral insurance policies to children and young people? (T4136:9-12)**

66. ANZ considers that the reform suggested in response to Question 20 above would greatly assist in minimising the risk of inappropriate sales practices and sales of unsuitable funeral products to vulnerable people, including children and young people.
67. ANZ offers a funeral life insurance product ("50+ Life Cover") to eligible customers aged between 50 and 70 years. The policyholder and the life insured are one and the same and the policy does not cover multiple lives. The Life Insurance Code of Practice, which specifically addresses funeral insurance, applies to ANZ's funeral insurance product. Under the Code, customers are to be provided with a key fact sheet that describes in plain language important details about the policy, including premiums.<sup>3</sup> The Code also requires life insurers to provide options for customers suffering financial hardship and to train staff to provide additional support to customers that require it.<sup>4</sup>

**Question 22: Does the current regulatory framework deal adequately with the potential for people with funeral insurance policies to pay more in premiums than may ever be paid out? (T4136:14-15)**

**And should the current regulatory framework be modified to include protections for holders of funeral insurance in relation to the cancellation of their policies for non-payment of premiums? (T4136:16-18)**

68. As to the first part of Question 22, ANZ refers to the effect of the Life Insurance Code of Practice described in answer to Question 21 above, which it regards as adequate.
69. As to the second part of Question 22, ANZ considers the requirement under the Life Insurance Code of Practice that premiums must remain unpaid for at least 60 days before a policy can be cancelled, together with requirements of the *Life Insurance Act 1995* (Cth), to be adequate.

**Question 23: Should estimates of total cost be given in relation to funeral insurance policies? (T4136:21-29)**

70. ANZ does not consider it necessary to add additional regulatory requirements for premium payment estimates. The Life Insurance Code of Practice currently requires life insurers to disclose in the key fact sheet whether the total amount of premiums payable under the policy has the potential to exceed the benefit amount. ANZ notes that premium illustrations are included in the current ANZ 50+ Life Cover Product Disclosure Statement and Key Fact Sheet, and premium options available include an option for total premiums to be capped to the amount of the life benefit.

<sup>3</sup> Life Insurance Code of Practice (LICOP), section 3.6(c).

<sup>4</sup> LICOP, sections 3.6(b) and 7.

**Question 24: In what circumstances, if any, is it appropriate for a bank to challenge directly or indirectly a customer's expressed wish to have a basic account? If the customer comes in, especially if the customer comes in with a support person, and the request is made for a basic account, in what circumstances, if any, is it appropriate for the bank to challenge that request? (T4146:36-41)**

71. For the purpose of responding to this question, ANZ understands "basic" accounts to include its Access Basic account, which is fee-free<sup>5</sup> and does not accrue interest or come with a VISA debit card. This account is available to customers who hold a concession card or receive particular government benefits, such as Centrelink payments.
72. ANZ expects that whenever a customer (with or without a support person) requests an account, its bankers will take the opportunity to understand if the account is appropriate for the customer, having regard to his or her current situation, goals and stated needs. This is achieved through the banker conducting a needs-based conversation with the customer.
73. ANZ believes that its customers are entitled to make an informed choice based on the account types for which they are eligible. In some circumstances, a particular type of account, for which a customer may have a pre-existing preference, may be unsuitable to meet the needs of the customer. For example, a customer who expresses a desire to open an Access Basic account may want features that are not available on that account (such as a VISA debit card or the ability to earn interest). For this reason ANZ expects that whenever a customer requests a particular type of account, its bankers will seek to understand if that account is appropriate for the customer.
74. Where a banker identifies that the requested account is unsuitable, or if the customer is not eligible for the account, the banker should inform the customer of other options that may better suit his or her needs. Rather than being characterised as "challenging" the customer, this involves the bank providing sufficient information to enable the customer to make an informed choice. ANZ respectfully submits that this is an appropriate course for banks to take in dealing with customer requests for new accounts.
75. ANZ staff are not given an incentive to promote fee-earning accounts, such as the Access Advantage account, over no or low fee accounts. This means that ANZ staff have no personal interest in suggesting a transaction account that is different to the customer's initial expressed preference if that type of transaction account is found to be suitable for the customer's needs or, if it remains the customer's choice after being informed of other appropriate accounts.

**Question 25: Do banks take sufficient steps to promote the availability of fee-free accounts to eligible customers? (T4147:47-4148:1)**

76. ANZ considers that it takes sufficient steps to promote its Access Basic account, and basic accounts more generally.
77. ANZ promotes the Access Basic account (as well as its other accounts) in a variety of ways, including through promotional material in ANZ branches and agencies, and on product information pages on ANZ.com. ANZ bankers receive specific product training, which includes training on how to conduct needs-based conversations with customers and to promote the benefits of ANZ's different accounts, including the Access Basic account, to eligible customers.
78. ANZ notes the suggestion made by Ms Lynda Edwards of Financial Counselling Australia to the effect that banks could audit the accounts of customers who receive government

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<sup>5</sup> This does not include overseas transaction fees and overseas ATM transaction fees.

benefits and contact them to assess if they are eligible for a basic account.<sup>6</sup> In December 2017, ANZ began a pilot program to assess the suitability of customer accounts and, where appropriate, to contact customers to discuss whether another account might be more suitable to their needs (such as an Access Basic account where the customer is receiving Centrelink payments).

79. More broadly, ANZ trains facilitators of its "MoneyMinded" and "MoneyBusiness" financial education programs (which programs operate independently of ANZ products) to educate participants about the existence and availability of fee-free accounts across the industry generally. Customers (or potential customers) can also find information about the various fee-free accounts offered by ADIs on comparison websites such as the Australian Bankers' Association affordable banking website.<sup>7</sup>

**Question 26: Are banks' identification requirements appropriate for Aboriginal and Torres Strait Islander customers? If so, are those identification requirements sufficiently understood and implemented by staff on the ground? (T4148:1-4)**

**Question 27: Should more banks have a telephone service staffed by employees with specific training in assisting indigenous consumers? (T4148:13-16)**

80. ANZ addresses Questions 26 and 27 together.
81. As to Question 26, different identification requirements apply at the account opening stage and subsequently (including when a customer seeks to contact ANZ by phone). ANZ considers that its requirements and processes for identifying customers are appropriate and provide flexible identification procedures that recognise barriers to financial inclusion while also complying with ANZ's obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**).
82. Consistent with the AUSTRAC guidance,<sup>8</sup> ANZ's "know your customer" (**KYC**) guidelines allow Aboriginal and Torres Strait Islander customers (**indigenous customers**) without primary or secondary identification documents to provide alternative forms of identification when opening an account with ANZ for the first time. Acceptable alternative forms of identification include a letter of identification known as a "Community Leader Document" or an indigenous community identification card.<sup>9</sup>
83. After customers have been verified through the KYC guidelines, ANZ has processes in place to protect identity and reduce the risk of fraudulent access to bank accounts. ANZ customers are able to verify their identity over the phone in a variety of ways, including by providing a verbal password chosen by the customer, or a one time passcode sent to the customer's mobile phone number. Additional security questions are only required if ANZ is unable to authenticate the customer through these means.<sup>10</sup> In December 2017, ANZ began a review of its over the phone verification processes to consider whether its security questions are appropriate and understood by all customers (including indigenous customers), while still remaining compliant with the AML/CTF Act. The review is primarily focused on customers in remote communities who are more likely to experience difficulties in over the phone verification and who face geographical challenges in attending a branch if re-verification in person is necessary. The review is due to be

<sup>6</sup> WIT.0001.0067.0001 (exhibit 4.140) at [66].

<sup>7</sup> Witness statement of Tony Tapsall dated 25 June 2018 (**Rubric 4-41 Statement**) (ANZ.999.016.0001, exhibit 4.204) at [40(e)]; exhibit TCT2-4 to Rubric 4-41 Statement: ANZ.800.777.0097.

<sup>8</sup> <http://www.austrac.gov.au/aboriginal-and-or-torres-strait-islander-people>.

<sup>9</sup> See exhibit TCT-3 and TCT-4 to the witness statement of Tony Tapsall dated 21 June 2018 (**Rubric 4-13 Statement**) (ANZ.999.012.0030, exhibit 4.202); ANZ.800.643.0447 and ANZ.800.645.0172.

<sup>10</sup> T4068.21-29.

completed later this year and, following completion, ANZ will consider what, if any, modifications are necessary to its current verification processes.

84. ANZ offers training to its staff to enable them to apply the verification procedures described above and to be sensitive to the needs of indigenous customers more generally. In particular, frontline staff undertake mandatory training each year to build and maintain knowledge of ANZ's KYC guidelines and requirements. ANZ's Contact Centre staff receive training on how to appropriately identify customers over the phone, and the implementation of these verification checks. ANZ also offers staff cultural awareness training which is designed to increase staff (in particular frontline staff and management) awareness and understanding of the barriers to financial inclusion that vulnerable customers including indigenous customers may face. ANZ intends to make the training mandatory for all Australian Retail Distribution staff by 31 December 2018, in accordance with ANZ's commitments under its 2016-2019 Reconciliation Action Plan (**RAP**).<sup>11</sup> ANZ staff will be required to complete this training every three years.
85. As to Question 27, when considering how ANZ can make banking easy and accessible for all customers (including those who face specific challenges), a key consideration for ANZ is whether a possible solution is sustainable. ANZ considers that the use of a targeted telephone service staffed by employees who are specifically trained to deal with indigenous customers would necessarily be relatively small in scale. This would result in fewer staff being available to assist these customers at any one time, and the ability of such a service to resolve enquiries quickly may be particularly vulnerable to the impact of events such as staff turnover. ANZ's preferred approach is to provide relevant awareness training to all of its Contact Centre staff and to continue to work on making the bank accessible for all customers, taking into account the language, cultural, and financial literacy barriers that they may face.

**Question 28: Do financial services entities have in place appropriate policies and procedures to assist Aboriginal and Torres Strait Islander people to overcome obstacles associated with geographical remoteness, to address the cultural barriers to engagement that some of these people face, to address the linguistic barriers to engagement that some of these people face, and to address the obstacles posed by the financial literacy levels of some of these people? (T4148:6-11)**

**If appropriate policies and procedures are in place, what changes should be made to those policies and procedures to deal with those matters? (T4148:11-13)**

86. ANZ recognises the importance of assisting customers, including indigenous customers, who may face obstacles associated with geographical remoteness, or cultural, linguistic or financial literacy barriers.
87. For customers, including indigenous customers, living in remote communities with limited access to online or phone services, ANZ offers the Bank@Post services at participating Australia Post offices and (together with 15 other member banks) funds a number of fee-free ATMs. In October 2017, ANZ also abolished ATM fees on ANZ ATMs for non-ANZ customers, including in remote areas.
88. ANZ recognises the benefit that employing indigenous people offers in terms of promoting cultural awareness within its Australian Branch Network and more generally. The ANZ Indigenous Traineeships program provides an opportunity for indigenous people to start a career at ANZ whilst completing their final years of high school. Pathways to full time employment exist after the program has been completed. Over the past 15 years, ANZ has had over 1,100 participants in the program. While ANZ recognises the need to

<sup>11</sup> ANZ Banking Group Reconciliation Action Plan 2016-2019: <https://www.anz.com/resources/d/dde1b851-e40f-4f72-b453-e93e1e70ca1d/anz-rap-2016-2019.PDF?MOD=AJPERES>.

service a variety of customers, it faces challenges in recruiting staff, in particular indigenous staff, in remote areas.<sup>12</sup>

89. ANZ also supports building financial literacy and money management skills throughout Australia (including in remote areas) by training external facilitators to deliver its "MoneyMinded" and "MoneyBusiness" programs (referred to in response to Question 25 above). These programs, which are delivered through community organisations, have been co-funded by the Australian government since 2005. In FY2017, approximately 49,300 people participated in MoneyMinded, 11% of whom identified as being of indigenous heritage. Total participation in MoneyBusiness was approximately 6,800 in FY2017, with 85% of participants identifying as indigenous.<sup>13</sup>
90. To assist in addressing some of the access issues that indigenous customers may face, and to support the goal of reconciliation more generally, ANZ established its first RAP in 2007. The RAP has been updated on four occasions and contains commitments relating to financial literacy, employment, cultural awareness and capacity building (including procurement for indigenous businesses). As set out in its current RAP, ANZ aims to increase staff and community awareness of some of the barriers that indigenous customers may face by offering and encouraging publicly available online cultural awareness training.
91. Notwithstanding the initiatives described above, ANZ recognises that the barriers to financial inclusion that indigenous customers may face form part of a much broader picture of historical, social and economic disadvantage. ANZ endeavours to implement policies and procedures to address the issues indigenous customers may face and recognises that its services play an important role in assisting vulnerable customers to overcome disadvantage.

**Question 29: Is it appropriate for informal overdrafts to be available in connection with basic accounts? If so, what policies and procedures should banks put in place to minimise the risk of consumer detriment in respect of those products? (T4151:19-21)**

92. ANZ presently offers two no or low fee transaction accounts to customers who hold a concession card or receive government benefits: the Access Basic and Pensioner Advantage accounts.
93. Except in limited circumstances,<sup>14</sup> these accounts are not eligible for informal overdraft facilities. This account restriction, which has always been in place for Access Basic accounts and was introduced to Pensioner Advantage accounts in June 2018, recognises the potential risk of consumer detriment where a bank offers informal overdraft facilities on transaction accounts that are only available to customers who hold a concession card or receive government benefits.<sup>15</sup>

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<sup>12</sup> T4090.27-43.

<sup>13</sup> <http://www.financialliteracy.gov.au/media/560892/mm-impact-2017.pdf>, pages 7-8.

<sup>14</sup> The limited circumstances in which these accounts may be eligible for an informal overdraft facility are described in the Rubric 4-13 Statement: ANZ.999.012.0030 at .0036 [25A].

<sup>15</sup> These account restrictions are discussed in the Rubric 4-13 Statement: ANZ.999.012.0030 at .0036, [23]-[24]; .0043-.0044, [55]-[59]; and TCT-12 to the Rubric 4-13 Statement: ANZ.800.772.0089; T4093.10-45.

**Question 30: Is it lawful for informal overdrafts to be offered on an opt-out rather than an opt-in basis to recipients of government benefits in circumstances where the costs of utilising the informal overdrafts are high and where informal overdrafts may not be adequately notified to customers? Is that lawful and is it appropriate? (T4151:24-32)**

94. ANZ responds to this question on the basis of its own informal overdraft facilities. It is unable to comment on the operation of informal overdrafts at other financial institutions.
95. ANZ provides informal overdraft facilities to allow eligible customers to meet unplanned short-term borrowing needs. ANZ considers that its customers, including recipients of government benefits, should have a choice whether to have an account which may (subject to the application of exclusion criteria) have an informal overdraft attached to it from time to time. Although ANZ customers do not “opt in” to informal overdraft facilities at the account opening stage, they do generally retain choice over whether to call on the facility.
96. **The customer’s request for credit.** In most cases where an informal overdraft facility attaches to a customer’s account, this occurs because the customer has actioned or requested a transaction in circumstances where the account contains insufficient funds to meet the transaction. ANZ customers have available to them a range of options for monitoring their account balances to consider whether they have sufficient funds for particular transactions. By making a request for credit in these circumstances, a customer does “opt in” to any informal overdraft facility that ANZ subsequently provides in response to the customer’s request.
97. **ANZ’s consideration of the request for credit.** Except in limited circumstances, ANZ does not offer informal overdraft facilities in response to a customer’s request for credit unless the customer “passes” the relevant exclusion criteria. For present purposes, the operation of these criteria can be explained as follows. *First*, the customer must hold an account other than an Access Basic or Pensioner Advantage account (being ANZ’s no and low fee accounts that are available to Centrelink recipients). *Second*, the customer must not have received unemployment benefits within a specified period. *Third*, Centrelink benefits must represent less than a specified percentage of the customer’s income. *Fourth*, the customer must not be excluded by reference to ANZ’s other exclusion criteria (which exclude, for example, accounts that were not in a credit position during a specified prior period or were overdrawn for more than a specified period).<sup>16</sup>
98. Where a customer wishes to restrict future access to an informal overdraft facility, he or she may submit a request to this effect to ANZ.<sup>17</sup> Where ANZ receives such a request, it will restrict the customers’ access to the informal overdraft facility by application of an exclusion criterion.<sup>18</sup>
99. ANZ submits that it is neither unlawful nor inappropriate to make informal overdraft facilities available to customers (including recipients of government benefits) in the circumstances described above.

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<sup>16</sup> The “specified” details, which are referred to in exhibit TCT-12 (ANZ.800.772.0089) to the Rubric 4-13 Statement, are subject to a non-publication order.

<sup>17</sup> See the Rubric 4-13 case studies concerning Client 1 and 2, each of whom submitted a request of this nature, which request was actioned by ANZ: T4094.18-4095.14; Exhibit 4.210 (ANZ.800.852.0002), Exhibit 4.211 (ANZ.800.853.0095 at .0103), Exhibit 4.212 (ANZ.800.852.0001) and Exhibit 4.217 (ANZ.800.856.0731 at .0740).

<sup>18</sup> See the “Account Level “Opt Out” from Shadow Limits” exclusion criterion in Exhibit TCT-12 to the Rubric 4-13 Statement: ANZ.800.772.0089. For the reasons stated in the Rubric 4-13 Statement (ANZ.999.012.0030) at .0036 [25A], a customer with restricted access to an informal overdraft facility may still overdraw his or her account in limited circumstances.

**Question 31: Should any other aspect of the current regulatory regime in respect of informal overdrafts be reformed to minimise the risk of consumer detriment? (T4151:32-33)**

100. As Counsel Assisting noted in opening, a range of overlapping legal and regulatory regimes provide general protections to consumers of financial services, including equity, contract, and the prohibition of unconscionable and misleading or deceptive conduct and the unfair contract terms jurisdiction under the ASIC Act.
101. Further, the current (2013) Code of Banking Practice (**CBP**), sets out standards of good banking practice with respect to consumer lending. These include, for example, acting fairly and reasonably towards customers and exercising the care and skill of a diligent and prudent banker in relation to the provision of credit.<sup>19</sup> Despite being a voluntary code of conduct, the provisions of the CBP are capable of having contractual effect.<sup>20</sup>
102. ANZ considers that the existing regulatory regime in relation to informal overdrafts minimises the risk of customer detriment and reforms are not required for this purpose. Separate to regulatory requirements, ANZ seeks to minimise customer detriment associated with informal overdrafts by applying the exclusion criteria referred to above and by communicating with customers who overdraw their accounts and may be charged fees as a result.<sup>21</sup>
103. For completeness, ANZ notes that the responsible lending obligations imposed on consumer lending under the *National Consumer Credit Protection Act 2009* (Cth) and the National Credit Code do not apply to informal overdraft facilities of the kind offered by ANZ. One reason for this is that such facilities do not involve any prior express agreement between ANZ and the customer as to the provision of credit. (At most, there is an agreement between ANZ and the customer that ANZ will apply the exclusion criteria to determine whether or not to provide credit from time to time.)<sup>22</sup>

**Question 32: Do ADIs presently have adequate policies in place for the implementation of the Code of Operation? (T4151:33-35)**

104. In the absence of evidence from other ADIs regarding the implementation of the Code of Operation (**Code**), ANZ is not in a position to make submissions about the adequacy of industry policies generally. ANZ notes the evidence of Ms Lynda Edwards of Financial Counselling Australia that the Code is not being used by banks in a systemic way and that, based on her experience, there are difficulties complying with obligations contained within the Code.<sup>23</sup>
105. As to its own practice, ANZ accepts that the policies it has in place (known as the "90% arrangements") do not meet the best practice guidelines set out in the Code insofar as ANZ does not currently apply these arrangements unless requested to do so by the customer. In part, this is the result of systems and process deficiencies that do not readily allow ANZ automatically to implement the 90% arrangements for eligible

<sup>19</sup> CBP, clauses 3.2 and 27.

<sup>20</sup> See *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302; *National Australia Bank Ltd v Rose* [2016] VSCA 169.

<sup>21</sup> In addition to this information being available via a balance enquiry, ANZ notifies its customers via letter or SMS when an account becomes overdrawn by more than \$50. See Rubric 4-13 Statement: ANZ.999.012.0030 at .0045 [69] and exhibits TCT-14 (ANZ.800.637.0001) and TCT-15 (ANZ.800.634.0001).

<sup>22</sup> National Credit Code, section 6(4). Section 5 of the *National Consumer Credit Protection Act 2009* (Cth) adopts the Code definition of "credit contract" and, therefore, the cognate concept of "credit to which the Code does not apply" (see Code sections 4 and 6). It follows that the responsible lending obligations under Chapter 3 of that Act do not apply to informal overdraft facilities, which involve "credit to which the Code does not apply" and, therefore, are not "credit contracts" regulated by the Code or the Act.

<sup>23</sup> T3739.35 – T3740.10.

customers. ANZ recognises the importance of the Code and is presently considering whether these deficiencies can be addressed.

106. ANZ has also begun a review of its policies and communication mechanisms to identify ways in which it might better meet the requirements of the Code. In the meantime, ANZ considers that the application of exclusion criteria (as discussed in response to Question 30 above) should minimise the work the Code has to do by limiting the extent to which customers in receipt of government benefits are able to overdraw their transaction accounts.

**16 July 2018**