

**ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING,  
SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY**  
**SUBMISSIONS OF THE AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**

**ROUND 4: EXPERIENCES WITH FINANCIAL SERVICES ENTITIES IN  
REGIONAL AND REMOTE COMMUNITIES**

The Australian Securities and Investments Commission (ASIC) makes the following submissions in response to certain of the general questions identified by Counsel Assisting in closing submissions.

**TOPIC 1: AGRICULTURAL FINANCE**

**Case study 1: ANZ**

*What does it mean for a bank to act fairly and reasonably towards a customer in a consistent and ethical manner? What does that obligation require of a bank in relation to agribusiness customers in an enforcement context?<sup>1</sup>*

1. There is a significant overlap between the current Code of Banking Practice obligation for a bank to act ‘fairly and reasonably ... in a consistent and ethical manner’;<sup>2</sup> the obligation for a financial services licensee to do ‘all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’ (*Corporations Act 2001* (Cth) (**Corporations Act**) s 912A); and – with respect to those banks listed on the Australian Stock Exchange – Principle 3 of the ASX Corporate Governance Principles and Recommendations, that directs companies to act ‘ethically and responsibly’, in a manner that is ‘consistent with the reasonable expectations of investors and the broader community’.
2. ASIC believes that fairness is of key importance in the financial services industry. This is not limited to compliance with the law, although this is an important safeguard. Fairness requires financial services entities to conduct themselves honestly and

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<sup>1</sup> Counsel Assisting: P-4108:13-16.

<sup>2</sup> In the Draft Banking Code, the relevant clause is 10 and provides ‘*We will engage with you in a fair, reasonable and ethical manner*’ Australian Bankers’ Association Inc’s *Banking Code of Practice* (draft May 2018), Exhibit #3.144.5 (**Draft Banking Code**).

transparently, including through prompt, effective treatment and remediation of complaints without unnecessary barriers to resolution. It requires entities to have reasonable regard to the interests of their customers. Consumers should be treated honestly and fairly at all stages of their relationship with a financial services entity.

3. As to the content of the obligation, some analogies can be found in the judicial consideration of the concept of utmost good faith in the insurance context. That duty has been described as requiring conduct consistent with ‘commercial standards of decency and fairness’.<sup>3</sup> The concept has been said to encompass more than merely acting honestly, and to have elements in common with the ‘clean hands’ equitable doctrine<sup>4</sup> and be something ‘akin to a fiduciary relationship’<sup>5</sup> although not a fiduciary relationship itself.<sup>6</sup> It may be breached by capricious or unreasonable conduct. Practical examples include that it requires ‘an obvious enquiry to be made’; where the terms of the contract have an element expressed in terms of satisfaction or opinion, the decision maker is to ‘give an objective even-handed and realistic consideration of the whole of the evidence, uninfluenced by personal beliefs, prejudice, suspicion or speculation’; and in the exercise of a power affecting both the insurer’s and claimant’s interests, due regard must be had to the interests of the claimant.<sup>7</sup>
4. That the current Code of Banking Practice obligation<sup>8</sup> has similar content is illustrated by the evidence of Mr Steinberg, and ANZ’s view that it may have breached the obligation in poor communication with Landmark customers, including ‘failing to communicate changes to customer’s loans in a clear and transparent way’, ‘failing to

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<sup>3</sup> *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at [15] (Gleeson CJ and Crennan J) (*CGU v AMP*). See also *Barwon Region Water Authority v CIC Insurance Ltd* (1999) 1 VR 683 at [45] (Ormiston JA, with whom Phillips JA and Kenny JA agreed).

<sup>4</sup> *CGU v AMP* at [257] (Callinan and Heydon JJ).

<sup>5</sup> *Maksimovic v Royal & Sun Alliance Life Assurance Australia Ltd* [2003] WASC 46 at [19].

<sup>6</sup> *Carroll v United Super Pty Ltd* [2018] NSWSC 403 at [93] (*Carroll*) (Slattery J).

<sup>7</sup> See the summary of the practical examples and legal principles by Slattery J in *Carroll* at [94], [101]. Gleeson CJ and Crennan J also emphasised the requirement to have ‘due regard’ to the interests of the counterparty in *CGU v AMP* at [15].

<sup>8</sup> Obligations under the Code of Banking Practice are enforceable as a matter of contract law, see for example *Doggett v Commonwealth Bank of Australia* [2015] 47 VR 302 and *National Australia Bank Limited v Rose* [2016] VSCA 169. The existence of obligations under any such code creates a community expectation that banks will comply with those obligations, including under any successor document such as the Draft Banking Code.

work with customers to overcome financial difficulties’, ‘failing to take all reasonable steps to ascertain if certain proposed guarantors were suitable to act as guarantors’,<sup>9</sup> and not working ‘constructively with [a customer] in a way to resolve the [customer’s] issues’.<sup>10</sup>

5. In ASIC’s view, the obligation will require the bank, in exercising any power affecting both the bank’s and customer’s interests, to pay due consideration to the farmer-customer’s interests and specific circumstances. In relation to agribusiness customers in an enforcement context, a convenient starting point for understanding an agribusiness customer’s interests and issues may be the description of Heydon J in *Waller v Hargraves Secured Investments Limited* (2012) 245 CLR 311 as follows:<sup>11</sup>

[T]he notorious problems which face Australian farmers ... include harsh climatic conditions; the vulnerability of crops and animals to disease; unpredictable volatility in prices on world markets; the tendency of farmers to be asset-rich but cash-poor; their dependence on loans; the risk of speedy ejection from their land if there is entire freedom for creditors to enforce their general law rights, despite the possibility of remedying defaults if climatic and market conditions change; and the expense of and often delay in litigation as a method of keeping creditors within their rights.

6. Evidence before the Commission supports this overview of problems faced by farmers, and in particular their vulnerability to the harsh climatic conditions<sup>12</sup> and the tendency to be asset-rich but cash poor and dependent on loans.<sup>13</sup> Based on the evidence before

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<sup>9</sup> Benjamin Steinberg (ANZ) concerning Rubric 4-1, Exhibit #4.8 at [45].

<sup>10</sup> P-3163:39-40.

<sup>11</sup> (2012) 245 CLR 311 at [28] (made in the context of describing the background to the *Farm Debt Mediation Act 1994* (NSW)).

<sup>12</sup> Warren Day of ASIC gave evidence that in his experience, common causes of financial distress for farming businesses include economic downturn conditions such as drought; inability to meet forecasts by reason of poor planning or business activity; or inability to meet forecast by reason of an individual life event that causes disruption to that specific farming business (such as someone suffering cancer, or the death of a family member): Warren Day (ASIC) Exhibit #4.6 at [43]; P-3100:42-47. Mr Day’s evidence was supported by many of the cases studies. For example, the Ruddys faced financial difficulties following Mr Ruddy’s hospitalisation and month off work, low cattle prices and drought (P-3442; 3444). The Smiths’ farm suffered from flooding in 2012, drought on properties in 2013 to 2017 and also depressed cattle prices (P-3546-3547; 3557).

<sup>13</sup> For example, Mrs Brauer gave evidence that, at the time the Brauers negotiated with Rabobank for a \$300,000 increase, they had ‘\$5 or something in our working account. It wasn’t very much’ (P-3334). Yet at that time, the Brauers owned two farms: Kia-Ora, a 5,300 acre property, and Jamberoo, a 10,000 acre farm which they purchased for \$2.8 million and sold for \$2.4 million: Statement of Wendy Jolene Brauer (Exhibit #4.31) at [3], [37], [61].

the Commission, ASIC considers that to this list of issues faced by Australian farmers the following should be added:

- (a) agribusiness often being different to other small businesses, in that the family home, and often intergenerational home, is located on the property of the small business;<sup>14</sup>
  - (b) farmers' ability to generate income is tied to the property including, land, livestock and machinery, all of which may be the subject of security.
7. In ASIC's view, the obligation should require the bank to have reasonable regard to these interests in considering enforcement options. For example, in determining the manner or priority of enforcement, the bank should have due regard to the customer's interests in assets being realised in an order that, to the extent possible, allows the farmer to keep the family home or property which will allow the farmer to generate income post-enforcement. The obligation requires the bank to be transparent with the customer in its reasons for making an assessment on the manner of enforcement.

***What weight should a bank give to the interest of a customer when making decisions about agribusiness customers experiencing financial difficulty? How should a bank balance the competing interests of the customer and the bank in that context?***<sup>15</sup>

8. In ASIC's opinion, for the reasons stated in answering the question above, a bank signatory to the current Code of Banking Practice is obliged to give due regard to the interests of the customer in making decisions about agribusiness customers experiencing financial difficulty. ASIC considers it unhelpful to be overly prescriptive as to the weight that should be given to a customer's interests in such decisions, but rather the focus should be on a bank considering the customer's interests in an objective, realistic manner, uninfluenced by suspicion or speculation and having reviewed bank remuneration models so to remove conflicts arising from incentives to behave in a manner that may fail to meet community expectations or amount to misconduct. Depending on the context in which decisions are made by the bank, the decision may require the bank to consider a number of other stakeholders. Mr Steinberg

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<sup>14</sup> Warren Day (ASIC) P-3104:14-15.

<sup>15</sup> Counsel Assisting: P-4108:16-18.

of ANZ gave evidence that the other stakeholders he took into account in making decisions are the depositors whose money the bank is managing and ANZ shareholders.<sup>16</sup> Other potential interests to consider may be the need to foster the bank's business relationship with suppliers, customers and others; the impact of the bank's operations on the community and the environment; the desirability of the bank maintaining a reputation for high standards of business conduct; and the interests of the bank's employees.<sup>17</sup>

9. Often, interests of the customer may align with corporate benefits flowing to the bank. Other times, what is in the interests of the customer may be detrimental to the bank's business. In ASIC's opinion, however, the interests of the two are never mutually exclusive, and failure to pay due regard to a customer's interests increases the risk to the bank's reputation, and more particularly to investor and consumer trust and confidence, and to all of which are interests of the bank.<sup>18</sup>
10. The Cheesmans offer an example of where there may have been little divergence between the interests of the bank and the customer. At the time of considering enforcement options, an ANZ internal file note recorded that the amount to be realised at auction would be the same – circa \$2.5 M – whether or not the Cheesmans' family homes were included.<sup>19</sup> In such circumstances, allowing the Cheesmans to keep ownership of one or more of their family homes may have better balanced the competing interests of the corporate benefits for the bank, the customer's interests, and the interests of the community.

***In what circumstances is it both best for the customer and best for the bank to appoint an external administrator?***<sup>20</sup>

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<sup>16</sup> P-3300.

<sup>17</sup> This list of competing factors to balance has been developed using the factors listed in s 172 of the *Companies Act 2006* (UK).

<sup>18</sup> As Edelman J observed in *Australian Securities and Investments Commission v Cassimatis [No 8]*, a corporation has an interest in its reputation, independently of any financial concerns: (2016) 336 ALR 209 at [482]

<sup>19</sup> Exhibit #4.10G.27.11.

<sup>20</sup> Counsel Assisting: P-4108:19-21.

11. ASIC notes that the appointment of external administrators can result in significant extra costs associated with the enforcement of assets which are often charged (in whole or part) back to the customer.<sup>21</sup> ASIC also notes that there was no evidence before the Commission of the appointment of a receiver and manager to an agribusiness, which was then managed by the receiver and manager as a going concern (and in Mr Steinberg's view, this is 'comparatively speaking infrequent in the agri space').<sup>22</sup> That said, ASIC considers there are likely to be some circumstances in which the appointment of an external administrator may be in the mutual interests of the customer and the bank. For example:
- (a) Receivers and managers will become personally liable for all expenses incurred in a receivership, and may also decide to pay pre-receivership creditors to ensure continuing supply.<sup>23</sup> In the agribusiness context this can mean that receivers fund the feed or agistment of livestock (whose welfare may have otherwise been a concern due to drought and the financial strain on the farm leading to a farmer otherwise struggling or unable to feed their livestock). It can also lead to suppliers owed money by the farmer (in what can be a small community) being paid.
  - (b) Farms are often family businesses, and it is recognised in the oppression context that issues of management often occur in family businesses. The appointment of a receiver and manager or a voluntary administrator may be beneficial when there is deadlock or disagreements between members of a family run agri-business in financial difficulty.
12. The appointment of external administrators in the form of a 'controller' (as defined in the Corporations Act) also means that the conduct of such external administrator is regulated by the Corporations Act which provides remedies available to aggrieved parties, noting the practical limitations identified in paragraph 13 below. For example, such controller has a duty of care under s 420A in exercising any power of sale. There

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<sup>21</sup> For example, the Harleys were charged \$84,526.51 in enforcement costs, of which \$59,115.46 was remuneration paid to the agents for mortgagee in possession: Annexure D to the Steinberg Witness Statement (Exhibit #4.9D) at [56].

<sup>22</sup> Steinberg (ANZ): P-3273:40-42.

<sup>23</sup> *Corporations Act 2001* (Cth) s 419. The receivers and managers will later have a right to claim these costs out of the assets realised.

are also limited reporting obligations to ASIC, about which Mr Day gave evidence.<sup>24</sup>

The Corporations Act also permits persons aggrieved by an act, omission or decision of a receiver to appeal to the court, which is a hearing de novo (s 599). A person can also complain to a court or to ASIC about the conduct of a receiver in performing their duties, and either body may inquire into the receiver's activities (s 423(1)(a)-(b)).

13. It is arguable that these rights may be of little assistance to a farmer, who may not have the financial means to pursue any of the Court options under s 420A and s 599 (although many of the farmers the subject of case studies had access to Legal Aid,<sup>25</sup> at least for the purposes of farm debt mediations). In the s 420A context, Mr Day also gave evidence that in terms of regulatory action by ASIC, ASIC must consider the broader public interest in deciding whether to take enforcement action in respect of what is essentially a private dispute between a customer and a bank's receivers.<sup>26</sup> That said, despite its arguable limitations, an agribusiness customer (and the bank) only has the benefit of this regulatory regime when there has been a formal appointment. There is no regulation of a bank's "enforcement", to the extent such enforcement is taken by letters of variation or deeds of forbearance which require customers to sell properties or significantly reduce their level of debt with the bank (for example, the Asset Management Agreement between the Cheesmans, Cheesman Family Farms Pty Ltd and ANZ required the Cheesmans to take steps to sell their properties [first by private sale, and then by auction, with a contract of sale to be signed by 30 November 2012, which date was later varied to 15 January 2012]<sup>27</sup> or the variation to the Brauers' loan with Rabobank which required them to agree to repay \$3 million of their borrowings within two years).<sup>28</sup>

### **Case study 2: Rabobank**

*Is it appropriate for financial services entities to conduct internal appraisals, as opposed to obtaining independent valuations of farms and other rural property? Is it appropriate for*

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<sup>24</sup> Warren Day (ASIC) Exhibit #4.6 at [66].

<sup>25</sup> For example, the Brauers and the Smiths.

<sup>26</sup> Warren Day (ASIC) Exhibit #4.6 at [66].

<sup>27</sup> Exhibit #4.10G.17 cl 4.

<sup>28</sup> Wendy Brauer Exhibit #4.31 at [52].

*staff involved in origination of the loan to conduct or otherwise be substantively involved with such appraisals? 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?*<sup>29</sup>

14. There is a tension between the costs of independent valuations and their utility (to both the bank and the customer). Evidence before the Commission establishes that independent valuations of the farms are a significant cost, which costs are often charged to the customer.<sup>30</sup> In Mr Ruddy's case, Mr Ruddy was required to pay Bankwest \$6,600 for valuations, which money Mr Ruddy needed to buy lick and fodder for his cattle.<sup>31</sup> Further, as Mr Day put it, valuations are 'only a snapshot in time'.<sup>32</sup> In particular in the context of farms and rural property, these valuations can become quickly historical given fluctuations in prices affected by (for example) the state of the crops or climate conditions.
15. In ASIC's view, if valuations are conducted internally, valuations should be conducted by qualified persons in a part of the bank separate to the areas of the bank responsible for the origination or recovery of the loan, particularly in circumstances where, for example, an originating bank officer is paid commissions or incentives corresponding to the size or volume of loans.
16. In earlier submissions to the Royal Commission,<sup>33</sup> ASIC noted its opinion (also expressed in ASIC's public reports) that misaligned incentives can facilitate poor consumer outcomes and drive unsatisfactory conduct, in the context of both mortgage brokers and the provision of financial advice.<sup>34</sup> ASIC noted that if commissions or incentives are paid corresponding to the size or volume of loans a like risk of conflict

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<sup>29</sup> P-4114:12-18.

<sup>30</sup> For example, the Hirsts were charged \$6,181.82 by ANZ for independent valuations in 2014 (Exhibit #4.9E at [37]). The Ruddys were charged \$6,600 for independent valuations Bankwest received in May 2013 (P-4115).

<sup>31</sup> P-3444.

<sup>32</sup> Warren Day (ASIC): P-3110:28.

<sup>33</sup> ASIC Round 1 Submissions [3]-[10], which also refer to ASIC's Review of Mortgage Broker Remuneration (ASIC Report 516).

<sup>34</sup> ASIC Round 2 Submissions [8], [9]-[12].

emerges. In the context of mortgage broking,<sup>35</sup> upfront and trailing commissions can create conflicts of interest. Inappropriately weighted incentives that are directly related to the generation of revenue or the number of new lending clients have the potential to distort small business lending decision-making or encourage failure to follow proper processes – including processes regarding the conducting of valuations of properties, which inform the loan to value ratio (and accordingly the amount the bank may extend to the customer).

***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? Should they be extended to oblige financial services entities to provide information on request, as well as documents?***<sup>36</sup>

17. The Brauers' solicitor sought certain documents and further information from Rabobank just prior to the mediation. Some of these documents (for example the loan application) are documents which are likely to be covered by s 21(4) of the Queensland Act. In ASIC's opinion, there is benefit to a clear-cut list of documents and information which a bank is required to give a customer, on request, prior to mediation.
18. Mr Day gave evidence about the difficulty experienced by customers in obtaining an up to date pay out figure prior to mediation for the principal debt and interest.<sup>37</sup> In ASIC's view, there should be a more general legislative requirement for the parties (ie the bank and the customer) to cooperate with requests for information or analysis of information, both leading up to and during the mediation (as well as the more specific list of documents set out in s 21(4) of the Queensland Act). The pre-mediation conference (which a mediator may call under s 25 of the Queensland Act) may also be an appropriate time for any such requests for information to be made, so they can be facilitated by the mediator. Mediations are likely to have more mutually successful outcomes when there is communication and co-operation between the parties, and understanding of the issues and interests on both sides, prior to the mediation.

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<sup>35</sup> ASIC's Review of Mortgage Broker Remuneration (Report 516) at [29], [30] and [115].

<sup>36</sup> Counsel Assisting: P-4114:25-29.

<sup>37</sup> Warren Day Exhibit #4.6 at [62].

### **Case Study 3: Bankwest**

*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?*<sup>38</sup>

19. ASIC's opinion is that misaligned incentives can bring about poor consumer outcomes and drive unsatisfactory conduct, in the context of both mortgage brokers and the provision of financial advice, and refers to its earlier submissions on this issue.<sup>39</sup>

### **Case Study 4: NAB**

*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? In what circumstances should the moratorium come into effect? In what circumstances should the moratorium be lifted?*<sup>40</sup>

20. ASIC's view is that the hardship obligations in the National Credit Code (NCC) provide a useful starting point for creating a framework for assistance of farmers in financial difficulty as a result of a natural disaster. It may provide a flexible regime for both the bank and the customer to consider the impact of any natural disaster (or other problem unique to farming, as discussed above).
21. Section 72 of the NCC provides a right for a debtor (to whom the NCC applies) to apply to a credit provider to change a contract on hardship grounds. This section provides for a process following the debtor identifying any such financial hardship,

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<sup>38</sup> Counsel Assisting: P-4118:24-32.

<sup>39</sup> ASIC Round 2 Submissions [8], [9]-[12]. See in particular ASIC's Review of Mortgage Broker Remuneration (Report 516) at [29], [30] and [115].

<sup>40</sup> Counsel Assisting: P-4122:3-9.

including: an ability for the credit provider to request information from the debtor relevant to deciding whether the debtor is unable to meeting their obligations under the contract/how the contract should be changed; an obligation on the credit provider to respond to any hardship notice within a prescribed period, including: giving the debtor notice recording whether or not they have agreed to the variation; if they refuse to vary the contract, the reasons for this as well as outlining the debtor's rights under the external dispute resolution scheme (ie the Financial Ombudsman Service (**FOS**)). The provision provides the debtor with an avenue for challenging the credit provider's decision through FOS or alternatively through Court.

22. The provision also provides a moratorium on enforcement proceedings while the hardship arrangement is being discussed or in place. This may be the appropriate way to frame any moratorium, rather than linking the moratorium to any natural disaster being declared itself, particularly considering a natural disaster may last for years (as in the case of the Smiths, in which the Smiths suffered drought on properties for over three years).<sup>41</sup>
23. The NCC's s 72 procedure also contains FOS and Court-review of the process, both of which would be useful oversights to have available for farmers and banks in this context.
24. A further potentially useful point of comparison in terms of regulatory approaches to hardship protection is also provided by the energy and water sectors, which give 'express recognition to the principle that these services are essential to life, and that the disconnection of consumers by reason of inability to pay for these services should be a last resort'.<sup>42</sup> It may be suitable for a legislative regime in this context to similarly acknowledge the reliance of farmers on their land for income and livelihood, and vulnerability to climate conditions and natural disasters.
25. ASIC notes that the Draft Banking Code requires banks to make publicly available their processes for working with customers in financial difficulty (at cl 168). This should

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<sup>41</sup> P-3546-3547; 3557.

<sup>42</sup> P Ali, E Bourova and I Ramsay, 'The Statutory Right to Seek a Credit Contract Variation on the Grounds of Hardship: A History and Analysis' (2016) 78 *Federal Law Review* 77 at 105, and the statutory provisions cited at footnote 196 therein.

extend to any moratorium or process the bank has available in the event of natural disasters. This would obviate issues such as that experienced by Mrs Brauer, who inquired as to hardship arrangements with Mr Brady at Rabobank, but was told that no such arrangements were available.

26. The current Code of Banking Practice contains a clause stating that the Bank will ‘try to help [the debtor] overcome your financial difficulties with any credit facility you have with us’ (cl 28.2) and the Draft Banking Code contains a more detailed process of what the bank will do in circumstances where a customer is facing financial difficulty (Part 9). Extending hardship regulations to banks with respect to farm debts should therefore not impose a significant change or burden on the banks’ practices.

***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? Should there be a uniform Farm Debt Mediation Act? If so, is any of the current Acts in a suitable form for uniform adoption?***<sup>43</sup>

27. ASIC considers there would be benefit to considering extension of the hardship provisions in the NCC (outlined above) to farmers, which could facilitate earlier discussions between the bank and customer.
28. ASIC also considers there to be benefit to a binding pre-mediation conference (by telephone) prior to a mediation, which may (among other things, as noted above) facilitate the provision of information sought by the farmer.
29. Mr Day gave evidence that ASIC considers there to be significant benefits to farm debt mediation, including that the face-to-face mediations involving farmers and people with experience involved as the mediators.<sup>44</sup> ASIC’s view is that there should be a uniform, compulsory Farm Debt Mediation Act or similar nationally consistent scheme, as the current approach can result in significant differences between States. As Mr Day stated during the course of his evidence, such legislation should be separate to a customer’s

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<sup>43</sup> Counsel Assisting: P-4122:15-20.

<sup>44</sup> Warren Day (ASIC): P-3121:5-23.

rights to dispute resolution processes to FOS (or soon the Australian Financial Complaints Authority (AFCA)).<sup>45</sup>

### **Case Study 5: Rural Bank**

*Should banks be required to contact individual customers when they become aware of misconduct in relation to their accounts?<sup>46</sup>*

30. In Round 2 of the Royal Commission, Deputy Chair of ASIC Peter Kell expressed ASIC's concerns about the timeliness and consistency of breach reporting by financial services licensees.<sup>47</sup> The legislation relies on self-reporting, and a subjective assessment on the part of financial services licensee in assessing significance for the purposes of s 912D(1)(b).
31. In ASIC's view, a requirement that the bank notify individual customers when they become aware of misconduct in relation to their accounts would complement the self-reporting provisions already provided in Part 7.6 Division 3 of the Corporations Act. A requirement to notify individual customers may improve the timeliness of the bank identifying 'significant', reportable breaches. In notifying individual customers of misconduct in relation to their accounts, a bank should also notify the customer of any ability it may have to use the FOS (or AFCA) complaint and dispute resolution process as a result of the misconduct identified.

## **TOPIC 2: INTERACTIONS BETWEEN ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE AND FINANCIAL SERVICES ENTITIES**

### **Case studies 1 (Aboriginal Community Benefit Fund<sup>48</sup> and funeral insurance) and 2 (Select AFSL and funeral insurance)**

*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*

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<sup>45</sup> Ibid.

<sup>46</sup> Counsel Assisting: P-4126:25-26.

<sup>47</sup> Peter Kell (ASIC) Exhibit #2.1 at [124]-[141].

<sup>48</sup> A reference in these submissions to **ACBF** includes a reference to one or more of the corporate entities associated with ACBF Group Holdings Pty Ltd and the funds operated by them.

*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 (Cth).*<sup>49</sup>

32. The current regulatory framework in respect of funeral expenses products is not adequate.<sup>50</sup> ASIC considers that certain elements could be amended to improve consumer outcomes and industry participant behaviour and practice in order to meet community standards and expectations. On the evidence before the Royal Commission in case studies 1 and 2, many of the product design and sales practice issues that ASIC identified in Report 454 *Funeral Insurance: A Snapshot*<sup>51</sup> (**Report 454**) remain a concern,<sup>52</sup> particularly when targeted towards low income consumers or Indigenous consumers.
33. There are two amendments to the current regulatory framework that should be made (each explained in further detail below):
- (a) first, a funeral expenses policy<sup>53</sup> should be a financial product covered by the financial services licensing and conduct regime of the Corporations Act. That is, the exclusion effected by regulation 7.1.07D of the *Corporation Regulations 2001* should be removed; and
  - (b) secondly, but dependant on the first matter, a funeral expenses policy that becomes such a financial product should also be made the subject of the:
    - (i) design and distribution obligations; and

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<sup>49</sup> Counsel Assisting: P-4135:38-42.

<sup>50</sup> ASIC notes that an appropriate regulatory framework is only one necessary element to achieve financial inclusion. Others, such as education and engagement, are in many cases equally important and require continuing prioritisation, support and resourcing.

<sup>51</sup> Exhibit #4.164.

<sup>52</sup> Ibid [11], [44]-[53]. These include: (product design) payment of more in premiums than will be paid under the policy and immediate loss of the benefit of premiums paid upon cancellation for lapsed payments; (sales practices) failure to provide an estimate of the total cost of the policy and failure to ensure that consumers understand the key features of the policy (such as, that it only covers actual funeral and related costs incurred to a maximum of the insured sum). Further concerns include: sale of policies that are of no or minimal benefit (double coverage), sales without substantive, informed consent due to pressure sales or factors such as gratuitous concurrence and sales where premiums are collected for children.

<sup>53</sup> *Corporations Regulations 2001 (Cth)* reg 7.1.07D defines a **funeral expenses policy** as a “*scheme or arrangement for the provision of a benefit consisting of the payment of money, payable only on the death of a person, for the sole purpose of meeting the whole or part of the expenses of, and incidental to, the person’s (a) funeral; and (b) burial or cremation*”.

- (ii) product intervention power,  
contemplated by the exposure draft *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017*,<sup>54</sup> with civil and criminal penalties available for failure to comply.<sup>55</sup>
34. This would result in industry or product specific regulation for funeral expenses products and financial services providers in respect of them, within the rubric of financial services regulation. Such industry or product specific regulation is appropriate where:
- (a) the risk of consumer detriment is relatively high and/or the detriment suffered if things go wrong is potentially significant and possibly irremediable;
  - (b) the suitability and quality of services is hard to gauge before or even after purchase; and
  - (c) there is a risk of predatory practice.<sup>56</sup>
35. The sale of funeral expenses policies provides a good example of where specific regulation is appropriate.<sup>57</sup> The products are complex and long-term. There are few widely available quality competing products and a low number of providers, who may be insensitive to reputational damage. Consumers in target markets are often on very low incomes. Certain groups of targeted consumers (such as members of Indigenous communities) may also be vulnerable due to cultural, language or financial literacy factors. Distribution channels are limited and are not conducive to vulnerable

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<sup>54</sup> As at the date of these submissions, the Australian Government has released an exposure draft of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* and an Exposure Draft Explanatory Memorandum, available at <https://treasury.gov.au/consultation/c2017-t247556/>.

<sup>55</sup> ASIC also referred to the product intervention power and design and distribution obligations in the ASIC Round 1 Submissions [28]-[32], [40]-[41] (product intervention power) and [42]-[45] (design and distribution obligations).

<sup>56</sup> Productivity Commission *Review of Australia's Consumer Policy Framework* Report No 45, 30 April 2008 Volume 1 pg 25 and Volume 2 pg 83. See also Commonwealth of Australia, *Financial System Inquiry Final Report*, November 2014 at pg 10, referring to dishonest or predatory practices and specialist regulation to promote fair treatment.

<sup>57</sup> ASIC notes that the *Financial System Inquiry Final Report*, November 2014 stated at pg 10 that specific regulation within the financial system may be particularly appropriate. ASIC considers that this is especially so for many financial products provided to retail consumers, such as funeral expense policies, that rely on a high level of consumer trust in comparison to other retail goods and services.

consumers understanding the product. There is a higher risk that corporate behaviour in connection with the product and its distribution does not meet community expectations.

36. If a funeral expenses policy was included as a financial product for the purposes of Chapter 7 of the Corporations Act, this would ensure that a provider of financial services in connection with that funeral expenses policy is:
- (a) required to hold an Australian financial services licence (**AFSL**) covering the provision of those services. The AFSL may be approved subject to conditions on matters such as adoption of internal systems or restriction of activities;
  - (b) bound by, among other things, the general and specific obligations upon financial services licensees contained in Chapter 7 of the Corporations Act, such as the s 912A(1)(a) Corporations Act general obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
  - (c) exposed to penalties for contravention of applicable provisions of Chapter 7 of the Corporations Act;<sup>58</sup> and
  - (d) subject to any further powers in respect of AFSL holders granted to ASIC arising from the *ASIC Enforcement Review Taskforce Report* dated December 2017, for example a power enabling ASIC to make certain directions to a licensee regarding the conduct of its business where ASIC has reason to suspect that the licensee has, is or will contravene AFSL requirements (including relevant laws)).<sup>59</sup>

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<sup>58</sup> Such penalties would be increased if the recommendations within the ASIC Enforcement Review Taskforce *ASIC Enforcement Review Taskforce Report* of December 2017 are implemented.

<sup>59</sup> ASIC Enforcement Review Taskforce *ASIC Enforcement Review Taskforce Report*, December 2017. Within Chapter 8 (ASIC's directions power), recommendations 46-50 relate to (1) the triggering of a directions power (2) the types of direction that ASIC might make to the holder of an AFSL (3) the making of interim directions (4) the consequences of failure to comply with ASIC directions.

37. The design and distribution obligations contained in the exposure draft *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017*, which arise from the *Financial Systems Inquiry Report*,<sup>60</sup> require:

- (a) product issuers to:
  - (i) determine the *appropriate*<sup>61</sup> target market, and consider the ability of consumers within a target market to understand key features of the product and meet obligations in respect of it;
  - (ii) consider whether the distribution channel or marketing approach will enable customers to understand the product; and
  - (iii) keep relevant records and review arrangements regularly; and
- (b) product distributors to:
  - (i) put in place and comply with reasonable controls to ensure products are distributed in accordance with the design and distribution system; and
  - (ii) keep relevant records.

38. Where a target market consumer has particular characteristics or vulnerabilities (for example, due to location or cultural factors), this will need to be taken into account. In the context of the case study involving ACBF and its targeting of Indigenous consumers,<sup>62</sup> the design and distribution obligations, if in place at product inception in the form proposed, may have required consideration of the appropriateness of:

- (a) the funeral expenses policy product for the Indigenous consumer, including strategies for ensuring that the product was tailored to and understood by the

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<sup>60</sup> Commonwealth of Australia, *Financial System Inquiry Final Report*, November 2014, Recommendations 21 and 22.

<sup>61</sup> ‘Appropriate’ as used means if the product was issued in the target market in accordance with the distribution conditions, the product would generally meet the likely objectives, financial situations and needs of the persons in the target market (*Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* – Schedule 1, Item 3 at proposed new ss 993DA(1) (defined term) and 993DB(10)).

<sup>62</sup> Jones (ACBF): Exhibit #4.146 at [3.1(b)] and Jones (ACBF) at P-3802:6-44.

Indigenous consumer as the target market taking into account factors such as gratuitous concurrence<sup>63</sup> and any difficulty in understanding financial concepts;

- (b) any distribution (marketing) approach that gave the appearance to the target Indigenous consumers that ACBF was an Indigenous organisation (including whether written disclaimers, where used, were insufficient);
- (c) the use of unsolicited phone calls or the use of aggressive or manipulative sales tactics to overcome objections during phone calls, where the target consumer may be more susceptible to such sales tactics;<sup>64</sup> and
- (d) charging to cover children,<sup>65</sup> and also whether distribution conditions should be imposed to prevent sales representatives from targeting insureds under 18 when soliciting sales.<sup>66</sup>

39. In Report 454, ASIC noted that it did not have a product intervention power.<sup>67</sup> The product intervention power within the proposed *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* would allow ASIC to:

- (a) make a range of orders prohibiting specified conduct (including banning the use of certain sales methods) in relation to products regulated under the Corporations Act; and
- (b) proactively reduce the risk of consumers suffering significant detriment from financial and credit products,<sup>68</sup> including harm or damage arising from the

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<sup>63</sup> Where an Indigenous person assents to a proposition put even when not agreeing with it or understanding it, or saying what it is thought a person (particularly in authority) wants to be said regardless of the truth of the matter – see Boyle (ASIC): Exhibit #4.138 at [43].

<sup>64</sup> See, for example, Boyle (ASIC): Exhibit #4.138 at [42]-[44].

<sup>65</sup> ASIC identified in Report 454 (Exhibit #4.164 at [43]) that only one funeral insurance provider had significant numbers of insured under 30 for whom premiums were being paid and 33% of insureds were under 15. ACBF was that provider.

<sup>66</sup> As to targeting of child insureds, see Jones (ACBF) P-3809:23-26, 37-47.

<sup>67</sup> ASIC Report 454 (Exhibit #4.164) at [11] and [28].

<sup>68</sup> *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* Exposure Draft Explanatory Memorandum at [2.8].

product's features, defective disclosure, poor design, or inappropriate distribution.<sup>69</sup>

40. The proposed product intervention order is temporary - up to 18 months - unless made permanent by the relevant Minister based upon an ASIC report.<sup>70</sup>
41. In the context of the case study involving Select AFSL, for example, such a power may have permitted ASIC to introduce specific conditions on the offer of the product to ensure consumers appreciated that the total amount of premiums payable could exceed the benefit amount, and to address consumer detriment arising from the inappropriate generation of customer referrals from vulnerable consumers.
42. The design and distribution obligations and the product intervention power may also produce a more targeted, nuanced regulatory outcome, without inflexible, prescriptive regulation that inhibits product innovation. A product issuer and distributor could mould a product and its distribution to a target market in a manner that is appropriate, and ASIC could respond efficiently and flexibly to conduct that causes significant detriment within that particular target market for reasons that might include cultural, language or geographic factors.

***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?***<sup>71</sup>

43. ASIC considers that the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) do presently apply to funeral expenses policies,<sup>72</sup> as neither s 12BAA(8)(o) of the ASIC Act nor applicable regulations made for the purposes of s 12BAA(8) operate to deem those policies not to be financial products. However, that may not be entirely free from doubt and the

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<sup>69</sup> Ibid [2.31].

<sup>70</sup> Proposed new s 1022CG of the Corporations Act - *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* Exposure Draft Schedule 2, Item 2.

<sup>71</sup> Counsel Assisting: P-4136:3-6.

<sup>72</sup> See Report 454 (Exhibit #4.164) at [27].

statutory language could be amended to clarify that funeral expense policies are not so excluded.

*Is the current regulatory framework sufficient to minimise the risk of:*

- (a) *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?*
- (b) *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?*<sup>73</sup>

44. No.
45. The present regulatory framework in respect of funeral insurance products is primarily reactive. It is responsive to breaches or matters causing detriment that either have occurred or are likely to occur in the near future. In Report 454, ASIC identified several situations of concern where its powers to prevent those situations were limited.<sup>74</sup>
46. The same factors that may make a consumer vulnerable – such as, in the case of Indigenous consumers in remote areas, language and cultural barriers and a lack of financial literacy and financial capability – can also impede harm identification and even formal enforcement of regulatory contravention.
47. Outreach to those consumers by regulators such as ASIC (through for example its Indigenous Outreach Program) as well as by financial advocacy and community groups assists in this regard (and for Indigenous consumers, further financial counselling resources would be a real benefit regardless of regulatory reform),<sup>75</sup> but it is not a complete solution.
48. Although the current regulatory framework does prohibit conduct that is misleading or deceptive or that is unconscionable and does provide other consumer protections, it is

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<sup>73</sup> Counsel Assisting: P-4136:6-12.

<sup>74</sup> Report 454 (Exhibit #4.164) at [11].

<sup>75</sup> Boyle (ASIC) P-3762:23-29.

not tailored to requiring product issuers and distributors to take positive steps to consider the appropriateness of products and distribution to particular end consumers.<sup>76</sup> A regulatory framework that emphasises early positive identification and prevention of specific risk by commercial parties who have the resources and knowledge to do so addresses the regulatory gap identified above. That is particularly so for products targeted towards consumers who may be vulnerable. ASIC would then be empowered to better tailor its response to matters of concern with that particular product's characteristics or distribution.

49. As identified in paragraphs 32 to 42 above, the present regulatory framework may be improved by applying design and distribution obligations to funeral insurance issuers and distributors, with oversight by way of product intervention powers. Such obligations may require a product issuer to cater in the product design for the possibility within the target market of double coverage, or for the issuer and distributor to allow for cultural factors such as gratuitous concurrence in the distribution of the product to a particular target market.
50. The Financial Services Council (FSC) has addressed the position of consumers with unique needs (including Indigenous Australians) in its Life Insurance Code of Practice.<sup>77</sup> This code, which only applies to signatory life insurers, currently contains commitments to take reasonable measures to provide additional support to this class of consumers (clause 7.1); and to train staff to help identify and engage appropriately with consumers who are having difficulties dealing with life insurance products (clause 7.2). Strengthened specific obligations to address the risk of poor consumer outcomes from unfair sales practices would need to be included in order to meaningfully protect Indigenous consumers from poor sales practices and outcomes. The life insurance industry also has an opportunity to implement the design and distribution obligations by including concrete provisions in the code that address the concerns that ASIC has raised

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<sup>76</sup> Financial System Inquiry (Final Report), November 2014, at p 207 and 208. See also *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* Exposure Draft Explanatory Memorandum at [3.9].

<sup>77</sup> Available at <https://www.fsc.org.au/policy/life-insurance/code-of-practice/life-code-of-practice.pdf>.

in this submission and in Report 454. Further, the code should also give consumers the right to take action for code breaches.<sup>78</sup>

***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?***<sup>79</sup>

51. No.

52. ASIC identified this in Report 454 at [11] where it said:

*‘The recommendations, especially as they relate to product design, are made in the context of ASIC’s current powers. ASIC does not have a product intervention power. While we can and do take action regarding misleading conduct, if conduct is not misleading ASIC does not have powers to prevent funeral insurance products creating situations where consumers may:*

*(a) pay more in insurance premiums over a long period than the benefit that will be available under the policy; or*

*(b) have to cancel a policy due to unaffordable premiums, despite having paid premiums over a long period (and potentially in excess of the benefit available under the policy).’*

53. ASIC does not consider that the regulatory framework should prohibit altogether the payment of more in premiums than the maximum benefit received. That is not always inappropriate, if adequately understood by consumers. It may not be inappropriate, for example, if the insurer takes the risk of paying claims in full prior to receipt of the full amount in premiums but, assuming prudent investment of the premium income pool, an unreasonable risk of loss would arise unless a certain percentage of the insured group paid more in premiums than benefits received.

54. However, that is not to say that the potential for payment of premiums in excess of available benefit is always appropriate. If by design a funeral insurance product allows for the payment of more in premiums than the available benefit amount, then the appropriateness of that design feature should be considered for the target consumers to

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<sup>78</sup> Clause 2.21 of the Life Insurance Code of Practice states: *‘The Code does not apply once you commence proceedings in any court, tribunal or external alternative dispute resolution process (with the exception of FOS and the SCT).’*

<sup>79</sup> Counsel Assisting: P 4136:14-15.

whom the product is distributed,<sup>80</sup> including any limit that should be placed on the amount of such additional premiums. Consideration should also be given to how this product feature is explained to ensure that the target consumers understand this before acquiring the product (noting the explanation may vary having regard to the method of distribution and the identity of the consumer). .

55. ASIC considers that there may also be grounds for insurance providers to be required to place a stated cap on premiums payable that is referable to (but not necessarily limited to) the applicable benefit amount.

***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?*<sup>81</sup>**

56. Yes, although ASIC recognises that this may have cost consequences for insurers that should be explored through consultation before any final decision is made.
57. In Report 454, in respect of the funeral insurance market in 2013 and 2014, 55% of funeral insurance policies were cancelled before the end of the first year.<sup>82</sup> For Indigenous consumers, a higher proportion of cancellations occurred for non-payment than among non-Indigenous consumers.<sup>83</sup> Cost of the product was a significant factor in cancellation occurring.<sup>84</sup> The likelihood of occurrence and the impact of cancellation (ie forfeiture of premiums paid) would appear to be significant elements of the business model of funeral insurance generally.
58. ASIC recommended that consumers be provided with more than the 28 days grace period required by law prior to any cancellation for non-payment, particularly for policies in place for a long time.<sup>85</sup>

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<sup>80</sup>See reference to the proposed design and distribution obligations at paragraph 37 above.

<sup>81</sup> Counsel Assisting: P-4136:16-18.

<sup>82</sup> Report 454 (Exhibit #4.164) at [40].

<sup>83</sup> Ibid [52].

<sup>84</sup> Ibid [40].

<sup>85</sup> Ibid, Table 1 Recommendation 2.

59. ASIC also noted that, after increased scrutiny of funeral insurance, certain insurers introduced product features such as:<sup>86</sup>
- (a) where the policy is cancelled for lapsed premium payments, a grace period of three months during which the policy can be reinstated;
  - (b) premiums that are discounted after a specified continuous period of coverage (e.g. every five years); and
  - (c) total premium payments that are capped at the sum insured, so that consumers will not pay more in premiums than the benefit amount.
60. Accordingly, there are two regulatory reform measures that could be considered:<sup>87</sup>
- (a) the ‘grace period’ of 28 days required before a policy is cancelled for non-payment is increased; and
  - (b) if a non-payment cancellation occurs, reinstatement without loss of the benefit of premiums paid should be able to be made within a further three month period, by bringing payments up to date.
61. If new funeral insurance products became the subject of design and distribution obligations identified previously in these submissions, it may be that further product modifications and/or warnings as to cancellation for non-payment may be appropriate for the particular target market to which the product is directed, for example if the product is directed towards low-income consumers who are at higher risk of falling behind in payment. It may be appropriate for example to provide further warnings to clarify that cancellation leads to loss of premiums paid (rather than return of premiums paid).

### **Case study 3 (ANZ and customers in a remote NT community)**

***Do banks take sufficient steps to promote the availability of fee-free accounts to eligible customers?***<sup>88</sup>

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<sup>86</sup> Ibid [55(b), (d) and (e)].

<sup>87</sup> Noting that any cap imposed on premium payments referred to in paragraph 55 would also indirectly effect a protection on cancellation by removing the obligation to continue payments after the cap is reached.

<sup>88</sup> Counsel Assisting: P-4147:47 to P-4148:1-4.

62. No.
63. The Draft Banking Code states at Chapter 16 that banks bound by that document will raise awareness of basic, low or no fee accounts and provide information about them, and also train staff to recognise a customer or potential customer that may qualify for a basic, low or no fee account.
64. If a *new* account is applied for, clause 44 of the Draft Banking Code would require the bank to ask if the customer has certain government cards (such as a pensioner concession card), and then provide information about banking services with low or no standard fees and charges, but, in the ordinary course, a customer must ask for a basic account before one is offered (cl 47).
65. The Draft Banking Code also states that banks may deploy a range of practices that can identify common indicators of financial difficulty and, if identified, the bank may contact the customer and discuss options including by offering basic bank accounts.<sup>89</sup>
66. Despite these requirements (most of which have an equivalent in the current Code of Banking Practice), more could be done by banks to ensure that customer facing staff actually do provide relevant information regarding basic accounts in a manner that takes into account the requirements of eligible customers, particularly within remote Indigenous communities, and do proactively offer fee-free accounts to existing customers: see paragraph 71 below.
67. The method of provision of that information should also be sensitive to cultural factors that promote understanding— for example, the use of visual aids may be of greater assistance to members of Indigenous communities.<sup>90</sup>

***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?<sup>91</sup>***

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<sup>89</sup> Draft Banking Code, Chapter 40 (We may contact you if you are experiencing financial difficulty).

<sup>90</sup> Edwards (FCA) P-3742:26-33.

<sup>91</sup> Counsel Assisting: P-4148:1-4.

68. As Mr Boyle of ASIC stated in his evidence,<sup>92</sup> identification requirements and procedures are a key barrier to financial services access for Indigenous consumers in remote communities. Ms Edwards of Financial Counselling Australia also emphasised the difficulties associated with identification of Indigenous consumers.<sup>93</sup> If financial counselling organisations and Indigenous advocates were able to spend less time on matters of identification, they could spend more time working with their clients to improve their budgeting skills, financial literacy and financial capability, with greater medium-term benefits.
69. In the present case study, ANZ may have failed to assist an Indigenous customer in meeting identification requirements.<sup>94</sup> It is an illustrative example - of which there are many others<sup>95</sup> - of failures of implementation of identification policies by banks.
70. In ASIC's view, banks are generally aware of issues associated with identification of Indigenous consumers in remote communities (as well as other access issues),<sup>96</sup> but their processes and procedures regularly do not or are not able to identify Indigenous people in remote areas as needing particular assistance. Alternatively, those processes and procedures are not consistently applied by customer facing personnel or issues are not escalated to specialist personnel with discretionary power to make appropriate decisions.
71. Ms Edwards and Mr Boyle accurately summarised the issue in their oral evidence, in response to Counsel Assisting enquiring about the most important changes that should be made to improve the engagement with financial services entities by Aboriginal and Torres Strait Islander people in regional and remote communities:

Ms Edwards:<sup>97</sup> "...I would say that to ensure any codes and legislation that – that is for financial services, is to make a requirement for those services to be really proactive in working with Aboriginal and Torres Strait Islander people, and particularly for that knowledge of those

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<sup>92</sup> Boyle (ASIC) Exhibit #4.138 at [104].

<sup>93</sup> Edwards (FCA) Exhibit #4.140 at [50]-[53].

<sup>94</sup> Counsel Assisting P-4146:11-14.

<sup>95</sup> For example, Boyle (ASIC) Exhibit #4.138 at [83]-[91].

<sup>96</sup> See, for example, the Draft Banking Code (Exhibit #3.144.5) at cls 35-37.

<sup>97</sup> Edwards (FCA): P-3762:7-14.

requirements to – to come – to be able to be known from the executive right to the coalface, so that everyone is – and there’s training and information around that, so that, you know, that – you know, the coalface people are working appropriately with Aboriginal and Torres Strait Islander people...”

...

Mr Boyle.<sup>98</sup> “... I think the biggest change that would really benefit things for indigenous consumers is if there was a concerted effort to make sure that all – all of the members of that service right down to the coalface, to the people who are on the telephone or who are dealing face-to-face with Aboriginal and Torres Strait Islander people, are – are aware of the policies that have been agreed to by the industry. And what I would really love to see is more executives from banks, and more policy makers from banks and from financial services institutions who are making these policies, to go out to Aboriginal communities and to see how the policies are actually working on the ground.”

***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? And, if appropriate policies and procedures are not in place, what changes should be made to those policies and procedures to deal with those matters?***<sup>99</sup>

***Should more banks have a telephone service staffed by employees with specific training in assisting indigenous consumers?***<sup>100</sup>

72. Bank policies and procedures are not consistently effective to overcome obstacles arising from geographic remoteness, cultural and language barriers or lack of financial literacy within Indigenous communities even where banks have longstanding, public commitments to addressing Indigenous disadvantage. Policies and procedures should be individually informed by consumer testing and their outcomes considered on the ground within Indigenous communities by personnel with power to change those policies and procedures.

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<sup>98</sup> Boyle (ASIC): P-3762:31-39.

<sup>99</sup> Counsel Assisting: P-4148:6-13.

<sup>100</sup> Counsel Assisting: P-4148:13-16.

73. As noted at paragraphs 70 and 71 above, even where policies are in place, there must be:
- (a) procedures at the direct customer interaction level that accurately identify when the policies need to be applied (for example, by being to identify geographic remoteness without the customer explicitly identifying it or to identify that alternative identification procedures may be appropriate); and
  - (b) concerted, continuous training and verification to ensure that those policies and procedures are known to and applied by the banks' personnel and systems.
74. A dedicated telephone service is just one factor in Indigenous consumers obtaining effective banking services, particularly in remote areas. Other elements of an effective service include adequate branch or ATM services (including with fee-free options) within remote and regional communities.
75. However, more banks should have a telephone service staffed by employees with specific training in assisting indigenous consumers. Such services should be staffed within both Australian Eastern Standard Time and Australian Western Standard Time business hours. Staff should include specialists to assist with identification and other access issues (such as language or financial literacy) and escalation protocols should be in place to allow for prompt consideration by specialist personnel.

#### **Case study 4 (ANZ and informal overdrafts on Groote Eylandt)**

*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?<sup>101</sup>*

*Should any other aspect of the current regulatory regime in respect of informal overdrafts be reformed to minimise the risk of consumer detriment?<sup>102</sup>*

76. An Authorised Deposit-Taking Institution should offer (and proactively promote)<sup>103</sup> at least one basic account with debit card capability that does not permit use of informal

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<sup>101</sup> Counsel Assisting: P-4151:19-21.

<sup>102</sup> Counsel Assisting: P-4151:32-33.

<sup>103</sup> See paragraph 66 and 71 above.

overdrafts. As a question of principle, it is preferable that the operation of such an account is as straightforward as possible.

77. ASIC does not consider that the regulatory regime in respect of informal overdrafts (as opposed to bank policy and procedures) should be otherwise reformed.
78. If an informal overdraft is to be made available, however, whether on the most basic account or otherwise, the existence and cost of such an overdraft should be fairly and properly disclosed in a manner understood by the recipient<sup>104</sup> and the recipient should be required to 'opt in'<sup>105</sup> to the availability of the overdraft having made an informed decision to do so.
79. It may also be appropriate, if an informal overdraft remains permitted on any of a bank's more basic, no or low fee accounts, for:
  - (a) no fees to be charged for limited use of an overdraft, and only a low interest rate applied. This may also incentivise a bank to consider whether to provide an informal overdraft on such accounts at all;
  - (b) additional limits to be placed on the use of an informal overdraft, such as single monthly use; and
  - (c) banks to make positive inquiries of a customer (consistent with the tenor of the proposed obligation within Chapter 40 of the Draft Banking Code to identify common indicators of financial difficulty and contact the customer) if an informal overdraft is accessed in successive months or if charges of over a specified amount are paid within a three month period.
80. Any overdrawn amount should only be repaid in accordance with the requirements of the Code of Operation: Recovery of Debts, if applicable.

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<sup>104</sup> ASIC would not regard disclosure of the existence or cost of an informal overdraft within the body of written terms and conditions in respect of an account, without anything more, as adequate disclosure (being, for example, the type of disclosure by ANZ referred to at P-4071:32 to P-4074, which Mr Tapsall of ANZ acknowledged was less than what the community might expect: P-4073:22-23).

<sup>105</sup> ASIC does not consider that a customer request to draw on an account in an amount exceeding available funds is 'opting in' - it will often not be an *informed* request for an overdraft to be provided by the bank. ASIC refers in particular to Boyle (ASIC) Exhibit #4.138 at [37] regarding misunderstanding as to the nature of overdraft facilities among members of Indigenous communities.

*Do ADIs presently have adequate policies in place for the implementation of the Code of Operation: Recovery of Debts?*<sup>106</sup>

81. ANZ admitted that its policies and procedures may have been inadequate in this regard.<sup>107</sup> This would be a failure to comply with obligations applying under the current Code of Banking Practice and Draft Banking Code. All banks should review and test their policies and procedures to ensure that they do not recover amounts in excess of those stated within the Code of Operation: Recovery of Debts.

GMG McIntyre SC  
PW Collinson QC  
G Coleman  
L Hogan

**Counsel for ASIC**  
**16 July 2018**

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<sup>106</sup> Counsel Assisting: P-4151:34-35.

<sup>107</sup> Tapsall (ANZ): P-4086:10-12.