

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

***FOURTH ROUND OF PUBLIC HEARINGS: EXPERIENCES WITH FINANCIAL SERVICES  
ENTITIES IN REGIONAL AND REMOTE COMMUNITIES***

**SUBMISSION OF NATIONAL AUSTRALIA BANK LIMITED -  
QUESTIONS ARISING FROM THE FOURTH ROUND OF PUBLIC HEARINGS**

**A. INTRODUCTION**

1 National Australia Bank Limited (**NAB**) provides the following submission in response to Senior Counsel Assisting's invitation to respond to the general questions arising from the case studies considered in the fourth round of public hearings concerning experiences with financial services entities in regional and remote communities.

2 The general questions posed by Senior Counsel Assisting raise important matters for consideration, and are the subject of ongoing consideration by NAB as part of its commitment to enhance outcomes, including for customers. However, a number of those questions are not capable of a comprehensive or meaningful response at this point, having regard amongst other things, to the evidence presently before the Commission.

3 In the circumstances, NAB's approach in responding to the questions posed by Senior Counsel Assisting is as follows:

- a. where a particular question can be answered by reference to evidence presently before the Commission, that has been answered by reference to NAB's view on the issue raised by the question;
- b. certain of the questions require more comprehensive investigation and review before a meaningful answer can be proffered. Although NAB is not at this stage in a position to provide a more substantive response to these questions, it has, where appropriate, sought to assist the Commission by identifying key matters which would need to be further considered and explored to enable meaningful answers to be given; and
- c. where NAB is unable to assist the Commission because the question posed is in relation to products or services that do not form part of NAB's business, it has not responded to those questions.

## B. TOPIC 1 – FARMING FINANCE

### *General questions arising from ANZ (Landmark) case studies*

4 **Question 1:** *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?*

5 **NAB's response:** The requirement to act fairly and reasonably towards a customer in a consistent and ethical manner is set out in the Code of Banking Practice (**Code**), which is a voluntary code of conduct setting standards of good banking practice to be followed when dealing with individual and small business customers.<sup>1</sup> NAB has adopted the Code and is a strong supporter of it and the proposed Code of Banking Practice (**Proposed Code**)<sup>2</sup>.

6 In its current form, the Code relevantly provides:<sup>3</sup>

*3.2 We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.*

7 As is self-evident from terms of the Code, the content of the requirement at clause 3.2 is informed by the customer's conduct, the bank's conduct, and the contractual agreement between the customer and the bank. Clause 3.3 of the Code also makes clear that in giving effect to the requirement, a bank will have regard to its prudential obligations.

8 The content of the requirement at clause 3.2 to act fairly and reasonably to customers in a consistent and ethical manner has been considered in a number of judicial decisions.<sup>4</sup> Guidance from those decisions as to what the clause requires includes as follows:

- a. whether the clause has been met must be assessed by reference to all relevant facts and circumstances relating to the particular customer. Put another way, any contention that a bank has breached clause 3.2 must be considered in context;<sup>5</sup>
- b. the manner in which a bank is required to act in the performance of a contract with the customer is to be ascertained with regard to the conduct of the parties in the context of their contractual arrangements;<sup>6</sup>

<sup>1</sup> Clause 1 of the Code.

<sup>2</sup> WIT.0001.0048.0001, Statement of Anna Maria Bligh dated 17 May 2018 with exhibits tendered as exhibit 3.144 (**Bligh Statement**), in response to Rubric 3-20, tab 5, ABA.002.001.0211.

<sup>3</sup> Unless otherwise indicated, references to the Code in this submission are to the Code in its current form (being the Code of Banking Practice 2013). NAB notes that the equivalent requirement under the current proposal for a revised Code is at clause 10: "We will engage with you in a fair, reasonable and ethical manner". NAB does not consider that formulation of the requirement to be materially different to the current form of the Code.

<sup>4</sup> See for example *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWSC 676 per Rein J (**Sam Management Services**) (affirmed on appeal in *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWCA 320); *Victor Seeto & Ors v Bank of Western Australia Limited* [2010] NSWSC 922 per Nicholas J at [37]-[39] (**Seeto**).

<sup>5</sup> *Sam Management Services* at [77]-[78].

- c. the clause preserves the entitlement of a bank to act with careful regard to its own interests under its contract(s) with a customer. The clause does not require a bank to subordinate its own interests to those of a customer. The clause does not require a bank to prefer the interests of the customer;<sup>7</sup>
- d. the clause reflects a bank's commitment to have due regard to the interests of both parties in the course of its performance of the relevant conduct. It is directed to the manner of exercise of a contractual right or power, but does not operate to qualify or vary such a right or power;<sup>8</sup> and
- e. it is recognised that in giving effect to the clause, a bank will have regard to its prudential obligations.<sup>9</sup>

9 In judicial decisions, relevant facts and circumstances which have been taken into account in considering the application of clause 3.2 have included: (a) whether the customer was in default under existing facilities with the bank at the time the bank is alleged to have breached clause 3.2; (b) whether the bank held back from enforcing its rights under the securities notwithstanding the customer's default; and (c) whether any proposed refinancing by the customer had been clearly formulated.<sup>10</sup>

10 NAB respectfully agrees with the judicial guidance provided by these decisions and submits that similar guidance should be applied in understanding community standards or expectations of fairness and/or honesty.

11 As to enforcement, it is not usual for NAB to take enforcement action in the context of an agricultural customer.<sup>11</sup> On those limited occasions that the prospect of enforcement action does arise, in NAB's view the guidance from the authorities described above should guide the application of clause 3.2 of the Code to the customer. The conduct of a bank on such an occasion should have regard to all the facts and circumstances of the customer. That should include consideration of the customer's conduct towards the bank, the bank's conduct towards the customer, the terms of the contract(s) between the parties, as well as the extent to which the enforcement context has arisen from external factors such as climatic, seasonal and economic factors which are outside the customer's control.

---

<sup>6</sup> Seeto at [38].

<sup>7</sup> Seeto at [38]-[39].

<sup>8</sup> Seeto at [39].

<sup>9</sup> Seeto at [37]-[38].

<sup>10</sup> See eg *Sam Management Services* at [77]; *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWCA 320 at [55]-[57] per Hodgson JA.

<sup>11</sup> See the response to Question 3 at paragraphs 19 to 23 below. The term "agricultural customer" is defined in WIT.0001.0069.0001, Statement of Ross Hugh McNaughton dated 18 June 2018 with Exhibit RHM-2 tendered as Exhibit 4.112 (**McNaughton Statement 2**), in response to Rubric 4-18, at [8].

- 12 NAB's approach to agricultural customers in an enforcement context reflects the need to consider each customer's unique position. This approach is reflected in the fact that, since 2005, NAB has had a specialised agribusiness team within its Strategic Business Services division (**SBS**), which allows for the tailoring of individual strategies in respect of agricultural customers. Those SBS specialised bankers have regard to a wide range of circumstances, including climatic, seasonal and economic factors and circumstances unique to agricultural customers.<sup>12</sup>
- 13 **Question 2:** *What weight should a bank give to the interests of the 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?*
- 14 **NAB's response:** When making decisions about agricultural customers experiencing financial difficulty, it is important for all banks, including NAB, to consider the interests of the customer, as well as the interests of the bank itself, the bank's depositors, the bank's other customers (the vast majority of whom are likely to be complying with their obligations) and the bank's shareholders.
- 15 As set out in greater detail in response to Question 1 above, a bank is not required to give such significant weight to the interests of the customer experiencing financial difficulty that it subordinates its own interests or prefers the customer's interests, or gives insufficient regard to its prudential obligations. What is instead required is due and careful regard to a customer's circumstances, including when considering how to resolve that customer's situation.
- 16 A determination of how much weight ought to be given to an agricultural customer's interests, and how the balance between competing interests should be achieved, will necessarily depend upon the individual circumstances of the particular customer. NAB recognises that achieving the right balance in certain situations can be difficult. NAB considers that the right balance is most likely to be achieved when a bank has experienced and specialised staff within its asset management team (for NAB, SBS) responsible for the customer (in conjunction with the customer's local relationship bankers, who are uniquely placed to provide insights and context in relation to both local matters and the individual circumstances of that customer<sup>13</sup>), and when those experienced and specialised staff are given the flexibility to tailor individual strategies for that customer.
- 17 NAB also considers it important that those staff are given appropriate guidance and training, including as to the values and behaviours that they should display in dealing with customers in financial difficulty, including agricultural customers. NAB has adopted a set of principles

---

<sup>12</sup> McNaughton Statement 2 at [42], [48]–[49], [52] and [55]–[57]; see also NAB's Strategic Business Services Principles, which accommodate NAB's approach (McNaughton Statement 2, tab 1, NAB.005.223.0960).

<sup>13</sup> McNaughton Statement 2, at [55] – [57].

intended to guide the achievement of the right balance by SBS.<sup>14</sup> NAB considers that implementing and adhering to those principles is important in balancing the competing interests of depositors, lending customers and the bank's shareholders when making decisions about agricultural customers experiencing financial difficulty.

18 **Question 3:** *In what circumstances is it both best for the customer and best for the bank to appoint an external administrator?*

19 **NAB's response:** Having regard to the importance that NAB's SBS team give to the individual circumstances of each agricultural customer, it is not possible to provide a definitive answer to this question other than to say it will rarely be in the best interests of the customer or of the bank to appoint an external administrator.

20 When an agricultural customer is referred to NAB's SBS team, SBS will seek to work with the customer to put in place a strategy to address the issues faced by that customer. The ultimate objective of the SBS team in developing this strategy is, wherever possible, to rehabilitate the loans of the customer in financial difficulty into performing loans, repatriate that customer to their relationship banker, and maintain NAB's relationship with that customer. NAB considers that wherever such an outcome can be achieved, it is in the interests of both the customer and the bank.<sup>15</sup>

21 Consistently with that approach, NAB considers that wherever possible, appointment of external administrators should be an option of last resort, where all other available options have been exhausted.<sup>16</sup> As a result, NAB has appointed a receiver, liquidator or mortgagee in possession, or has acted as mortgagee in possession, in relation to an agricultural customer on only 13 occasions from 2015 to 2017 (out of approximately 20,000 agricultural customers).<sup>17</sup>

22 On the limited number of occasions when NAB has appointed an external administrator to an agricultural customer, the reason has been dependent on the specific, unusual circumstances of that customer. For example, it might be because the customer is insolvent and a liquidator has been appointed, or because another receiver has been appointed by another creditor. It might be because a customer considers that their business is no longer viable and they have requested the bank to appoint a receiver. In both of those examples, NAB considers it would usually be in its interests to appoint a receiver, and it may well also be in the customer's interests. Whether it is or not will be in the customer's interests will depend on the particular situation.

---

<sup>14</sup> McNaughton Statement 2 at [37]; McNaughton Statement 2, tab 1, NAB.005.223.0960.

<sup>15</sup> McNaughton Statement 2 at [52].

<sup>16</sup> McNaughton Statement 2 at [62].

<sup>17</sup> McNaughton Statement 2 at [21], [34].

23 On the rare occasions that external administrators are appointed, in NAB's view the appointment should occur in a manner which seeks to ensure that the individuals involved, including any external appointments, are sensitive to the difficult position of the agricultural customer, and conduct themselves in an ethical and transparent manner.<sup>18</sup>

**General questions arising from Rabobank Case Study**

24 **Question 1:** *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?*

25 **Question 2:** *Is it appropriate for staff involved in origination of the loan to conduct or otherwise be substantively involved with such appraisals?*

26 **Question 3:** *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?*

27 **Question 4:** *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?*

28 **Question 5:** *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?*

29 **NAB's response:** NAB makes the following response to questions 1 to 5 above.

30 NAB submits there is insufficient evidence presently before the Commission to enable any conclusions to be drawn about the appropriateness (or otherwise) of internal appraisals and any processes associated with such appraisals, at least in respect of NAB.

31 Before these questions can be answered meaningfully and any findings that might apply to NAB made, matters including the following would need to be considered and evaluated:

- a. the benefits and costs of requiring external and independent valuations of farms and other rural properties from both a customer's perspective (for example, the cost and convenience of such valuations) and the bank's perspective;
- b. the practicalities of using an independent valuer for farms and other rural properties that are remote (or very remote), including the additional time and cost that would be involved;

---

<sup>18</sup> McNaughton Statement 2 at [62].

- c. whether any perceived risks of staff being involved in both the origination of a loan and appraisals can be appropriately mitigated through appropriate controls and checks (e.g. peer review or audits undertaken by separate functions within the bank);
- d. whether internal appraisals should only be used for loans up to a prescribed amount and limited to less specialised types of agribusinesses;
- e. the scope and effectiveness of existing prudential standards on internal appraisals (noting Prudential Standard APS 220 – Credit Quality (**APS 220**), Attachment B, includes provisions governing internal appraisals<sup>19</sup>);
- f. the use(s) a bank may make of any internal appraisal, including whether an internal appraisal may be relied on to trigger any non-monetary default; and
- g. the appropriate level of qualification, skill and experience required of bank employees to conduct appraisals.

32 NAB is not in a position to comment on the position of other banks in respect to these matters.

33 **Question 6:** *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?*

34 **NAB's response:** NAB makes the following response to the question.

35 Section 21 of the *Farm Business Debt Mediation Act 2017* (Qld) (**FBDMA QLD**) provides:

**21 Giving requested documents to farmer**

- (1) *The farmer may give a notice to the mortgagee asking the mortgagee for copies of documents related to the farm business debt and the farm mortgage.*
- (2) *The farmer may give the notice -*
  - (a) *when the farmer gives a request for mediation notice to the mortgagee; or*
  - (b) *at any time after the farmer gives a request for mediation notice to the mortgagee but before the mediation ends.*
- (3) *The mortgagee must comply with the notice, at the mortgagee's cost, within—*
  - (a) *30 business days after receiving the notice; or*

<sup>19</sup> Exhibit 4.117, RCD.0022.0005.0001.

- (b) *a longer period agreed between the farmer and the mortgagee, in consultation with the mediator.*
- (4) *The mortgagee complies with the request by giving the farmer copies of the documents in the mortgagee's possession or control relating to:*
  - (a) *the farmer's application for the farm business debt and farm mortgage, and any variation of the debt or mortgage; and*
  - (b) *the contractual relationship between the farmer and the mortgagee, including any loan or mortgage documents; and*
  - (c) *correspondence between the farmer and the mortgagee about changes to the farm business debt or the farm mortgage; and*
  - (d) *the farmer's default under the farm mortgage and any action taken by the mortgagee in relation to the default; and*
  - (e) *any other matter prescribed by regulation.*

36 Failure to comply with this obligation (or to make reasonable efforts to comply) has consequences for the bank, including the possible suspension of any enforcement action by the Queensland Rural and Industry Development Authority, as it has failed to take part in the mediation in good faith: FBDMA QLD, section 21(7) and sections 40 to 47.

37 The *Farm Debt Mediation Act 1994* (NSW) (as amended on 9 July 2018) (**FDMA NSW**) now includes a provision allowing a mediator to request information for the purpose of assisting parties to resolve the issues between them. Section 18D provides:

**18D Requests for information**

- (1) *A mediator may facilitate the exchange of information between the parties to the mediation for the purpose of assisting the parties to resolve the issues between them.*
- (2) *For that purpose, a party to a mediation must give the mediator a copy of any request for information before giving the request to the other party.*
- (3) *In preparing a summary of the mediation under this Part, the mediator is to have regard to whether any request for information made by a party was reasonable, and whether information was provided in response to a request within a reasonable period.*
- (4) *Subsection (3) does not limit the matters to which the mediator is to have regard in preparing a summary of the mediation.*

38 Similarly to the FBDMA QLD, the failure of a bank to respond to a reasonable request for information within a reasonable period has consequences for the bank, including the possible suspension of any enforcement action: FDMA NSW, sections 9 and 10.

39 NAB considers that to achieve a successful outcome at a farm debt mediation, the parties should have access to relevant information and documentation. However an appropriate balance needs to be struck in this context between ensuring:

- a. the parties have ready access to all documents relevant to their arrangements with each other; and
- b. that requests for documents or information are not so extensive that they would delay attempts to resolve the issues between the parties and/or be more in the nature of discovery or interrogatories which would apply in a court proceeding.

40 NAB is of the view that any disclosure obligations imposed in the context of farm debt mediations should appropriately require any request for information to be subject to supervision and oversight of the mediator or relevant authority, in a manner similar to section 18D of the FDMA NSW.

### **General questions arising from Bankwest Case Study**

41 **Question 1:** *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?*

42 **NAB's response:** NAB's response to this question is set out immediately below. In answering this question, NAB has focussed on loans provided through its Business and Private Bank. NAB also refers to paragraphs 23 to 24 of its submissions in response to questions arising from the first round of public hearings on consumer lending.<sup>20</sup>

43 NAB regularly reviews its remuneration and incentive policies in order to ensure they align with best practice in the banking industry. To the extent that its remuneration and incentive policies reward its employees for the volume of loans sold, NAB does not consider that those policies create an unacceptable risk that bank employees will prioritise the sale of loan products over any of the following: (a) the bank's responsible lending obligations; (b) 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; or (c) the bank's obligations to act fairly and reasonably towards customers in a consistent and ethical manner.

---

<sup>20</sup> NAB's submission in response to questions arising from the first round of public hearings dated 3 April 2018 (**Round 1 Submission**) at [23]–[24].

- 44 That is because NAB has in place a variety of mechanisms and controls which work to ensure that its bank employees act consistently with the bank's obligations to customers and counter any risk posed by its remuneration policies to the extent they reward bank employees for sales.<sup>21</sup> Three of those mechanisms are described immediately below.
- 45 *First*, eligibility for an incentive under NAB's Group Short Term Incentive Plan is subject to a "conduct gate". The conduct gate requires an employee to comply with all policy and compliance standards applicable to their role, including obligations set by laws, regulators, contracts industry standards, internal policy, procedures and codes, including the NAB Code of Conduct.<sup>22</sup> As explained by Mr Waldron in the first round of hearings before the Commission (and set out in NAB's previous submissions<sup>23</sup>), if an employee receives a red conduct gate, they do not get a bonus. An amber rating results in a 25% reduction of any variable reward.<sup>24</sup>
- 46 *Second*, banker performance is assessed by reference to performance plans, which use a balanced approach, assessing performance across four areas: the conduct gate referred to immediately above, core expectations, stretch expectations and values and behaviours. Relevantly, the values and behaviours assessment measures how an employee has performed against the NAB values and behaviours relevant to the role and the stretch expectations assessment includes a mandatory risk and compliance goal. Those assessments will impact on the employee's incentive outcome, and if the risk goal in particular is assessed as not achieved, the employee will receive a reduced incentive.<sup>25</sup>
- 47 *Third*, bank employees are required to adhere to policies and procedures requiring them to comply with various obligations. These policies and procedures include the NAB Code of Conduct, which includes requirements for employees to act fairly, requirements for managing conflicts of interest, and requirements to comply with legal and regulatory obligations;<sup>26</sup> the Conflicts of Interest policy;<sup>27</sup> and the NAB Group policies on remuneration

<sup>21</sup> See, in the context of financial advisers, NAB's submission in response to questions arising from the second round of public hearings dated 7 May 2018 (**Round 2 Submission**) at [30]–[37]. Certain of the mechanisms and controls are outlined in detail in WIT.0001.0022.0001, Statement of Andrew Paul Hagger dated 5 April 2018 with Exhibit AH-1 tendered as Exhibit 2.178 (**Hagger Statement 1**), in response to Rubric 2-9, at [31]–[33], [39]–[45].

<sup>22</sup> WIT.0001.0047.0001, Statement of Howard William Silby dated 29 May 2018 with Exhibit HWS-2 tendered as exhibit 3.184 (**Silby Statement 2**), in response to Rubric 3-19, at [58(a)]; Silby Statement 2 at tab 36, NAB.005.369.0016; Silby Statement 2, tab 26, NAB.005.369.0036.

<sup>23</sup> Round 2 Submission at [31]; NAB Submissions in response to questions arising from the third round of public hearings dated 12 June 2018 (**Round 3 Submission**) at [58].

<sup>24</sup> Waldron XXN at T170.9-15 and T170.35-39. See also WIT.0001.0010.0001, Statement of Anthony John Waldron dated 2 March 2018 with Exhibits AJW-1 and AJW-2, tendered as exhibit 1.4, in response to the Commission's request dated 16 February 2018 (**Waldron Statement**) at [231]; Silby Statement 2 at [58(a)]; Silby Statement 2, tab 26, NAB.005.369.0036.

<sup>25</sup> Round 3 Submissions at [57]–[61]; Silby Statement 2 at [45]–[49] and exhibits referred to therein.

<sup>26</sup> Silby Statement 2 at [64(c)]; Hagger Statement 1 at [21], Hagger Statement 1, tab 5, NAB.083.001.5786; Silby Statement 2, tab 26, NAB.005.369.0016.

<sup>27</sup> WIT.0001.0023.0001, Statement of Ross Andrew Barnwell dated 13 April 2018 with Exhibit RAB-1 tendered as Exhibit 2.8 (**Barnwell Statement**), in response to Rubric 2-34 parts A and B, tab 12, NAB.005.113.0035.

or benefits.<sup>28</sup> Each of these documents imposes obligations which act as a control or mechanism to prevent employees from prioritising sales over the bank's obligations to customers.

48 In addition, NAB has committed to implement the Sedgwick remuneration recommendations ahead of the 2020 deadline.<sup>29</sup>

**General questions arising from NAB case study**

49 **Question 1:** *To what extent does default interest reflect the cost to financial services entities of carrying impaired loans?*

50 **NAB's response:** NAB submits that there is insufficient evidence presently before the Commission to enable a meaningful answer to be given to the question posed. Mr McNaughton was asked, and answered, questions by Counsel Assisting as follows:<sup>30</sup>

*All right. Then in 27 [referring to a paragraph of APS 220<sup>31</sup>]: Where a facility has been identified as impaired an ADI must raise provisions. Could you explain the concept of raising provisions?---When – when impaired asset manager has a – has a file where it has gone 90 days past due, and future payment is in doubt, then they should assess the future cash flows and security position to consider whether the – whether the bank is likely to – the bank's position is likely to result in a loss.*

*All right. And what's the consequence of classifying a file as being impaired insofar as the bank's cost of capital is concerned?---My understanding is that we would hold additional capital.*

*And the fact of the bank holding additional capital, is that a cost to the bank's business?---I – I don't know the answer to that, sorry.*

*Right. Do you know whether or not there is any relationship between cost of capital as a consequence of impairment and the – and a bank's decision to charge default interest?---No, I'm sorry, I don't know the answer to that.*

51 Save for that exchange, Mr McNaughton and others who appeared before the Commission did not address the question posed by Senior Counsel Assisting during the hearings. Further, this is not a topic on which NAB was asked to provide evidence in the questions to which Mr McNaughton's written statement responded.

<sup>28</sup> These include the NAB Group Remuneration Policy and associated guidance document, being the Employee Remuneration Guide for conflicted remuneration, see Barnwell Statement at [96]; Barnwell Statement, tab 17, NAB.005.260.0001.

<sup>29</sup> Being the recommendations contained in Stephen Sedgwick, "Retail Banking Remuneration Review", 19 April 2017.

<sup>30</sup> McNaughton XXN at T3591.10–29.

<sup>31</sup> Exhibit 4.117, RCD.0022.0005.0001.

52 This question raises complex questions of fact, and before the question can be answered meaningfully, detailed evidence would need to be provided on the cost to financial services entities of carrying impaired loans.

53 **Question 2:** *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?*

54 **Question 3:** *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? By legislation? By an industry code? Or by some other means. In what circumstances should it come into effect? And in what circumstances should it be lifted?*

55 **NAB's response:** NAB makes the following response to questions 2 and 3 above.

56 NAB acknowledges the significant impact on its customers (including agricultural customers) who have property that is affected by natural disaster.

57 NAB considers that enforcement action should always be a step of last resort. As explained in Mr McNaughton's evidence, it is rare for NAB to proceed to enforcement action and as a general rule, to proceed to enforcement against an agricultural customer affected by drought is not in the financial interests of the customer or in the interests of the bank.<sup>32</sup> The same general rule applies to agricultural customers affected by other natural disasters.

58 To the extent that a customer with farm property affected by natural disaster is in financial difficulty and NAB's SBS specialised agribusiness team has taken on management of the customer's file, as described above, NAB's current practice is that SBS will work with the customer to put in place a bespoke strategy to address the issues faced by that customer, with the ultimate objective of rehabilitating the loans into performing loans and maintaining NAB's relationship with that customer.<sup>33</sup> The strategy developed may include the provision of additional financial accommodation or the provision of temporary relief including via relaxation of covenants, the deferral of amortisation or interest payment relief (among other things).<sup>34</sup> In each case, NAB utilises the resources of dedicated agribusiness bankers to consider the individual circumstances of the relevant agricultural customer and develop a bespoke strategy.

---

<sup>32</sup> McNaughton Statement 2 at [49].

<sup>33</sup> McNaughton Statement 2 at [52].

<sup>34</sup> McNaughton Statement 2 at [52].

- 59 NAB also provides assistance to borrowers who are unable, due to “reasonable cause”, to meet their obligations under their existing credit contract and who reasonably expect to be able to discharge their obligation if the terms of the contract were changed.<sup>35</sup> Reasonable cause can include natural disaster.<sup>36</sup>
- 60 Despite these existing practices, which enable NAB to provide tailored relief to agricultural (and other) customers whose properties are affected by natural disasters, NAB considers that questions 2 and 3 are worthy of close (and regular) consideration. The questions (particularly those aspects of them that are concerned with how and when any moratorium might be implemented) raise complex questions of policy. NAB considers that these questions would best be answered after further analysis and industry consultation (including with government), including in respect of the following:
- a. consideration of the likely effectiveness of any moratorium, including as compared with other options (including measures NAB currently has in place);
  - b. consideration of the impact of any moratorium on a banks’ approach to lending and credit risk assessment for the bank’s agribusiness loan portfolio, including having regard to the value ascribed to security within the portfolio (given that security could not be enforced with a moratorium);
  - c. identification of the full range of customers who may be impacted by natural disasters and the extent to which any moratorium should apply beyond agricultural customers;
  - d. consideration of the scope of any moratorium and whether it will apply in circumstances where non-bank creditors of agricultural customers may be contemplating enforcement action;
  - e. consideration of the impact of any moratorium on all of NAB’s stakeholders, particularly having regard to the possibility of a long-lasting impact of certain natural disasters (such as drought);
  - f. consideration of any unintended consequences of any moratorium, including the reduced supply of any credit used to operate the business, possible reduction of options available to refinance and potential de-valuation of any rural property affected by the moratorium; and
  - g. the likely involvement of government (Commonwealth and State) in any natural disaster response (including appropriate classification of the relevant event).

---

<sup>35</sup> McNaughton Statement 2 at [60]; tab 18, NAB.005.191.0559.

<sup>36</sup> McNaughton Statement 2 at [61]; tab 19, NAB.005.291.0001 at .0004.

61 **Question 4:** *Should provision be made in the farm debt mediation acts or another legislative development 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?*

62 **NAB's response:** NAB recognises that early engagement with customers and their representatives is important in cases where farmers face actual or probable financial distress. NAB's approach is to involve the SBS team at an early stage, given the specialist expertise within that team, in order to devise a strategy with the customer to rehabilitate the loan.<sup>37</sup>

63 NAB also has in place policies which allow its customers to engage in negotiations when financial difficulties arise as a result of unforeseen temporary causes.<sup>38</sup> Those policies reflect the requirements for responding to requests for hardship variations imposed by section 72 of the *National Consumer Credit Protection Act 2009* (Cth).

64 The latest draft of the Proposed Code (clause 158) encourages customers experiencing financial difficulty to contact the bank as soon as possible.<sup>39</sup>

*We encourage you to contact us if you are experiencing financial difficulty*

*158. If you are experiencing financial difficulty, then you, or your representative should contact us as soon as possible. We will discuss your situation and the options available to help you. The sooner you contact us, the sooner we can try to help.*

65 The Proposed Code also makes clear that a bank may contact a customer if they are experiencing financial difficulty (clause 165):<sup>40</sup>

*165. We will employ a range of practices that can identify common indicators of financial difficulty. If we identify that you may be experiencing difficulty paying what you owe under a loan (or are experiencing financial difficulty), then we may contact you to discuss your situation and the options available to help you. We will do this on a case-by-case basis.*

66 Having regard to these provisions, and the fact that they enable early engagement by the bank appropriate to the circumstances of each customer, NAB does support facilitating earlier discussion between banks, farmers and third parties. As NAB has previously

<sup>37</sup> McNaughton Statement 2 at [35].

<sup>38</sup> McNaughton Statement 2 at [60]-[61]; McNaughton Statement 2, tab 18, NAB.005.191.0559, tab 19, NAB.005.291.0001; Exhibit 4.119, NAB.106.001.0679; Exhibit 4.118, NAB.106.001.0674.

<sup>39</sup> Bligh Statement, tab 5, ABA.002.001.0211 at .0243.

<sup>40</sup> Bligh Statement, tab 5, ABA.002.001.0211 at .0243.

indicated, it supports the introduction of the Proposed Code<sup>41</sup> and supports the recent amendments to the FDMA NSW which provides for a farmer to be able to request a mediation with their creditor whether or not there has been a default under the loan. It is important though to have sufficient flexibility to engage in a range of different ways with customers (and their advisors, for example a rural financial counsellor) and deal with the individual circumstances of customers experiencing financial difficulty.

67 **Question 5:** *Should there be a uniform Farm Debt Mediation Act? If so, is any of the current acts in a suitable form for uniform adoption?*

68 **NAB's response:** NAB supports the introduction of a uniform Farm Debt Mediation Act. Although NAB considers that the FDMA NSW is the best example of this type of legislation, if a national scheme were introduced, NAB is of the view that this would present an opportunity to (a) identify the best practice components of each existing Act; and (b) consider other approaches, including other alternative dispute resolution processes which might assist the parties to reach a resolution.

69 A uniform scheme would allow:

- a. a more consistent approach to mediations nationally, including a consistent approach so that customers with properties in or across multiple jurisdictions do not have to engage with multiple and different pieces of legislation;
- b. consolidation of the concepts and definitions which, in turn, would allow the banks to provide more consistent and consolidated information to its agricultural customers;
- c. a consolidated approach to any subsequent review of changes to the uniform scheme; and
- d. introduction of farm debt mediations in states that currently have no such scheme at all.

70 Also worthy of consideration, is whether a uniform Act would continue to be administered by state bodies (in NSW, this is the Rural Assistance Authority and in Queensland, the Queensland Rural and Industry Development Authority). NAB is of the view that state bodies charged with the administration of rural affairs should be, or continue to be, responsible for administering a national scheme.

---

<sup>41</sup> Round 3 submission at [77] and [78].

**General questions arising from Rural Bank case study**

71 **Question 1:** *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?*

72 **Question 2:** *How should banks balance portfolio growth against the need to monitor and manage their existing clients?*

73 **Question 3:** *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?*

74 **NAB's response:** NAB makes the following response to questions 1 to 3 above.

75 NAB is of the view that questions 1 to 3 are worthy of close consideration. However, NAB submits that there is insufficient evidence presently before the Commission to enable an answer to be given to the questions posed, at least insofar as they relate to NAB. Before these questions can be answered meaningfully, matters including the following would need to be considered and evaluated:

- a. an analysis of the range of ways in which external events may (or may not) impact loans within an agribusiness loan portfolio (noting that, in NAB's experience, the number of impaired loans within the agribusiness segment is generally as low as 1%<sup>42</sup>);
- b. what policies banks have for dealing with external events that may impact an agribusiness loan portfolio, including in response to political, economic, regulatory and climatic events;
- c. detailed consideration, including by reference to whole of industry views, of what, if any, level of external support (both financial and otherwise) agricultural customers and banks, or other entities (including government) should be provided in responding to external events, including political, economic, regulatory and climatic events; and
- d. how any such external support impacts on the way in which banks balance portfolio growth against the need to monitor and manage customers.

NAB considers that it would be a lengthy and detailed undertaking to consider and evaluate those matters.

76 During Senior Counsel Assisting's Closing Address, the Commissioner enquired as to what standard applies to banks in deciding when and how to enforce a credit contract and whether shareholders, customers and the public more generally expect banks to abide by a

---

<sup>42</sup> McNaughton XXN at T3572.2-26.

standard of a prudent and diligent banker or a different standard.<sup>43</sup> Such a question warrants detailed consideration, including of the regulatory and prudential environment in which banks operate. In that regard, NAB refers to paragraphs 11 to 16 above.

77 **Question 4:** *Should banks be required to contact individual customers when they become aware of misconduct in relation to their accounts?*

78 **NAB's response:** NAB considers that banks should, in appropriate cases, contact individual customers to alert the customer of any known misconduct in relation to their accounts.

79 However, NAB does not consider it possible to say when this should occur. That will be dependent on the particular circumstances of the customer and the misconduct at issue. There may be circumstances, for example, where it is not appropriate to immediately inform a customer of misconduct as this could create unnecessary alarm, or the alerting of the customer could possibly jeopardise an investigation.

**C. TOPIC 2 – INTERACTIONS BETWEEN ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE AND FINANCIAL SERVICES ENTITIES**

80 NAB provides the following submissions in response to Senior Counsel Assisting's invitation to respond to the general questions arising from the case studies concerning interactions between Aboriginal and Torres Strait Islander people and financial services entities.

81 While NAB recognises each of the questions posed by Counsel Assisting raise important matters for consideration, NAB respectfully does not consider that it is in a position to provide a comprehensive or considered response to several of the questions, based on the evidence presently before the Commission. As noted in paragraph 3 above:

- a. certain of the questions require more comprehensive investigation and review before a meaningful answer can be proffered. Although NAB is not at this stage in a position to provide a more substantive response to these questions, it has, where appropriate, sought to assist the Commission by identifying key matters which would need to be further considered and explored to enable meaningful answers to be given; and
- b. where NAB is unable to assist the Commission because the question posed is in relation to products or services that do not form part of NAB's business, in particular in relation to funeral insurance, it has not responded to those questions.

---

<sup>43</sup> Senior Counsel Assisting's Closing Address at T4126.28-47.

**General questions arising from ANZ Basic Account Case Study**

82 **Question 1:** *Do banks take sufficient steps to promote the availability of fee-free accounts to eligible customers?*

83 **NAB's response:** Whilst NAB recognises the promotion of the availability of fee-free accounts to eligible customers, including to Aboriginal and Torres Strait Islander customers living in remote communities, raises an important matter for consideration, it considers there is insufficient evidence presently before the Commission to meaningfully comment on NAB's promotion of fee-free accounts.

84 Some of the matters that would need to be considered and evaluated in order to meaningfully address this issue include:

- a. the fee-free accounts offered by NAB;
- b. the range and number of fee-free accounts otherwise available in the market;
- c. what eligibility criteria, if any, exist in respect of each of those accounts;
- d. how banks assist customers to demonstrate their eligibility for fee-free accounts. Clause 35 of the Proposed Code<sup>44</sup> (which NAB supports) provides that if a customer tells a bank that they are Indigenous, the bank will take reasonable steps to make information about its banking services accessible as well as, among other things, telling them about any accounts and services that have no, or low standard fees;
- e. the steps taken by NAB and other banks to promote fee-free accounts, particularly in regional and remote communities; and
- f. the sufficiency of those steps having regard to the geographical, cultural and linguistic barriers faced by many Aboriginal and Torres Strait Islander people in regional and remote communities, as well as issues relating to financial literacy and access to traditional marketing channels.

85 **Question 2:** *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?*

86 **NAB's response:** NAB recognises that its Aboriginal and Torres Strait Islander customers, including those living in regional and remote communities, may encounter difficulties in

---

<sup>44</sup> Bligh Statement, tab 5, ABA.002.001.0211 at .0225.

providing conventional proof of identification.<sup>45</sup> NAB acknowledges that such difficulties could contribute to financial exclusion if not appropriately addressed.

- 87 Part 2 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and Chapter 4 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2009 (No 1) 2007* (Cth) impose regulatory obligations on banks (including NAB) with respect to proof of identification. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is the applicable regulator in respect of those requirements.
- 88 In 2016, AUSTRAC released guidance about identification requirements for Aboriginal and Torres Strait Islander people.<sup>46</sup> The AUSTRAC guidance allows reporting entities such as NAB to accept alternative identification documents from persons of Aboriginal and Torres Strait Islander heritage while remaining mindful of social and cultural sensitivities.
- 89 NAB has adopted AUSTRAC's guidance as to alternative forms of identification for Aboriginal and Torres Strait Islander customers, who may otherwise be unable to comply with conventional identification requirements.
- 90 In assisting Aboriginal and Torres Strait Islander customers to overcome any difficulties with conventional identification requirements, it is important that the availability of alternative forms of identification is sufficiently understood and implemented by bank staff. However, there is insufficient evidence before the Commission as to the understanding and implementation by NAB's staff of its identification requirements.
- 91 NAB is committed to continuously improving the awareness of its staff of alternative forms of identification available to its Aboriginal and Torres Strait Islander customers, especially those living in regional and remote communities.
- 92 **Question 3:** *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?*
- 93 **NAB's response:** NAB recognises the importance of addressing the issues raised in this question. Each of the obstacles and barriers identified (geographical remoteness, cultural

<sup>45</sup> See for example. WIT.0001.0067.0001, Statement of Lynda Edwards dated 22 June 2018 (**Edwards Statement**), tendered as exhibit 4.140 at [50]–[51]; ASIC.0800.0007.0001, Statement of Nathan Boyle dated 25 June 2018 (**Boyle Statement**), tendered as exhibit 4.138 at [77]–[79].

<sup>46</sup> Edwards Statement at [52]; Boyle Statement at [77]–[79]; paragraph 5.2.2 of the Commission's Background Paper 19.

and linguistic factors and lower financial literacy) are capable of contributing to financial exclusion, as was recognised by the Commission's Background Paper 19. Clause 37 of the Proposed Code<sup>47</sup> provides that banks will provide cultural awareness training to staff who regularly assist customers in remote Indigenous communities. NAB is committed to continuously improving the cultural awareness of its staff, including through its support of the Proposed Code. However, NAB respectfully submits that there is insufficient evidence presently before this Commission for it to advance a comprehensive and considered response to this question.

- 94 Whether financial services entities should have in place formal policies and procedures of the kind postulated, and, if so, the content of those policies and procedures raises numerous complex issues, including issues of social policy. Working through those issues is a considerable and complex undertaking and should involve engagement and coordination amongst numerous stakeholders, including Indigenous bodies (such as land councils and service entities), industry participants (such as financial services providers with customers in regional and remote communities), the Australian Banking Association, relevant government departments and agencies, local communities, and representatives from bodies routinely advising Aboriginal and Torres Strait Islander people living in regional and remote communities.
- 95 Addressing the appropriate policy response to the obstacles and barriers identified by the question would require at least the following matters to be considered and evaluated:
- a. the nature and extent of the cultural and linguistic barriers experienced by Aboriginal and Torres Strait Islander people living in different remote and regional communities, the differing levels of financial literacy of those people, and to what extent and how those issues translate into practical difficulties in accessing basic financial products and day-to-day interactions with financial services entities;
  - b. the barriers and restrictions to accessing online services for some Aboriginal and Torres Strait Islander customers;
  - c. an analysis of industry wide policies and procedures to determine current best practice and the merits of adopting a consistent industry approach to addressing the obstacles referred to in the question;
  - d. how appropriate policies and procedures are to be designed and implemented in a manner that is mindful of social and cultural sensitivities and consistent with applicable anti-discrimination laws, particularly having regard to the fact that within and across Aboriginal and Torres Strait Islander communities, there will be differences of

---

<sup>47</sup> Bligh Statement, tab 5, ABA.002.001.0211 at .0225.

experience, including the extent to which the obstacles and barriers identified by Senior Counsel Assisting are faced<sup>48</sup>;

- e. the level of financial literacy necessary for customers (including Aboriginal and Torres Strait Islander customers) to understand financial products available and offered to them by financial services entities and the steps that might be open to an entity to ameliorate any difficulties faced by a customer (including an Aboriginal and Torres Strait Islander customer) with insufficient financial literacy;
- f. whether it is necessary and desirable to have specific policies and procedures for Aboriginal and Torres Strait Islander customers or whether it would be preferable to ensure universal policies and procedures are sufficiently flexible to address the issues identified in the question; and
- g. which external bodies and regulators should be consulted in relation to any such policies and procedures.

96 **Question 4:** *Should more banks have a telephone service staffed by employees with specific training in assisting Indigenous customers?*

97 **NAB's response:** NAB is of the view that this question warrants close consideration and acknowledges the evidence of Ms Lynda Edwards as to the merits of such a telephone service.

98 However, there is insufficient evidence presently before the Commission to conclude that a telephone service is the only, or most, effective way of addressing difficulties Aboriginal and Torres Strait Islander customers face in accessing information and support from financial services entities. The following matters would need to be considered in evaluating whether such a recommendation is justified:

- a. whether alternative models of communication or access to information and support may be equally or more effective than a telephone service staffed by employees with specific training in assisting Indigenous customers;
- b. the nature and level of training and support for staff required to ensure the effectiveness of such a service; and
- c. how many Indigenous customers would be inclined to use a dedicated telephone service staffed by employees with specific training in assisting Indigenous customers, having regard to the varying cultural, linguistic and socio-economic barriers some Indigenous people face in accessing telephone services and being able to communicate

---

<sup>48</sup> See for example, XN Boyle, T3720.15–22.

and understand information (including financial information) provided over the telephone<sup>49</sup>.

**General questions arising from ANZ Informal Overdraft Case Study**

- 99 **Question 1:** *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?*
- 100 **Question 2:** *Is it lawful for informal overdrafts to be offered on an opt-in rather than opt-out 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 that appropriate?*
- 101 **Question 3:** *Should any other aspect of the current regulatory regime in respect of informal overdrafts be reformed to minimise the risk of consumer detriment? Do ADI's presently have adequate policies in place for the implementation of the Code of Operation?*
- 102 **NAB's response:** NAB makes the following response to questions 1 to 3 above.
- 103 NAB acknowledges the existence and appropriateness of informal overdrafts in connection with basic accounts is a matter which warrants consideration by the Commission. Further, NAB acknowledges and is aware of the need to ensure that recipients of government benefits are able to use their funds to maintain their living standard in priority to other payments being made, in accordance with the Code of Operation.<sup>50</sup>
- 104 However, NAB respectfully submits that there is insufficient evidence presently before this Commission for it to advance a considered and meaningful response to the questions posed, at least so far as they relate to NAB, including in relation to informal overdrafts and the Code of Operation.
- 105 There are numerous legal, regulatory and practical considerations that would need to be considered in relation to informal overdrafts before such a considered response can be given including:
- a. the circumstances in which NAB permits customers to overdraw their accounts, including the characteristics of individual account holders and their account history which may impact upon whether a customer should be allowed to overdraw their account;

<sup>49</sup> These issues were summarised in Senior Counsel's Closing Address at T4138.10-24.

<sup>50</sup> The Code of Operation is endorsed by the ABA for member banks (including NAB), and is a non-legally binding statement of best practice between the Department of Human Services, the Department of Veterans Affairs, and representative bodies on behalf of relevant ADI members, Senior Counsel Assisting's Opening Address at T3703.10-14.

- b. the terms and conditions for basic accounts, including the extent and clarity of disclosure of any ability to overdraw accounts and whether a customer must opt in or out of any overdraw feature; and
- c. the range of circumstances in which preventing an account being overdrawn by a nominal amount would in fact cause consumer detriment.

**16 JULY 2018**

**W A Harris**

**J A Redwood**

**D F C Thomas**

**S Kanagaratnam**

**H Mann**

**T Kane**