

**ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND
FINANCIAL SERVICES INDUSTRY
ROUND 4 HEARINGS – FARMING FINANCE**

RABOBANK AUSTRALIA LIMITED

SUBMISSIONS CONCERNING THE BRAUER CASE STUDY (RUBRIC 4-16)

A INTRODUCTION

1. These submissions are made by Rabobank Australia Limited (**Rabobank**) to address the matters raised in Counsel Assisting’s oral closing submissions in relation to the Brauer Case Study at the hearing of the Royal Commission (**Commission**) on 6 July 2018 (**Closing Submissions**).
2. The Closing Submissions are contained in the transcript of the hearing on 6 July 2018 at P-4108 – 4114.
3. Bradley Mark James (**Mr James**) gave evidence on behalf of Rabobank to the Commission in the form of his statement dated 15 June 2018 (**James First Statement**; Ex 4.33), his statement dated 22 June 2018 (**James Second Statement**; Ex 4.34) and orally at the hearings on 27 June 2018 (P-3339 - 3378) and 28 June 2018 (P-3382 – 3429).
4. Rabobank’s submissions are structured as follows:
 - a. Part B addresses the matters which Counsel Assisting identified in the Closing Submissions as findings which are open to the Commissioner to make regarding conduct by Rabobank in the Brauer Case Study falling below community standards and expectations and which might be characterised as misconduct (as that latter term is defined in the Letters Patent); and
 - b. Part C addresses particular matters concerning certain of the factual findings in relation to the Brauer Case Study which were made in the Closing Submissions.

B FINDINGS REGARDING CONDUCT BY RABOBANK IN THE BRAUER CASE STUDY

5. Rabobank’s response to the findings sought by Counsel Assisting in relation to its conduct in the Brauer Case Study are made subject to Rabobank’s separate submissions on the meaning of “fairness” in the notion of conduct falling below community standards and expectations and the proper construction and meaning of clause 2.2 of the Code of Banking Practice effective May 2004 (**Code of Banking Practice 2004**) and clause 3.2 of the Code of

Banking Practice published in 2013 with amendments effective 1 February 2014 (**Code of Banking Practice 2013**)¹. Rabobank acknowledges that if the Commission comes to a different view than that submitted by Rabobank on the meaning and applicability of those terms, its conduct as submitted by Counsel Assisting in the Brauer Case Study (as addressed below) may fall within those terms.

B1 Expectation created by email of 22 September 2009 from bank manager to Mrs Brauer

6. Counsel Assisting submitted that it was open for the Commissioner to find that Rabobank's conduct:

- a. by the bank manager in sending an email on 22 September 2009 which could have caused the Brauers to consider that they had an assurance from Rabobank that further funds would be provided in March 2011 for livestock purchases; and
- b. the terms on which the \$300,000 were provided to the Brauers in August 2011 which did not meet an expectation on the part of the Brauers that may have been created by that email,

was conduct falling below community standards and expectations and may have been misconduct in that it may have breached the Code of Banking Practice because it was unfair to the Brauers (P-4112.41 - 4113.3).

7. Rabobank accepts that it is open for the Commissioner to make these findings, based on Mr James' acknowledgement in the James First Statement at [95] to [97] (Ex 4.33).

B2 Approval of the loan for Jamberoo acquisition

8. Counsel Assisting submitted that it was open for the Commissioner to find that Rabobank's conduct in approving the proposed facility without communicating to the Brauers that it could not be serviced if they ran both properties at full capacity was conduct falling below community standards and expectations and could be characterised as a breach of the Code of Banking Practice because it was unfair to the Brauers (P-4113.5 – 10).

9. Rabobank accepts that it is open for the Commissioner to make these findings, based on Mr James' acknowledgement in the James Second Statement at [6] to [10] (Ex 4.34).

¹ Rabobank adopted the Code of Banking Practice 2004 on 22 September 2008 and the Code of Banking Practice 2013 on 1 February 2014.

B3 Farm Debt Mediation

10. Counsel Assisting submitted that it was open for the Commissioner to find that Rabobank's refusal to provide the documents sought by the Brauers, as well as information sought by the Brauers, prior to the farm debt mediation was conduct falling below community standards and expectations and could be characterised as misconduct within the meaning of the Code of Banking Practice (P-4113.10 – 15). Rabobank presumes that the reference in the Closing Submissions to "could be characterised as misconduct within the meaning of the Banking Code of Practice" was mistaken and that it should in fact read "could be characterised as misconduct in that it may have been a breach of the Code of Banking Practice because it was unfair to the Brauers".
11. Rabobank accepts that it is open for the Commissioner to make these findings if they are premised on the basis that it was conduct that was unfair to the Brauers, based on Mr James' acknowledgement in the James Second Statement at [11] to [13] (Ex 4.34) and the matters accepted by Mr James during the course of his oral evidence (P-3415.36 – 3419.9).

B4 Credit assessment of the Brauers' ability to repay the \$3.7 million loan

12. Counsel Assisting submitted that it is open to the Commissioner to find that Rabobank failed to exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the Brauers' ability to repay the \$3.7 million loan and had, therefore, breached clause 21 (which we presume should have been a reference to clause 25.1) of the Code of Banking Practice (P-4113.17 - 21) and that it was misconduct and conduct falling below community standards and expectations.
13. Rabobank accepts, based on Mr James' acknowledgement in the James Second Statement at [6] to [10] (Ex 4.34) and the matters accepted by Mr James during the course of his oral evidence (P-3391 – 3392), that it is open to the Commissioner to find that Rabobank's conduct was misconduct because it breached clause 25.1 of the Code of Banking Practice and was conduct falling below community standards and expectations.

B5 Conflict of interest in Jamberoo transaction

14. Counsel Assisting submitted that it is open to the Commissioner to find that by acting on each side of the Jamberoo transaction, without disclosing that fact to the Brauers, Rabobank failed to act in an ethical manner as required by clause 2.2 of the Code of Banking Practice

and therefore engaged in misconduct (P-4113.23 - 27). For the reasons set out below, Rabobank submits that such a finding is not open to the Commissioner. Whilst the evidence indicates that there was a failure of the bank manager to comply with then existing policies of Rabobank for the dealing with such potential conflicts of interest, that failure should not be characterised as unethical.

15. The potential for conflict was that the Jamberoo transaction involved three parties, as identified by Mr James (James First Statement at [104] Ex 4.33 and P-3349.13 – 3350.27): the vendor, Mr Tom Campbell, was an existing client of Rabobank; one purchaser was the Brauers (through the trustee of their trading trust, Shaytim Pty Ltd as trustee for The Tim Shay Trading Trust) who were existing clients of Rabobank; and the other purchaser was the son of Paul and Marina Wright who were active in negotiations on behalf of their son (Tim Wright), owned an adjoining property to Jamberoo and were also existing clients of Rabobank. Tim Wright was a prospective client of Rabobank.
16. Rabobank submits that in the circumstances in which the bank manager acted in the Jamberoo transaction there was not a failure to act in an ethical manner. Rabobank refers to the additional factual matters it submits should inform the Commission's findings on this issue as set out in section C4 below. Rabobank submits that in those circumstances the bank manager had disclosed to the Brauers that he was acting for the Wrights and the Brauers and therefore the bank manager acted in the Jamberoo transaction with the knowledge of the Wrights and the Brauers.
17. In relation to the vendor side of the transaction, the identity of Mr Campbell as vendor was disclosed by the bank manager to the Brauers in his emails of 26 and 30 June 2009 (Statement of Wendy Brauer [21] – [25] Ex 4.31 WB-5 and WB-6) and in any event was known to the Brauers and the Wrights from their joint meeting with the bank manager and Mr Campbell at the Jamberoo property.
18. In relation to the purchasers' side of the transaction, the Brauers and the Wrights knew of each other for many years, knew that they were both involved in the proposed transaction and knew the bank manager was acting for both sets of purchasers. The bank manager was transparent in his dealings between them. The purchasers independently negotiated a purchase price with the vendor.
19. Rabobank submits that in the circumstances there was no conduct that could be characterised as a failure to act in an ethical manner in terms of clause 2.2 of the Code of

Banking Practice. The circumstances indicate that no party in the transaction received a benefit or suffered a detriment of any kind. The parties proceeded to negotiate arm's length agreements between themselves with no involvement from the bank manager on any side as to the terms of the sale agreements. No confidential information was passed on or was misused by any party or the bank manager. In fact, the outcome of the transaction was to the mutual satisfaction of all parties with Mr Campbell agreeing to stay on that part of Jamberoo purchased by the Brauers for agistment of his cattle. The Brauers and the Wrights were also satisfied with the price they paid respectively.

B6 Hardship policy

20. Counsel Assisting submitted that it is open to the Commissioner to find that by failing to inform the Brauers of its policy on hardship in circumstances where the Brauers' operations had been adversely affected by both flood and the live export ban, Rabobank engaged in conduct that fell below community standards and expectations (P-4113.29 – 32).
21. Rabobank accepts that in circumstances where the Brauers' operations had been adversely affected by both flooding and the live export ban, and they found themselves upon their return to Australia in March 2011 without sufficient rental income to service their loans, Rabobank's failure to review the Brauers' position within its credit department and consider activating its hardship policy (James at P-3405 – 3406) was conduct that fell below community standards and expectations.

B7 Remuneration policies and practices

22. Counsel Assisting has submitted that it is open to the Commissioner to find that the misconduct and conduct that fell below community standards and expectations was a result, at least in part, of the remuneration policies and practices of Rabobank and those policies and practices rewarded loan sales and failed to properly weight other important elements of the banking relationship, including the accuracy of the assessment of loan serviceability, the accuracy of the assessment of security value, and frankness in communicating credit concerns to clients (P-4113.32 - 39).
23. Rabobank submits that its remuneration policies and practices in respect of bank managers (rural managers) at the time of the events in the Brauer Case Study did not cause, even in part, the conduct that fell below community standards and which may have been misconduct. Rabobank submits that there is no direct evidence, and no evidence from which

to infer, any causal link between its then remuneration policies and the events that led to the Brauer situation.

24. Rabobank also notes that its current remuneration policies weigh revenue targets at 17.5% of the overall performance of rural managers in respect of discretionary bonuses (known within Rabobank as “variable incentives”) in line with the recommendations of the Retail Banking Remuneration Review Report by Stephen Sedgwick AO dated 19 April 2017 (**Sedgwick Report**; Ex 4.57) as set out directly below.

B8 Compliance with recommendations in Sedgwick Report

25. Counsel Assisting submitted that Mr James gave evidence that Rabobank’s current remuneration structure is still predominantly driven by sales and is, therefore, not yet consistent with the recommendations of the Sedgwick Review (P-4113.41 - 43).
26. For the reasons set out below, Rabobank submits that this finding should not be made because Mr James’ evidence is not correct and does not reflect Rabobank’s current remuneration structure with respect to discretionary payments to employees which is consistent with the recommendations of the Sedgwick Report.
27. The relevant recommendation of the Sedgwick Report which deals with discretionary payments is Recommendation 3 which provides that “[e]ligibility to receive any variable reward payment should be based on an overall assessment against a range of factors that reflect the breadth of the responsibilities of each role.”
28. Commentary to Recommendation 3 is then provided in the Sedgwick Report at page 15 and under the subheading “Financial Measures in Scorecards” it is stated (at page 17):

Consistent with the intention to signal a sharp break with more sales centric approaches of the past, it is recommended that banks move as quickly as possible:

- *Where banks adopt a scorecard, to reduce the aggregate effective weight assigned to financial measures (in each retail staff scheme) to no more than 50 percent as quickly as systems and other changes can be introduced and falling to 33 percent or less within three years; and*
- *Where banks use discretionary decision making they should be able to demonstrate credibly that performance against any financial measures did not play a significant*

part in determining the variable reward amount (a point that applies more generally in the context of Recommendation 3).

29. Recommendation 4 of the Sedgwick Report then states (at page 17):

Any financial measures included in an overall assessment consistent with Recommendation 3 should:

a. Be product neutral (i.e. not encourage the sale of one product over another); and

b. In the case of a scorecard, together attract a maximum effective weight of 50 percent as quickly as systems and other changes can be introduced, falling to 33 percent or less by 2020.

30. At the hearing on 28 June 2018, Rabobank tendered a document which was marked “Rabobank KPIs Rural Manager (Current)” (Ex 4.87) (**Rabobank Rural Manager KPIs**). Mr James gave oral evidence that the Rabobank Rural Manager KPIs was “a set of the current key performance indicators for the position of rural manager at Rabobank Australia Limited” and that the “position of rural manager is effectively the same position as that of the manager who has been described in relation to dealing with the Brauers” (P-3428.5 – 11).

31. Rabobank Rural Manager KPIs are used to assess performance and behaviour and therefore to consider promotions and discretionary bonuses (which Rabobank now refers to as “variable incentives”) and is sometimes used by Rabobank to assess salary increases.

32. Rabobank Rural Manager KPIs are used by Rabobank to assess commercial and prudential performance on the one hand (weighted as 50% of overall performance) and behavioural performance on the other hand (weighted as 50% of overall performance).

33. The commercial and performance aspect of the Rabobank Rural Manager KPIs include 35% weighting under the heading “Assets (35%)” and include various measures for asset and revenue growth. The remaining performance measures are “Initiatives (25%)” (customer satisfaction ratings, succession training by upskilling other staff and Global farmers which relates to Rabobank’s digital knowledge platform) and prudential measures (40%) which relate to the quality of loans originated which are regulatory and credit risk measures.

34. Accordingly, Rabobank’s discretionary bonus (or variable incentives) remuneration structure for rural managers is weighted at 50% for its commercial and prudential performance

measures of which sales related measures (Assets) are 35%, resulting in an overall weighting of 17.5%. The Rabobank Rural Manager KPIs therefore adopt a “scorecard” approach consistent with recommendations 3 and 4 in the Sedgwick Report.

35. Mr James’ evidence in response to Counsel Assisting’s questions (P-3411) was not correct. There should be no finding based on Mr James’ oral evidence on this topic. Rabobank was given no sufficient notice prior to the hearing that this document was intended to be relied on by Counsel Assisting as might reasonably be expected by its inclusion in the proposed list of “Documents that Counsel Assisting may refer to or tender” otherwise notified to Rabobank prior to the hearing. The Sedgwick Report was not placed in the Online Hearing Book until 9.05am on 28 June 2018, just as Mr James was about to enter the witness box for the second day of his evidence. Mr James had no opportunity to consider the Sedgwick Report before he gave evidence about it. Mr James can also fairly be excused from not having complete knowledge of all aspects of Rabobank’s business, in particular, its many regulatory requirements such as compliance with the remuneration recommendations of the Sedgwick Report. His responses to the questioning reflected his lack of knowledge of the Sedgwick Report and Rabobank’s current remuneration practices in the detail that was asked of him by Counsel Assisting.
36. Accordingly, Rabobank submits that it is a matter of fact that it presently fully complies with the recommendations for current remuneration practices contained in the Sedgwick Report and already fully complies with the recommended 2020 standard for discretionary bonuses of its rural managers. No finding to the contrary should fairly be made.

B9 Inadequate internal systems at Rabobank

37. Counsel Assisting has submitted that:
- a. the misconduct and conduct that fell below community standards and expectations was the result of inadequate internal systems at Rabobank (P-4113.43 – 45);
 - b. it remains unclear as to why the loan to the Brauers was approved (P-4113.46);
 - c. the initial concerns of Rabobank’s credit department were not dealt with in a comprehensive fashion in any document provided to the Commission (P-4113.46 - 4114.2); and
 - d. in no document provided to the Commission did the credit department explain those concerns (P-4114.4 – 5).

38. As to the submission in subparagraph a above, Rabobank accepts that there was a failure by the bank manager to communicate Rabobank's credit department's qualified approval of the loan for the Jamberoo acquisition. Rabobank does not accept that this failure was a result of inadequate internal systems at Rabobank.
39. It is plain from the evidence at the hearing that authority to grant the loan application, and the terms of the loan application, are reposed in Rabobank's credit department by the relevant credit manager. The duty of the bank manager was to communicate accurately and precisely the terms of, and qualifications to, the loan application that was granted by the credit manager and any material comments or concerns raised by the credit manager regarding the loan application. Had that occurred, the Brauers may well have considered the Jamberoo acquisition in a different light. Nevertheless, Rabobank is presently considering whether the provision of the line of communication (and the monitoring of this communication) between critical staff in control functions (such as, for example, a credit manager, an analyst or regional manager), bank manager and customer can be improved so as to avoid such an occurrence in the future.
40. As to the submission in subparagraph b above, as is plain from the communications between the credit manager and the bank manager prior to the loan being approved, the loan was approved by the credit manager on the footing that it could be serviced, at least in the short term until the Brauers returned from the USA in 2011 (and afterward if they chose), from income derived from leasing both the Kia-Ora and Jamberoo properties. Mr James gave evidence to that effect at the hearing (P-3391.9 – 39). As indicated above, and as Mr James and Rabobank acknowledge, the bank manager did not communicate to the Brauers that the loan could not be serviced on the basis of their business plan of a cattle operation as submitted with the loan application and that it could only be serviced as an investment loan; that is, by leasing both properties and, as acknowledged by Mr James, that required the Brauers to change their plans (P-3391.41 and P-3400.27 – 44). Mr James acknowledged that such an outcome was unfair to the Brauers and breached clause 25.1 of the Code of Banking Practice, as does Rabobank (see section B4 above).
41. As to the submission in subparagraph c above, Rabobank understands the reference to "any document provided to the Commission" to mean any *contemporaneous* document created in the period of the events in the Brauer Case Study (2009 - 2015). Rabobank accepts that the initial concerns of Rabobank's credit department were not dealt with in a comprehensive fashion in any *single* document provided to the Commission but, rather,

were communicated back and forth in a series of emails between the credit manager and the bank manager. Rabobank submits that it is likely that those email communications were supplemented by telephone conversations between the credit manager and the bank manager as is the ordinary course in Rabobank's internal consideration of loan applications that warrant further consideration and deliberation. Rabobank further accepts that no document was provided to the Commission which records the credit manager's satisfaction of the questions and concerns that had been raised by him when the credit submission for the Brauers' loan application was first considered.

42. Rabobank also accepts that in subsequently assessing the situation of the Brauers, particularly at the time when it came to consider the request for the advance of \$300,000 in June to August 2011 and thereafter, including at the farm debt mediation in May 2015 (as was acknowledged by Mr James at P-3418.28 - 36 and P-3419.9), a review of the Brauers' file should have been conducted. That review should have considered the circumstances in which the loan was approved and would have been assisted by the existence of a document that set out the basis on which the credit manager's concerns had been addressed and the reasons for granting credit approval of the loan for the acquisition of the Jamberoo property; namely, as an "investment" loan serviced by rent from the Jamberoo and Kia-Ora properties and that the business proposal advanced by the Brauers was not considered by Rabobank to be viable at the time the loan was assessed and approved.
43. As to the submission in subparagraph d above, the credit department's concerns were explained in a series of emails between the credit manager, Mr Mark Gray, and the bank manager (Ex 4.47 and Ex 4.49). As indicated above, Rabobank accepts that the bank manager did not communicate the credit manager's concerns accurately and wholly to the Brauers. Rabobank also accepts that a document recording the credit manager's concerns, the credit manager's satisfaction of those concerns and the reasons for granting the loan for the acquisition of the Jamberoo property would have assisted Rabobank in managing the Brauer situation. Nevertheless, Rabobank does not regard this failure as having arisen from an internal systems failure that is widespread to its business operations. Rabobank bank (rural) managers are expected and required to accurately convey the decisions of the credit department and the terms on which applications are granted. In this instance the bank manager failed to do so. Rabobank's general experience is that no systemic issue exists in this respect and bank managers on the whole comply with their duties in this respect. Further, Rabobank's general experience is that its record keeping practices and file management systems in relation to considering and making decisions on loan applications

accurately and sufficiently record its internal consideration and decisions and its dealings with customers throughout that process.

B10 Internal appraisal of property values

44. Although Counsel Assisting sought no findings of misconduct or conduct falling below community standards and expectations in respect of the bank manager's valuations in the Brauer Case study, it was submitted that:
- a. at all relevant times, Rabobank's policies regarding internal appraisal of property values failed to adequately divide the function of loan origination and security valuation (P-4114.5 – 7); and
 - b. Rabobank placed both tasks in the hands of a banker who was incentivised to write loans, and failed to have internal appraisals assessed by staff who were qualified and experienced in that field (P-4114.7 – 9).
45. Rabobank accepts that the bank manager who originated the Jamberoo loan also performed the security valuation and, *at that time*, there was no internal appraisal by a qualified valuer of the valuation performed by the bank manager. Rabobank's current valuation policy (James First Statement at [99], Ex 4.33 tab 51 [RAL.0005.0006.0340]) now requires that security valuations be undertaken by persons other than originators (bank managers). In addition, part of that policy is that internal appraisals are for Rabobank's use only and must not be released to any other party unless authorised by its legal department (section 3.2 at p771 [RAL.0005.0006.0340]).
46. The evidence indicates that the valuations by the bank manager were prepared for loan approval and capital application processes of Rabobank. There is no evidence that the valuations that were prepared were shown to or relied on by the Brauers. There is no evidence to show the valuations that were prepared by the bank manager were incorrect at the time they were prepared. The valuation prepared as part of the loan application for the Jamberoo property reflected the contract price that was agreed between the Brauers and Mr Campbell, the vendor for the part of Jamberoo that was acquired by the Brauers.
47. Rabobank also submits that in the circumstances of the Brauer Case Study there is no evidence that an adverse outcome to the Brauers' position was occasioned by the bank manager's valuation of either the Kia-Ora or Jamberoo properties.

C FACTUAL FINDINGS

48. Rabobank accepts that the evidence received by the Commission supports the factual findings submitted by Counsel Assisting in the Closing Submissions (P-4108 – 4114), subject to the matters raised below. The matters below are raised in order to clarify the facts to be found by supplementing or qualifying certain of the facts as submitted by Counsel Assisting. Rabobank submits that by reason of the supplemental or qualifying matters it has raised as indicated and identified below, certain of the findings which the Commissioner should make should be different to those proposed by Counsel Assisting.

C1 General matters

49. At relevant times, the Brauers had as professional advisers a firm of accountants, Active Financial Answers, and later in 2013 also a firm of financial advisers, Powers Accountants and Advisers. At various times those advisers were engaged in the dealings between Rabobank and the Brauers, including when the application for the loan for Jamberoo was made (Ex 4.65 [RAL.0002.0003.3214]). At other times, the Brauers had the assistance of those advisers when dealing with Rabobank (First James Statement Ex 4.33 at tab 22, p.505 [RAL.0002.0003.0001]).

50. The Brauers had a considerable degree of financial sophistication. The Brauers had seven investment trusts which held residential investment properties in which they had interests as appointors and beneficiaries and as shareholders and directors of the various trustee companies. The financial and trust structures that had been established were complex (Ex 4.81 [RAL.0002.0003.1434]; Ex 4.82 [RAL.0002.0003.1442]; Ex 4.83 [RAL.0002.0001.3694]; Ex 4.84 [RAL.0002.0003.1450] & Ex 4.85 [RAL.0002.0003.1458]). Their financial advisers from time to time assisted with the preparation and provision of documents to Rabobank setting out the Brauers' financial position and arrangements, including when the Jamberoo loan application was assessed and granted (Ex 4.65[RAL.0002.0003.3214]; Ex 4.66 [RAL.0002.0003.1283]; Ex 4.67 [RAL.0002.0003.1287] & Ex 4.68 [RAL.0002.0003.3199]).

51. Rabobank submits that the above matters should inform the Commission's consideration of the relevant findings of fact to be made and any assessment of the fairness of the dealings between the Brauers and Rabobank. Specifically, it is submitted that some recognition should be accorded to customers, such as the Brauers, that have a degree of financial sophistication and knowledge and who have at their disposal professional advisers who might reasonably be expected to be consulted on the commercial affairs pertaining to their rural business enterprises.

C2 Unsolicited approach to acquire Jamberoo property

52. Counsel Assisting submitted that “at the time [June 2009] the Brauers received that email, they were not actively looking for another property.” (P-1409.10-12).
53. The email referred to by Counsel Assisting was the email from the bank manager to the Brauers of 26 June 2009 informing them Jamberoo was on the market, which was Tom Campbell’s property, and which adjoined Paul and Marina Wright’s property known as “Nankeen” (Ex 4.31 WB-5 [RAL.0002.0003.3219]).
54. Rabobank submits that any proposed factual finding on that matter should have regard to the following evidence:
- a. On 10 February 2009, Ms Brauer emailed the bank manager (James First Statement Ex 4.33 tab 28, p.657 [RAL.0002.0003.3025]). In that email, Ms Brauer raised with the bank manager the prospect of leaving Kia-Ora and finding an alternative “block”. Ms Brauer stated:
- Adrian hasn’t done anything about the other block yet. Have a workman here this week, so soon, I hope. I am really more in favour of this block than the one closer to town. It gives us so many more opportunities in the long run. Would put us in a better position when the time comes to have to leave here because of the mine, we have the back up to start on a better block again somewhere else. I think it gives us a few more options on the succession side of things are (sic) well. Lots to think of.*
- b. Mr James also gave oral evidence at the hearing that, from his review of the Brauer file, in previous communications between the bank manager and Ms Brauer, the Brauers had expressed some interest in acquiring a property in the future (P-3344.1 – 11).
55. Rabobank submits that in light of this there is evidence before the Commission that Ms Brauer and the bank manager had communicated, prior to the bank manager raising the possibility of the Jamberoo acquisition, about the possibility of the Brauers acquiring another or alternative property to the Kia-Ora property. The email of 26 June 2009 sent by the bank manager to the Brauers regarding the possibility of acquiring Jamberoo was not simply an unsolicited approach but, rather, part of the Brauers’ future planning, including succession planning, communicated to the bank manager. The indication to the Brauers by the bank manager in June 2009 of the possibility of acquiring Jamberoo followed the Brauers’

expressing to him their desire to explore the possibility in the future of acquiring another property and, whilst they may not have been “actively looking” for a property at that time because they were in the USA, they had expressed a general interest and openness to the possibility of acquiring one as part of their planning for the future.

C3 The funds to be used to restock both properties when the Brauers returned from the USA

56. Counsel Assisting submitted that “[i]n July, the bank manager emailed the Brauers and outlined how a possible purchase of part of Jamberoo could be financed. Amongst other things, the manager explained that the Brauers’ existing facility limits were \$1.2 million, not all of which was fully drawn. He suggested an additional 3 million be borrowed, which would mean that undrawn funds would remain in the facility following the purchase of Jamberoo. They had planned to utilise those undrawn funds, along with funds held in farm management deposits and realised equity on the sale of their home in America, in order to stock Kia-Ora and Jamberoo on their return to Australia.” (P-4110.1 - 9)
57. Rabobank submits that in respect of those proposed findings the Commissioner should have regard to the following matters:
- a. Following the communications in July 2009, Ms Brauer and the bank manager communicated by email about some of the issues identified by Rabobank’s credit department in response to the Brauers’ loan application.
 - b. One such email was from Ms Brauer to the bank manager (James First Statement Ex 4.33 tab 32, page 710 [RAL.0002.0003.3020]). In that email, in response to the question of how easy would it be to sell the USA house in a depressed market and for how much, Ms Brauer provided further information on how the Brauers might stock both properties and gave an assurance to the bank manager that in addition to expected revenue from the sale of the USA house, which would be “[e]nough to get us started in the cattle market in Australia very comfortably”, the Brauers “also have other options that [sic] to fully stock the properties ourselves upon our return to Australia.” The statement could only be understood at that time to give an assurance to the bank manager that the Brauers were entering into the loan for the Jamberoo purchase without dependence on the further \$300,000 from Rabobank initially sought in their loan application. The “other options” may well have been the disclosed unrealised equity (in the order of \$700,000) in the investment properties held by the Brauers in their investment trusts which were listed in the statement of assets and liabilities

provided by email from Ms Brauer to the bank manager on 31 August 2009 (Ex 4.76 [RAL.0002.0003.3031] and Ex 4.77 [RAL.0002.0003.3032](see pages 1-2)).

- c. A further assurance about the possibility of liquid funds being available on their return was provided in Ms Brauer's email to the bank manager on 23 September 2009 when she stated "I think the proposal is fine. It may even be that the real estate that the \$200K is involved with will be refinanced in the next twelve months as well. That will release that loan to be fully used to finance the restocking effort as well as some improvements." (James First Statement Ex 4.33 tab 34, p. 713 [RAL.0002.0003.3028]).

58. Accordingly, Ms Brauer's evidence before the Commission that the deal to purchase Jamberoo "*hinged on the bank providing another \$300,000 to stock it*" (P-3332.1 - 2) should not be wholly accepted when seen against the above contemporaneous emails which indicate the contrary.

C4 Acting for both sides of the Jamberoo transaction

59. Counsel Assisting submitted that "[u]nbeknown to the Brauers, the vendor of Jamberoo was also a client of the bank manager, as were the parents of one of the purchasers of the other portion of Jamberoo. The bank manager did not at that time act for the purchasers of the other portion of Jamberoo, but was encouraging them to become clients of Rabobank." (P-4111.26 - 30).

60. Rabobank submits in response to that proposed finding that the Commission should have regard to the following evidence:

- a. On 30 June 2009, the bank manager emailed Ms Brauer and indicated that before taking the proposed transaction for the acquisition of Jamberoo further he sought to confirm that he had permission of one of the other prospective purchaser's father, Paul Wright, to let Ms Brauer know what Mr Wright was planning (James First Statement Ex 4.33 tab 29, p. 666 [RAL.0002.0003.3216]). It can be inferred from the email that the permission was granted prior to the sending of the email. Further, the identity of the vendor of Jamberoo, Mr Tom Campbell, was disclosed at the outset and was almost certainly known in any event by the Brauers as residents of a nearby property and part of the farming community in Dalby;
- b. Subsequently, after the Brauers expressed interest, they communicated by email directly with Paul and Marina Wright, in relation to the proposed acquisition of the

respective parts of the Jamberoo property. The Brauers informed the bank manager of the price agreed by the vendor for the sale of the whole of Jamberoo of \$4 million: (Ex 4.59 [RAL.0002.0003.3005]). Ms Brauer then arranged a meeting between the Wrights and Mr Brauer when Mr Brauer planned to arrive in Brisbane on 15 July 2009 (Ex 4.60 [RAL.0002.0003.2989]; James First Statement Ex 4.33 tab 29, p. 662 [RAL.0002.0003.3210]). The bank manager was a recipient of that email.

- c. The Wrights were friends of the Brauers (Statement of Wendy Brauer Ex 4.31 [22]). It can be inferred that the Wrights and the Brauers communicated between themselves in relation to the joint offer to the vendor (ultimately agreed at \$4 million) and all purchasing parties knew of and consented to the bank manager acting for the various purchasers and facilitating the financing of the transactions. That is also confirmed in the subsequent email on 8 July 2009 when the bank manager arranged to meet both Paul Wright and Mr Brauer together at Jamberoo and awaited the apportioning of the purchase between them and disclosed that he had spoken to Paul Wright (James First Statement Ex 4.33 tab 29, p. 660 [RAL.0002.0003.3208]). All relevant parties - the bank manager, Adrian Brauer, Paul Wright, Tim Wright and Tom Campbell - met together at Jamberoo in July 2009 to discuss the proposed transaction (Statement of Wendy Brauer Ex 4.31 [28]); and
- d. Later in July 2009, the bank manager dealt with the Brauers solicitor, Ben Wright of South & Geldard solicitors, in the ordinary course in preparation of the conveyance of their part of the Jamberoo property (Ex 4.62 [RAL.0002.0003.1468]; Ex 4.63 [RAL.0002.0003.2676] and Ex 4.64 [RAL.0002.0003.2679]). Ben Wright had no relation to the Wright family who purchased part of Jamberoo.

13 July 2018

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