

14 November 2014

Mr Geoff Fader
Chairman
Tasmanian Small Business Council
123 Bathurst Street
HOBART TASMANIA 2001

Dear Mr Fader,

RE: AUSTRALIAN BANKING CODE

The JMA Parties are writing to you to provide information regarding problems with banking contracts issued to customers of Australia's major banks between 2004 and 2014.

The following claims are reviewed in this document:

- A) Are the subscribing banks' contracts binding?
- B) Were the statements made by the subscribing banks and its association misleading?
- C) Was the conduct of the subscribing banks similar to that of Bank of America?

The evidence referred to here, notes:

- A) It was reported that there were 2.5 million complaints.
- B) The Code Compliance Monitoring Committee only investigated 30 complaints per year.
- C) Documents published by the senate banking inquiry in 2010, would have been accessed by the regulators.
- D) A public inquiry into banking practices would find there were many examples where subscribing banks took customers to court for breach of contract while the bank was silent on its policies.

The following analysis of bank documents provides evidence of the actions perpetrated by banks and how it was accomplished through their contract. While not all the clauses identified in the documents were necessarily breaches of the contract law, they all added to an agreement that is unethical, unconscionable and established to disadvantage the signatory at the bank's will, without regulation or repercussion.

The following analysis utilises small business contracts of one of the 4 major banks. Excerpts of the contract are provided in the boxes below.

DOCUMENT 1

FACILITY OFFER (Annexure A)

Following our recent discussions we are pleased to offer the following facilities:

Offer and Interpretation

We offer facilities on terms set out in this facility offer and in the enclosed General Standards Terms... ([8] 2003 version) (which should be read together) ...

How to accept

You may accept this facility offer ... by signing the enclosed copy and returning it within 14 days of the date of this letter ...

Fees

The following fee(s) must be paid before any of you request the first drawdown:

- An establishment fee of \$14,650.00 ...

FACT

- There are no initial problems obvious in the opening statements of the Facility Offer. Clearly there are a series of Terms and Conditions associated with the offer, which is referred to in two documents, both of which are provided.
- The bank sets a time precedent for interaction between itself and the signatory, that being two weeks.

Acceptance by you

By signing this document, you:

1. Accept the facilities to you on the terms set out in this facility offer and the General Standards Terms.

FACT

- The offer is reinforcing the fact that the only terms and conditions the signatory has to know about are in the facility offer and the General

Standards Terms.

- This is not a problem as both documents are provided for the signatory and its lawyers. In this information, it is not obvious that the General Standards Terms incorporate a third document that is only available on request.

By signing this document, you:

2. Acknowledge that:

- a. a legally binding contract is created between you and us
- b. you have made your own independent judgment and decision to enter this facility agreement and are not relying on any information given or representations made by us to you

By signing this document, you:

3. Make the declarations in the General Standards Terms.

FACT

- The contract is explaining that by signing the offer, a legally binding contract is created for both parties – the signatory and the Bank. The Bank is now contractually required to meet the terms and conditions set out in the facility offer.
- While the bank rids itself of responsibility for decisions based on sales pitches wrought by its employees, it does not suggest that the signatory should not base their judgment on the information provided by advocacy groups the bank belongs to, such as the Australian Bankers Association.
- The offer clearly acknowledges that the General Standard Terms is also a legal document that it and the signatory are contractually bound to. The bank is therefore contractually bound to meet the requirements of the Code of Banking Practice referred to in the General Standard

Acknowledgment by guarantor(s):

The terms of this facility agreement are to be acknowledged by each guarantor

Terms.

PROBLEM

- While the facility offer does not mention the General Standard Terms explicitly in relation to guarantors, the facility offer does guarantee that it and the General Standard Terms are contractually legal documents.
- As such, the guarantors are protected by the same Code of Banking Practice as the signatory of the loan.

DOCUMENT 2

GENERAL STANDARD TERMS (Annexure B)

The terms and conditions of your facility are set out in the facility offer and in these standard terms. They should be read together.

Conditions of using the facilities and declarations:

1.4 You declare that:

- (f) you have not withheld any information that might have caused us not to enter into any arrangement with you; and
- (i) all declarations made by you in each other arrangement with us are correct and not misleading ...

PROBLEM

- The bank once again explains that there are two documents that need to be read in order for the signatory to understand the terms and agreements of the loan. The bank fails to draw the signatory's attention to the Banking Code of Practice at this time. This is hypocritical considering the declarations regarding withheld information in 1.4.
- The bank sets the precedent that the signatory must not withhold any information that may have prevented the bank from making an offer to the signatory.
- The bank does not specify the nature of this information, thus suggesting it is any information, not just financial information.
- The bank expects any information provided to be correct and in no way misleading. While the bank expects this of the signatory, this is not a precedent they must meet themselves, as they do not make mention of the Banking Code of Practice in the summary of the agreement.

1.5 You must tell us when ever anything happens which would mean you could not truthfully repeat all the declarations in this facility agreement.

PROBLEM

- The bank goes as far as to insist that the signatory update the bank if anything changes the information the bank used as the basis for

issuing the loan.

- The bank has not told the signatory about the constitution that prevents them being protected by the Banking Code of Practice.

Fees and Charges

3. General

- 3.1 Fees and charges payable or which may become payable under this facility agreement, and when they are payable, are set out in the facility offer ... You must pay the fees and charges applying at the relevant time.
- 3.3 We may introduce new fees and charges at any time. When we do we will provide written notice of the introduction at least 30 days before the fee or charge takes effect.
- We may vary fees and charges at any time. When we do we will notify you in writing or by newspaper advertisement no later than the date on which the variation takes effect.

PROBLEM

- The signatory signed to say that they were contractually obliged to meet the conditions of this agreement.
- Clause 3.1 makes reference to agreed time periods for payment. This is a contractual agreement.
- Clause 3.3 is concerned with the bank's ability to alter fees and charges. While these charges affect the signatory personally, the signatory is not guaranteed personal notification of any changes.
- The contract assumes that a newspaper advertisement is efficient in notifying people. This is seemingly inefficient as it assumes that all signatories have access to newspapers (and time to read them) on a regular basis. Likewise, the bank will only alert customers 30 days in advance.
- This is not a negotiable point and does not take into account the nature of the signatory's access to income (they may only be paid monthly) or ability to make financial changes. This clause particularly disadvantages rural signatories and those who live in isolated places where the ability to make financial changes is limited.

Undertakings

9. Values, Investigators and Consultants

- 9.1 We may obtain a valuation report of any secured property at any time. You must pay us all costs in connection with the valuation.

PROBLEM

- In section 9 of the contract, the double standard the bank feels it is able to set become very clear. Once again, these points are not negotiable. The signatory must either accept them or be denied access to capital.
- While it seems justified that the bank may obtain a valuation report on a property they have invested in at any time, there is no reason the signatory must pay for this. Particularly when the bank has resources and finances to pay for such a requirement, and the requirement is in the bank's interests.
- Where the bank has provided a business loan, there is no reason for the bank to value only property. The bank has not only secured property, it also secured a business model or plan and thus it is within expectation that they consider this business model or plan when they seek to value their investment.

- 9.2 If we reasonably believe you are or may be in default or we reasonably believe the circumstances exist which could lead to default, we may appoint a person to investigate whether this belief is accurate ... You must pay us all costs in connection with the investigation.

PROBLEM

- This particular clause may allow the bank to break its agreement set earlier in the document. This clause allows the bank to investigate a property or business even if the signatories are making the agreed to repayments by the agreed to times.
- The bank makes no effort to explain what "circumstances" could be that would lead to a default. This leaves a very real likelihood of abuse and discrimination against signatories. For example, the bank may "reasonably believe" a sick or injured signatory may default on their business loan as they are unable to work.

- This clause would give the bank the ability to investigate the situation, forcing the signatory to reveal their illness or risk the chance of default. While privacy laws ensure an individual does not have to disclose any medical condition, this clause makes it impossible for a signatory to avoid such a disclosure.
- The bank has the ability to discriminate against a signatory under this clause.
- The bank requires the signatory to once again finance the bank's invasion into the signatory's life.
- The bank can also use the requirement for a signatory to pay for any number of investigations as a way to destroy their cash flow and profit, thus making a business or property renovation impossible and the source of the loan unviable.

9.4 Any valuer, investigator or consultant we use is an independent contractor and not an agent or employee. [We] aren't responsible for any representation, action or in action by them.

PROBLEM

- In this clause the bank is attempting to negate, in advance, any claim of impropriety between the bank and the investigator. While the bank explains that the investigator will be financially independent, it does not outline the research methodology and practice the investigator may use.
- The bank has the ability to set the research parameters e.g. 'will this business turn a profit in the next 12 months,' or 'will the signatory's mortgage repayments be greater than 25% of their wage in their new job?' There is little information the signatory can provide to present a positive view of their business or property if these are the questions the bank has set for investigation.
- The bank does not explain if it will give the signatory the opportunity to provide the same or similar amount of information to the investigator as the bank does.
- It is not stated if the investigator will have access to all information the bank has about the agreement, or only the information the bank chooses to provide in order to present a particular perspective of the loan management.
- While the bank may not be responsible for the investigator, they have the ability to control and lead the investigation itself.

9.5 Any report we obtain from the valuer, investigator or consultant is for our use only. You cannot sue us, the valuer, investigator or consultant if the report is wrong. You must obtain your own report if you wish to rely on it.

PROBLEM

- This particular clause ensures that the bank can prevent any rights the signatory has in relation to a report written about their investment or business.
- The bank can refuse to give the signatory a copy of the report they commissioned but the signatory paid for.
- This ensures that any information the bank provided to the investigator remains secret and any evidence of a bank deliberately leading research or tampering with an investigator's methodology also remains secret.
- The bank then goes so far as to prevent the signatory from seeking any form of legal remedy if the report is incorrect.
- The bank contractually enables itself to make unilateral decisions based on incorrect information or biased research and prevents the signatory, the financier of the information and the person/s directly affected by the report, any access to them or ability to remedy incorrect information.
- The bank has developed this non-negotiable clause in order to force people seeking capital to always be at the mercy of bank decisions and whims.
- This clause also ensures that the signatory must spend more money if they want access to information they have already paid for.

Default

When are you in default?

You are in default if:

(k) In our opinion, the value of the secured property materially decreases from its value at the date of this facility agreement or it becomes less saleable than its salability at the date of this facility agreement.

PROBLEM

- The main concern with this clause is that the bank has made a signatory responsible for something that may be totally out of their control. While a signatory could make changes to a property that reduces its value, or a business owner may be a poor business manager and thus decrease the value of the business, business and property values regularly increase and decrease on the economic boom and bust cycle.
- There are also other factors that business and agricultural signatories cannot control, such as climate, access to resources, cost of production etc., which directly affect the value of their business.
- This clause does not differentiate between material decreases that result from poor management and those that result from issues beyond the signatory's control.
- All signatories are forced to live in fear of the bank deeming their property/business of less value, as this means the bank can declare the loan in default – regardless of payment amount and regularity, as declared earlier in the agreement.
- This is a non-negotiable clause and the signatory must hope all works in their favour or else the bank may declare them in default of their loan.
- This clause makes no reference to the power the bank has to devalue a property or business through its own actions, but rather relies on the signatory to comply with this contract without recourse.

11. What can we do?

11.1 If you are in default:

- (a) we no longer need to provide any facility, and
- (b) the sum of the total amount owing for all facilities is payable on demand.

PROBLEM

- This is the most significant clause in the contract. Regardless of the payment amount and period negotiated between a signatory and a bank, this all becomes void if the bank deems a property or business has lost value and declares the signatory to be in default of their loan.
- If this valuation was based on incorrect information, the signatory has

no recourse, legal or otherwise, due to clause 9.5.

- Once in default, the signatory has their access to their loan or any other facilities removed and they are expected to repay the total amount owing. With their asset/s and/or business/s removed, it is highly unlikely that any person/s seeking a loan would have the resources to enable them to repay a loan on demand.
- This clause ensures the bank is able to send any person they wish, including those found default as a result of incorrect information,

12. Default Interest

12.1 From the time any amount is overdue for payment until it is paid, you must pay interest at a higher rate, the default rate, on overdue money.

bankrupt.

PROBLEM

- There seems little financial reason the bank would need to increase the interest rate on a default loan if it is being repaid within the contractually agreed to period.
- Unless it moves beyond this period, the bank would not be losing any money.
- The increased interest rate is simply another contractual ploy to prevent the signatory to the default loan from maintaining or earning enough money to engage in a legal dispute with the bank over the loss of their property/business.

General Matters

How we may exercise our rights

28.1 We may exercise a right or remedy or give or refuse our consent in any way we consider appropriate, including by imposing conditions

28.2 If we do not exercise a right or remedy fully or at a given time, we can still exercise it later.

28.3 We are not liable for loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising, a right or remedy, whether or not caused by our negligence.

PROBLEM

- Clause 28 gives the bank the freedom to discriminate.
- While many of the preceding clauses depend on the bank's opinion or evaluation of circumstances, there is no information regarding the situations or circumstances that would lead to the bank choosing to utilise these powers.
- In clause 28, it becomes clear that the bank is guaranteeing the ability to utilise these powers at its discretion. Once again, there are no standards or terms of reference given for this discretion.
- Interestingly, in clause 28, the bank also recognises that there are circumstances where it has the ability to remedy a situation, such as a situation where devaluation of a property or business has occurred but is beyond the signatory's control.
- Once again the bank reserves its right to institute a remedy only as it chooses and where it sees fit.
- The bank is not required to explain the foundation of any of these decisions. Are they based on personality? Nepotism?
- The bank has contractually ensured that, regardless of its actions at any time during the period of the loan, it will never have to explain the basis for its decisions to a signatory or a court.

30. Variation and waiver

30.2 We may vary any provision of this facility agreement as we choose (other than fixed interest rate). We must notify you as required or permitted by the Code of Banking Practice if it applies to the variation. If the Code of Banking Practice does not apply, we will notify you by newspaper advertisement no later than the day on which the variation takes effect.

PROBLEM

- None of the agreed to aspects of the contract are ensured, as clause 30.2 allows the bank to change any aspect of the contract with minimal notification provided to the signatory.
- This clause makes reference to the fact that notification rules are outlined in the Code of Banking Practice. This is the first mention of such a document.
- The Code of Banking Practice is also not provided to the signatory with

the Facility Offer and General Standard Terms contracts.

- The Code of Banking Practice is not mentioned at the beginning of each contract as being a document that needed to be read to understand the terms and conditions of the agreement. Clause 30.2 of the Code of Banking Practice denotes the rules for notification.
- As it is part of the General Standard Terms, the Code of Banking Practice is part of the contractual arrangements between the bank and the signatory.

31. Inconsistent law

31. To the extent permitted by law, this facility agreement prevails to the extent it is inconsistent with any law.

PROBLEM

- This clause (noted after the rights of the bank) explains that the contract is only legally enforceable as long as it does not break any existing laws. While this may seem valid, this clause gives the bank further power.
- This clause prevents the bank from being obligated to provide its customer with a legal contract.
- The signatory can sign up to illegal conditions. However, if the signatory then suffers as a result of an illegal act perpetrated by the bank, then it is the signatory's responsibility to prove this illegality in a court of law.
- As previously discussed, many of the clauses of this contract ensure that the signatory is forced to spend as much money as possible and thus prevent them from having the fiduciary reserves to launch a legal defense against an illegal act or contract.
- This clause gives the banks power as it forces the onus of legality to be financed by the signatory.

35. Code of Banking Practice

The relevant provisions of the Code of Banking Practice apply to this facility agreement if you are an individual or small business.

PROBLEM

- The bank does not provide a copy of the Code of Banking Practice with the contract, yet by applying the provisions of the Code of Banking Practice to the General Standard Terms, it is making the Code of Banking Practice a contractual aspect of the agreement.
- The signatory is forced to actively seek out this document which details Terms and Conditions under which some of the rights of the bank, as outlined in the General Standard Terms, can be implemented.
- It seems the bank is seeking to keep the signatory from finding out about their rights by not providing them with the Code of Banking Practice and not suggesting this is a document that should be read together with the Facility Offer and the General Standard Terms.

More information about banking

There is a booklet called banking services terms and conditions and general information, which is available on request from any of our business banking or corporate branches. This booklet contains all types of information about banking services and the code of banking practice ... which you may find helpful.

PROBLEM

- This aside is provided at the end of the document that is provided to the customer for signing.
- It suggests the Code of Banking Practice is little more than helpful information that may be of interest to the signatory, similar to information about banking services.
- This is not the case, as clause 35 ensures that the Code of Banking Practice is in fact a legal contract as relevant sections of the Code apply to the contract.
- This minimal information provided at the end of the contract, and only available upon request, works to suggest the Code is not important and actively suppresses the likelihood of a signatory reading this information prior to agreeing to the contract, or asking to see it after the contractual agreements are settled.

DOCUMENT 3

CODE OF BANKING PRACTICE (Annexure C)

PART A: INTRODUCTION

It notes that the bank is required to maintain the following practices:

1 Introduction

- 1.1 This Code is a voluntary code of conduct which sets standards of good banking practice for us to follow when dealing with persons who are, or who may become, our individual and small business customers and their guarantors.

PROBLEM

- As previously mentioned, the bank has placed information about the Code of Banking Practice at the end of the contract documents.
- This seriously reduces the chance that a prospective customer would be aware of the standards of good banking practice prior to becoming a customer with a bank.
- The fact that this code is only available on request makes it unlikely an existing customer would ask for it unless they were already experiencing a problem with the bank.

PART B: OUR KEY COMMITMENTS ...

2 Our key commitments to you

- 2.1 We will:
- (a) continuously work towards improving the standards of practice and service in the banking industry;

PROBLEM

- This seems an empty promise considering the contract signed prior to the signatory finding out about the existence of a Code of Banking Practice being adhered to by the bank, allowed the bank to make almost any change to the contract as long as it benefited the bank.
- The signatory had no protection under the contract, demonstrating

there was no attempt to improve banking standards.

- Evidence of any attempt to improve practice (such as providing the Code of Banking Practice to customers), or service (such as giving a signatory to a loan some rights and/or protection from discrimination) are clearly not occurring.

2.1 We will:

- (b) promote better informed decisions about our banking services:
 - (i) by providing effective disclosure of information;
 - (ii) by explaining to you, when asked, the contents of brochures and other written information about banking services; and
 - (iii) if you ask us for advice on banking services:
 - (A) by providing that advice through our staff authorised to give such advice;
 - (B) by referring you to appropriate external sources of advice; or
 - (C) by recommending that you seek advice from someone such as your legal or financial adviser;

PROBLEM

- While promising to provide information when it is asked for, it is not likely to be asked for if clientele are not aware of the misinformation in both the 2003 and 2004 Code of Banking Practice.
- Explaining the contents of brochures is not the same as providing important, informed detail of banking services, as a brochure is not required to give the same detail as a contract such as the Code of Banking Practice.
- Being a document developed for simple description of benefits for the purpose of selling a product, a brochure will not provide a customer with an informed opinion about the positive and negative aspects of a product. To do this, they would have to ask for a copy of the actual Code.
- The term “effective disclosure” is not defined. As a result, the bank is responsible for deciding what it deems “effective disclosure” to be.
- If the Code of Banking Practice being kept from the customer is considered effective disclosure, it seems the bank already has a

different opinion of effective than a prospective customer may.

- The statement seems like consumer protection until it is analysed more closely. While staff may be trained to provide informed advice, there is no guarantee that the advice will be unbiased or provided in the best interests of the client rather than the bank.
- While the promise to send customers to external advice, particularly informed advice such as a financial adviser seems like a protection, recent investigation shows that this is not the case.
- The situation where the Commonwealth Bank provided financial reward to financial advisors for recommending their product, which led to customers receiving advice that did not suit their circumstances and cost them significant amounts of money is a situation able to be repeated as a result of these clauses.

2.1 We will:

- (c) provide general information about the rights and obligations that arise out of the banker and customer relationship in relation to banking services;

PROBLEM

- There is no guarantee that a client will be provided with specific information or information that relates to their circumstance as the Code only provides for the “general” presentation of customers’ obligations upon utilization of banking services.
- There is no definition of what constitutes general versus specific information.

2.1 We will:

- (d) provide information to you in plain language

PROBLEM

- The Code itself is a good example of the problem with this promise. While the Code is written in plain language there is no guarantee that the words used will live up to common understanding.
- For example, ‘general information,’ remains undefined. A customer may consider this to be any information pertinent to them, explained

verbally in a way they understand.

- The bank may consider general information to be information that advantages them.
- Once again, this particular clause is dependent on the banks' ethics and good faith, which is by no means guaranteed.

2.1 We will:

- (e) monitor external developments relating to banking codes of practice, legislative changes and related issues.

PROBLEM

- While the bank promises to monitor developments and legislation that may advantage customers, it does not promise to disclose this information to its customers.

2.2 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.

PROBLEM

- The bank promises to act ethically and to act consistently. However, the information that informs this treatment is "your conduct."
- If the bank does not consider your conduct appropriate, then they may feel it is ethical to do all in its power to declare you in default.
- The other information which informs the bank's fair and ethical behaviour is the contract signed, which as has already been shown, is fundamentally unfair, unethical and always in the bank's favour.

2.3 In meeting our key commitments to you, we will have regard to our prudential obligations.

PROBLEM

- This is another example of unclear language as 'prudential' has two meanings, one common and one financial. In a common reading this clause suggests that the bank will act in a manner prudent to its aim, in

other words, it will act in a way that allows it to continue making money. This seems valid to the consumer.

- However, “prudential obligations” refer to the obligations established by bank-regulatory authorities.
- As Australian banks are self-regulating, they are referring to their adherence to their own rules, which allow them to monitor and act to maintain their financial stability.
- As Australia’s banks make massive profits each year, their prudential obligations will be to continue turning this kind of profit by maintaining customer relationships that allow this to occur.
- There is no consideration of ethics in this clause.

3 Compliance with laws

3.1 We will comply with all relevant laws relating to banking services, including those concerning:

- (a) consumer credit products;
- (b) other financial products and services;
- (c) privacy; and
- (d) discrimination.

PROBLEM

- As previously identified, the bank contracts were written in such a way that if a signatory claimed protection under laws relating to these issues, they could be found in default of their loans.
- As such, banking compliance with these laws is secondary to contract conditions in reality.

5 Review of this Code

5.3 We will require the ABA to establish, and we will support, a forum (including consumer, small business and banking industry representatives) for the exchange of views on:

- (a) banking issues; and
- (b) the effectiveness of this Code.

We will also require the ABA to ensure that these views are taken into account in the next review of this Code.

PROBLEM

- There is no information that states who “we” are. Who will be supporting the ABA? If it is the Code complying banks, their CEOs are members of and responsible for the ABA. The ABA is responsible for the writing of the Code.
- So the Code is, in reality, written by the Code complying banks. For the people who write the Code to promise that they will hand pick a few select people who supposedly represent consumers and small business in order to receive feedback about the Code is comical.
- To suggest that these hand-picked individuals, who will provide information in the presence of Bank representatives, will complain and that this will then create some form of change that advantages customers at the expense of the banks’ power and extreme wealth is

7 Staff training and competency

We will ensure our staff (and our authorised representatives) will be trained so that they:

- (a) can competently and efficiently discharge their functions and provide the banking services they are authorised to provide; and
- (b) have an adequate knowledge of the provisions of this Code.

absurd.

PROBLEM

- Training staff only to provide banking services they are “authorised to provide,” ensures that no staff member will provide a customer information or advice that does not benefit the bank. As all authorised advice can be vetted to ensure it benefits the banks’ power or profits.
- Likewise, knowledge of the Code does not mean a bank employee has the power to ensure that the Code conditions are met. Knowing the Code does not mean a staff member will know about the CCMCA Constitution which prevents the customer protections outlined in the Code from being utilised.

8 Promotion of this Code

We will require the ABA to:

- (a) promote this Code; and
- (b) clearly make public:
 - i. which banks subscribe to this Code; and
 - ii. how you can get a copy of this Code.

PROBLEM

- Even if the ABA did promote this Code and make public which banks subscribe to the Code and how a customer can get a copy of the Code, there is no information that clearly explains to a customer that some of the clauses of the Code are contractually binding, and thus should be read alongside the facility offer and General Standard Terms.

10 Terms and conditions

10.2 The terms and conditions of our banking services will:

- (a) be distinguishable from marketing or promotional material;
- (b) be in English and any other language we consider to be appropriate;
- (c) be consistent with this Code;

PROBLEM

- Analysis of the preceding facility offer and Standard Terms show that the bank has made no attempt to meet these standards.
- While the Code is part of the Terms and Conditions of the contract, the Bank has only made it available to their customer in the form of a brochure if the customer asks for it.
- As already identified, some of the terms used in the contract have both common and financially specific meanings that are confusing for the customer.

- The Code does not give the Bank the power to make financial decisions about customers based on incorrect information regardless of the customers' ability to meet the terms of the contract. This means the contract is not consistent with the Code.

13 Operation of accounts

13.1 We will provide to you or a potential customer, upon request, general descriptive information concerning our banking services, including where appropriate:

- (a) account opening procedures;
- (b) our obligations regarding the confidentiality of your information;
- (c) complaint handling procedures;

PROBLEM

- Once again, the promise to provide "general information" is non-descript and too general. Such a statement leaves the bank to decide what is general information and what is specific information.
- As seen in the analysis of the facility offer and General Terms, the bank does not consider ethical behaviour when making decisions and always provides information in its best interests, rather than the customers.

30 Advertising

30.1 We will ensure that our advertising and promotional literature drawing attention to a banking service is not deceptive or misleading.

PROBLEM

- Once again, it is left to the banks' ethics as to what it seems deceptive or misleading. It has already been shown that the bank is willing to act unethically, thus such a statement is not consumer protection.
- The bank has ensured it cannot be held accountable for any deceptive or misleading banking services, as it removes its responsibility for any customer decision based on its advertising.

PART E: RESOLUTION OF DISPUTERS, MONITORING AND SANCTIONS

34 Monitoring and sanctions

We agree:

- a) to participate in establishing a Code Compliance Monitoring Committee (“CCMC”) comprising:
 - i. 1 person with relevant experience at a senior level in retail banking in Australia, to be appointed by banks that adopt this Code;
 - ii. 1 person with relevant experience and knowledge as your representative, to be appointed by the consumer and small business representatives on the Board of Directors of the BFSO; and
 - iii. person with experience in industry, commerce, public administration or government service, appointed jointly by the BFSO and banks that adopt this Code (this person is to be the Chairperson of the CCMC);

FACT

- The formation of the CCMC will ensure that a body is created to hear customer complaints.
- This body appointed by Code subscribing banks and Financial Ombudsman Service will not be dominated by a single bank and will be unbiased.

We agree:

- b) that the CCMC’s functions will be:
 - i. to monitor our compliance under this Code;
 - ii. to investigate, and to make a determination on, any allegation from any person that we have breached this Code but the CCMC will not resolve, or make any determination on, any other matter; and
 - iii. to monitor any other aspects of this Code that are referred to the CCMC by the ABA;
- c) to ensure that the CCMC has sufficient resources and funding to carry out its functions satisfactorily and efficiently;
- d) to annually lodge with the CCMC (in a form acceptable to the CCMC) a report on our compliance with this Code;
- e) to empower the CCMC to conduct its own inquiries into our compliance with the Code;
- f) to co-operate and comply with all reasonable requests of the CCMC in pursuance of its functions;

FACT

- The Code has published conditions that will allow the CCMC to function without banks placing undue pressure on the CCMC members.
- This should ensure customers receive a fair and ethical hearing at the CCMC.

We agree:

- g) to require the CCMC to arrange a regular independent review of its activities and to ensure a report of that review is lodged with ASIC which review is to be initially held after the first year in which the CCMC operates after which it is to coincide with the periodic reviews of this Code (see clause 5);
- h) to empower the CCMC to carry out its functions and to set operating procedures dealing with the following matters, first having regard to the operating procedures of the BFSO and then consulting with the BFSO and the ABA:

FACT

- The Code is ensuring that the CCMC is restricted to operation only within the banking sector.
- It is answerable to outside agencies and laws.
- This should ensure that the CCMC meets community expectations with regards to investigation and findings for and against banks.

We agree:

- i) to empower the CCMC to name us in connection with a breach of this Code or in the CCMC's report, where it can be shown that we have:
 - i. been guilty of serious or systemic non-compliance;
 - ii. ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time;
 - iii. breached an undertaking given to the CCMC; or
 - iv. not taken steps to prevent a breach reoccurring after having been warned that we might be named.

FACT

- The Code ensures the CCMC has the power to take sanctions against the banks for not meeting Code requirements.
- While sanctions are not significant and there are no financial requirements to pay compensation as a result of a breach, publically naming the bank may allow a customer to seek financial remediation in another forum.

35 Internal dispute resolution

35.1 We will have an internal process for handling disputes with you. This process will:

- i. be free of charge;
- ii. meet the standards set out in Australian Standard AS4269-1995 or any other industry dispute standard or guideline which ASIC declares to apply to this Code;
- iii. adhere to the timeframes specified in this clause 35; and
- iv. require us to provide written reasons for our decision on a dispute.

FACT

- Whilst the Bank is obliged to have an internal process to handling disputes this is qualified in section 40 when the definition of dispute is understood to only include certain financial issues.

35.6 If the rules of an external dispute resolution scheme of which we are a member, provide that a matter may be referred to it if a decision is not made within a specified time period, then we will inform you, no more than 5 business days after the expiry of that time period, that a dispute may be lodged with the scheme.

FACT

- The external dispute resolution scheme to which the bank is a member is, in fact, the Financial Ombudsman Scheme (FOS). This is not an independent scheme.

- 35.7 Our dispute resolution process is available for all complaints other than those that are resolved to your satisfaction at the time they are drawn to our attention.
- 35.8 We will provide you with the above information in writing unless it has been mutually agreed that it can be given verbally.

FACT

- There seems to be a difference of opinion into what the banks are saying about the power of this clause. On reading the words in the clause, there is a requirement by the bank to have a dispute resolution process that is not recorded in the definitions.
- The bank is obliged to ensure its resolution process available for customers' complaints unless the complaints have been resolved to the customer's satisfaction when drawn to the attention of the CCMC.
- The bank is obliged to investigate all complaints, without exception and having done so, provide the complaints with the results of their investigations in writing unless the parties agree that the report can be given verbally.

PART F: APPLICATION AND DEFINITIONS

Definitions

Dispute:

means a complaint by you in relation to a banking service, that has not been immediately resolved when you bring the complaint to our attention.

banking service:

means any financial service or product provided by us in Australia to you

FACT

- The definitions outlined in this section ensure that any customer who signed the contracts would be eligible to have a complaint heard, as ensured by the Code providing the limited definition of the dispute, as defined as being any financial service or products.

DOCUMENT 4
CODE COMPLIANCE MONITORING COMMITTEE ASSOCIATION
CONSTITUTION

1 Name

1.1 Code Compliance Monitoring Committee Association

The name of the association is the Code Compliance Monitoring Committee Association

FACT

- The Code Compliance Monitoring Committee Association's (CCMCA) and the constitution are not referred to the facility offer, General Standard Terms or the Code of Banking Practice, or the guarantee provided to the customer when the agreement is signed by the

2 Definitions

2.1 Definitions

CCMC means the Code Compliance Monitoring Committee established pursuant to this Constitution.

Code means the Code of Banking Practice 2003

Consumers' directors of the BFSO means a Consumers' Director appointed pursuant to the Constitution of BFSO.

Forum means any court, tribunal, arbitrator, mediator, independent conciliation body, dispute resolution body, complaints resolution scheme (including, for the avoidance of doubt, the BFSO scheme) or statutory Ombudsman, in any jurisdiction.

customer and guarantor.

FACT

- The definitions make reference to circumstance and restrictions that are not referred to the facility offer, General Standard Terms or the Code of Banking Practice, or the guarantee provided to the customer when the agreement is signed by the customer and guarantor.

3 CCMC Association

3.1 Objectives

Objectives of the CCMCA are to establish and to make provision for this operation of the CCMC.

3.3 Objectives

A CCMCA member is each code subscriber, which subscribes to this constitution by giving an instrument to that affect signed by its Chief Executive Officer (CEO.)

3.7 Functions

The CCMCA shall meet only for the purpose of considering proposed amendments to the constitution, amending the constitution and for any other purpose that arises from the constitution.

3.11 Representation at meeting

Each association member shall be represented at a meeting of the CCMC association by:

- (a) by the chief executive officer of the Association Member, or
- (b) a senior executive of the Association Member appointed by instrument in writing signed by the chief executive officer of the Association Member...

FACT

- The initial clauses of the CCMCA's constitution suggest that the constitution has been developed to ensure there is a procedural document, and that it instructs the banks how the CCMC is to be constructed and able to function in order to assist the operation of the CCMC.
- As the facility offer, General Standard Terms or the Code of Banking Practice, or the guarantee provided to the customer when the agreement is signed makes no mention of the changed circumstance in relation to the contract put to the customer by the bank.
- The Constitution allows the CCMCA members to influence all of the customer protection provided to their individual and small business customers.

4.1 Establishment of CCMC

There shall be Code Compliance Monitoring Committee established pursuant to this clause 4.1 and in accordance with this constitution, with the powers and obligations set out in the constitution.

PROBLEM

- This clause suggests that the CCMC should be established in accordance with the constitution, which for the period from 2004 until 2013 has been the soul domain of subscribing banks.
- The constitution has been kept from the subscribing bank customers that until recently did not have any knowledge about the terms and conditions it places upon the publically available Banking Code of Practice.
- The CCMC drafted and implemented the constitution, however, from its start was not consistent with the Code of Banking Practice nor was it established pursuant to the banking contracts.

4.2 Factions

The functions of the CCMC are:

- (a) to monitor compliance under the code by Association members,
- (b) to investigate and to make a determination on any allegation from any person that a CCMCA member has breached the code (but the CCMC must not resolve, or make any determination on, any other matter), and
- (c) to monitor any other aspects of the code that is referred to the CCMC by the ABA.

4.3 Independence of CCMC

The CCMC Association and each Association Member shall not

- (a) except as expressly provided in this Constitution, intervene in the CCMC's activities; or
- (b) denigrate the CCMC.

FACT

- These clauses suggest that the CCMC will have the powers as outlined in the Code of Banking Practice, but this is not correct.

- In these clauses, the concept of Code defining the responsibilities of the banks and the CCMC is replaced with CCMCA Constitution.
- This is because all Code complying banks have their CEO representing them on the CCMCA.

PROBLEM

- The Constitution is seemingly establishing procedural requirements for the CCMC members.
- It also reduces the independence of the CCMC as widely promoted by the ABA and not corrected by the CCMC or subscribing banks.
- This clause also requires the CCMC to comply with the subscribing banks that determine the CCMC responsibilities, which can be changed.
- The CCMC are agents of the subscribing banks and they operate, not as set out in the code, but rather as required under the constitution.

8.1 Consideration of complaint about code breaches

The CMCC must consider any complaint alleging that an Association Member has breached the code, except that the CCMC must not consider a complaint:

- (a) to the extent that the complaint relates to an Association Member's commercial judgement in decisions about lending or security. However, the CCMC may consider a complaint alleging a breach of the code arising from maladministration by the Association Member in arriving at a commercial judgement...
- (b) if the CCMC is or becomes aware that a complaint
 - i. is being or will be heard (whether as standalone matter or as part of any process or proceeding) by another Forum, and the Forum may make a final determination as to whether a breach of the code has occurred. In such a case the CCMC must not consider the relevant complaint until the relevant Forum has determined or declined to determine (for whatever reason), whether a breach of the code has occurred...
 - ii. was heard (whether as a standalone matter or as part of any process or proceeding) by another Forum, and the Forum has determined whether a breach of the Code has occurred...
- (c) if the CCMC thinks there is a more appropriate Forum to deal with the complaint. Without limiting this exception, CCMC may form the view that there is a more appropriate Forum to deal with the complaint where the complaint alleges in whole or in part that an Association Member has breached any legislative provision.
- (d) which the CCMC has referred to the Association Member concerned, unless
 - i. the Association Member has responded to the complaint, or
 - ii. 45 days has lapsed,whichever is the earlier.
- (e) If the CCMC considers the complaint is frivolous or vexatious, or
- (f) If the complaint is based on the same events and facts as a previous complaint ...
- (g) if the events to which the complaint relates occurred...
- (h) the complainant was aware of the events to which the complaint relates, or would have become aware of them if they had used reasonable diligence, more than one year before the complainant first notified the CCMC in writing.

- This is a significant section of the CCMCA Constitution.
- Section 8.1 is devoted to identify where the CCMC has no powers to investigate complaints.
- The CCMCA, which is made up of the chief executives of subscribing banks, have limited the circumstances where a complaint can be investigated.

The CCMC can no longer hear a complaint if:

- i. It is about the commercial judgement of the bank. It does not outline the standards they use to make commercial judgements. In reality, they can end a financial agreement at any time. While the clause goes on to say that a complaint can be made based on maladministration in relation to the formation of a commercial judgement, we saw that the contract makes it impossible for a client to establish maladministration as the bank has written the contract in such a way that any form of administration is appropriate and the client has no recall, even if the decision was based on incorrect information.
- ii. The second point is the most useful for the banks. It prevents the CCMC from hearing a complaint if it is or could be heard in another forum. Such a forum is mediation. Therefore, banks can enter into mediation in order to prevent the CCMC from hearing the complaint. If mediation is unsuccessful, then the only place the complainant can challenge the decision is the court. This is expensive, and as seen previously, the bank does all in its power to ensure that any client who may complain upon losing a business is charged a maximum amount of money to limit the funds necessary obtain effective legal advice. The case would be difficult to win as the client was forced to sign a contract that ensured the bank was free to do as it wished in relation to a signatory.
- iii. This clause also gives the CCMC the ability to refuse to hear a complaint and refer it to another forum, such as a court, which would provide the subscribing bank an advantage as it has sizeable financial resources.
- iv. The language of section (d) is convoluted. The CCMC cannot investigate a complaint made to it by a subscribing bank unless it has replied to the complaint, or a period of 45 days has lapsed since the complaint was made to the CCMC. As the bank has a duty to reply within 20 days, this would extend the period before a complaint was heard by the CCMC to 65 days. A complainant could be deemed in default and have property removed within 65 days, thus making any complaint moot.
- v. This makes the previous clause more powerful, as the complainant

cannot repeat a complaint if things change in the 65 days between making the last complaint and having it heard. While new information may be added to allow a complaint to be heard, there is no definition of what constitutes vexatious or frivolous. However, a second complaint on a single issue can be deemed vexatious or frivolous, and refused.

- vi. This clause covers almost all signatories. There is ample debate that can be put forward that a complaint could have been foreseen. As a result, there is almost no complaint that could be heard.
- vii. The final clause applies a one-year limit on complaints. There is no way the complainant could know this, as this constitution is not referred to in the Code of Banking Practice and is not published by the banks.

Conclusion

This paper reveals that the relationship between the subscribing banks and their customers is unconscionable and unfair.

Having access to all four documents, which includes the constitution, makes it clear that publications presented by the subscribing banks and their agency the Australian Bankers' Association to the media are misleading. Further, there is evidence that the subscribing banks' contracts with individuals and small businesses promote a commitment to investigate all complaints and a dispute resolution package that does not exist.

Upon reviewing the Bank of America case, reported widely in August 2014, there is evidence of fraud by banks in the developed world that is becoming more vigilantly investigated and fiercely prosecuted. Corrupt practices are now receiving significant penalties. While this has not yet happened in Australia, this may well be the result of the banking sector being poorly regulated.

This paper notes that the relationship between subscribing banks and customers has been damaged by the failure of regulators to prosecute banks that have breached part of the APRA, ASIC and ACCC Acts.

The decision by legislators to allow banks to be self-regulated has no justification based on the research in this paper.

Yours sincerely,

Archer Field
Research
Tasmanian Small Business Council

Copy: Council of Small Business Organisations of Australia