



Ref: 160330 White Collar Crime

The Secretary  
Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Sir/ Madam,

### **SENATE INQUIRY INTO PENALTIES FOR WHITE COLLAR CRIME**

Thank you for considering my submission, which deals with the following terms:

- d. The value of fine and other monetary penalties, particularly in proportion to the amount of wrongful gains;*
- e. The availability and use of mechanisms to recover wrongful gains;*
- f. Penalties used in other countries, particularly members of the Organisation for Economic Co-operation and Development [OECD];*
- g. Any other relevant matters*

I am filing this submission because my business partner, National Australia Bank, failed to act as a diligent banker when it managed my affairs.

### **Background**

In 2006, some of my companies, including Cousins Securities and Cardwell Country Estate, took out loans with the NAB to provide funding for three development projects. When the loans were taken out, the bank stated that funds would be available to move the projects to the next stage given that their valuations had increased sufficiently.

In 2008, the three projects with the NAB had combined valuations of \$7.5 Million. These projects included Cardwell Country Estate, Sunrise Estate, and Wild River Timber Plantation. The Wild River Timber Plantation, having a debt of \$115,000 to the NAB, was put on the market late 2007 for sale at \$3.75M to assist in future working capital and retire debt on the other developments. The total debt on these three projects at this point in July 2008 was \$1.8M. We

required the sum of \$210,000 to proceed with approvals for Cardwell and working capital until the sale of the Timber Plantation or re-finance.

### **NAB's Pre-emptive action**

On 31 October 2008 our other financier Grenfell Securities had receivers appointed, which meant we were unable to borrow further funding to advance our projects with this lender. Requests were made to NAB for further funding to finalise project approvals. However, these were rejected and we defaulted on the \$1.8M after being given 12 days to repay the money.

The companies were then placed under the control of PKF (the controllers) who the NAB appointed in November 2008. During this period, the properties were valued at \$7.8 million.

In July 2010, Cardwell Country Estate sold for \$700,000 (\$1.5 million under valuation). Attempts were made to block the sale but the controllers settled the sale. In May 2011, Sunrise Estate sold for \$400,000 (\$2.6 million under valuation). In January 2013, Wild River Plantation Lot 634 sold for \$185,000, and Lot 635 sold for \$210,000 Prior to the controllers being appointed, the Wild River Timber Plantation was put on the market for \$1,500 per acre.

As a result of the NAB calling in our loan, it created a situation where the bank's agent was now managing our properties with regards to our financial positions. In doing so, the bank voided our rights as its client and acted in a way that varied from its contractual obligations. The decision by one partner, the NAB, to appoint an agent to manage its affairs meant that our rights were secondary.

Our immediate response was to obtain as much information as possible to assist us in determining how the NAB could firstly, have obtained the control of the assets as a result of a secondary financial institution's failed mismanagement practices, and then appreciate what had happened to our value laden assets.

The considerable research we have obtained in the last few years has allowed us an insight into other bank customers' issues with major banks in Australia. We believe at an early stage that the bank had rights under its contract and in certain circumstances had rights to act in recalling its loan. However, the contract also had expressed and implied rights to consumers, which we had rights to expect that our business partner, the NAB would act diligently and responsibly.

### **Terms of reference, "d"**

When we considered whether there were suitable fines and other monetary penalties, which are imposed on parties that seek to obtain wrongful gains, it became apparent that the regulators of the banks are restricted in their ability

to investigate customer complaints due to the introduction of the constitution of the CCMC introduced in February 2004.

**Terms of reference, “e”**

This submission raises concerns unless individuals and small businesses can obtain funds to take actions against banks and financial institutions that have acted dishonestly there is no other recourse available. While the 1993 Code of Banking Practice was introduced “to require banks to have procedures for resolution of disputes”, the banks voided this clause in 2003. The latter part of this paper will outline this.

The limited mechanisms available to government to deal with systems failures include the following:

1. Introducing independent regulators with powers to impose multi-million dollar penalties for corporate crime such as breaches of corporate law,
2. Introducing legislation, such as the *Wilkie Bill* (2012), and
3. Instructing APRA to mandate the Code

**Terms of reference, “f”**

This submission will not go into the details of global corruption in the banking and financial section, besides noting that it is claimed that US and European banks have been penalised \$250 billion since the Global Financial Crisis. The use of class actions by consumer groups has resulted in some of the parties that have suffered damages obtaining justice. However, this has not been the case in Australia, where there is no existing legislation or regulation to protect bank customers from corrupt banking practices.

The NAB and our companies had rights during this period. The bank could redraw its loans in circumstances where it had complied with its responsibilities beforehand. In our case it failed to do so. In our case, the NAB acted in a pre-emptive manner and secured financial gain without, in the first case, addressing our rights as its customers. As such, the bank acted to our detriment.

**Terms of reference, “g”**

During the past three years, we have seen our business assets disposed of by our bank, in a manner that we considered was unethical, deceitful and dishonest. As a result, the following review sets out our position in relation to allegations of corruption within the banking and financial sector.

We understand that the NAB exercised its rights according to some provisions in the contract, without regard to other clauses that provided safeguards for our companies. As small-businesses, the bank had responsibilities to us that

should have been dealt with through practices that were subsequently found did not exist.

The NAB had sufficient information on the prospects of our business prior to it funding our developments. The information it relied on included the fact that Grenfell Securities was also acting as financier in other projects. We believe that the NAB called in its loan as a result of Grenfell Securities being placed in receivership. If this was the reason, then the NAB failed to act as a diligent banker when we entered into our contract with them in 2006. However, the NAB has not confirmed this.

Following the appointment of Grenfell Securities' receivers, we experienced hardship. The NAB, prior to it appointing receivers and managers in 2008, did not consider our rights under this provision. We noted that in May 2013, the bank articulated its responsibilities in relation to this clause in our contract. Under this review, we have been unable to locate any information available on the NAB's website in regard to this important provision.

### **FOS and the CCMC**

As a background to the above four terms of reference that I have relied on, I believe the following comments are relevant to this inquiry.

In 2004, the banks modified the Code, with the Financial Ombudsman Service ("FOS") acting as their agents, appointed the Code Compliance Monitoring Committee ("CCMC") to replace government regulators. The banks claimed that the CCMC would monitor their compliance of the Code and name banks that failed to rectify breaches.

With the 2004 modified Code, bank CEO's introduced a further document that was not accessible to bank consumers. This was the Constitution of the Code Compliance Monitoring Committee Association ("CCMCA"). The CCMCA members were CEO's of the code subscribing banks.

The introduction of the CCMC as regulators required the collective support of the FOS and the compliance monitors. The Constitution changed the purpose of the 1996 Code by limiting any prospects of consumers having complaints under the Code investigated by the CCMC and rectified.

The Constitution meant banks would not have to investigate any complaints or be named for breaching the Code. Section 8.1(b) of the Code below, provides an example of this:

*"... the CCMC must not consider a complaint:*

*(b) if the CCMC is, or becomes, aware that the complaint:*

*(i) is being or will be heard (whether as a standalone matter or as part of any process or proceeding) by another Forum.*

Forum is defined in the Constitution:

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

The Martin Committee recommended introducing a Code so disputes could be resolved without using courts and other forums where highly resourced banks had a considerable advantage. Section 8.1(b) of the Constitution violates this principle, allowing banks to commence actions in the courts to circumvent the CCMC’s authority to investigate breaches.

In order to address systems failures, the government and its agencies might now have an opportunity to balance the competing rights of customers and banks. The issues set out above are comprehensively dealt with in the attached small business paper.

I would appreciate an opportunity to appear before the committee in order to present the concerns of the many people who have written to me in relation to this matter in the last three years.

Yours sincerely,

Russell Cousins  
Chairman