



12 August 2016

Mr Greg Medcraft
Chairman, Australian Securities & Investment Commission
GPO Box 9827
MELBOURNE VIC 3001

Dear Mr Medcraft,

RE: BANKING IN AUSTRALIA: PART 11

Banking in Australia: Unregulated & Unprotected Part 11 identifies provisions in the 2003 Code whereby customers are treated unfairly.

The 2003, the code subscribing banks declared that amendments to the Code of Banking Practice would achieve a fair relationship between banks and their customers. To date, neither the government nor your office has investigated the following banking practices.

2003 Code Review

Clause 10.3 states “written terms and conditions will include a statement by banks to the effect that the relevant provisions of the code apply to the banking service but need not be set out these provisions” [The Australian Bankers’ Problematic Code (ABPC), p.188]. To customers that intended signing a loan contract with a subscribing bank, the statement ‘need not be set out these provisions’ was apparently acceptable.

Former FOS legal counsel Anna Dea wrote, in 2003, *The New code of Banking Practice – Issues for Litigation Lawyers*, which goes further.

“The provisions of the code are part of the contract between banks and their customers.” (ABPC, p.188)

The Anna Dea statements were “published at or about the same time as the constitution was being drafted [by banks].” (ABPC, p.189)

“The ... report provides evidence of the machinations in the planning by banks and the appointment of the Code Monitors by the banks and FOS [that] undermine the integrity, honesty and independence of the CCMC.” (ibid)

Contractual Nature of Code

“The ABA ... and subscribing banks were also funding and publishing media

statements regarding the ... 2003 code and its high standards, as well as [it] being a contract between the banks and customers.

ABA Chair, David Murray, supported by ABA's David Bell, said:

The code sets out the banking industry's key commitments and obligations to customers on standards of practice, disclosure and principles of conduct for banking services.

The code is a valuable safeguard for customers - it will benefit [customers] and assist them to have a better understanding of standards the banks will follow in day-to-day banking, complicated financial transactions and even if the customer experiences financial difficulty...

Once the bank adopts the code next year it is explicitly committed to 'act fairly and reasonably towards their customers in a consistent and ethical manner' ... the adoption of the code will be a mark of quality and customers should be encouraged to check if their bank subscribes because it is a binding contract between a bank and its customers, for which the institution will be held accountable." (ABPC, p.189-190)

2003 Code Fairness

"The 2003 Code, which is intended to apply to individuals and small business customers create an obligation on the part of the subscribing banks to act fairly and reasonably in a consistent and ethical manner. To give perfect to this clause that 2003 Code contained more details provisions on disclosure ... compared to its predecessor.

Arguably, the obligation to act with 'fairness' towards bank customers must not be taken lightly in light of legal developments relating to concepts of fairness and equity. There is a dictionary meaning of the word 'fairness', which is "acting equitably, impartially: in accordance with the rules. ...

As a result of the expanded community and legal meaning of the concept of fairness, practices, which may have been considered acceptable in previous decades, may be ruled as unfair today.' Example is of such practices include terms irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract." (ABPC, p.192-193)

A Changed Culture

In 2003, banks changed the banking culture following the Martin Committee Review, which was published ten years earlier.

Also, in late 2003, the banks' Code Compliance Monitoring Committee was established. This coincided with legal advice in February 2004 on how banks - with the support of the FOS - could avoid being named by the proposed CCMC members for breaching the code.

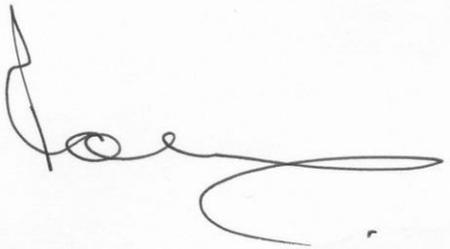
Apparently, in 2003, the government and federal regulators had apparently dismissed concerns that banks collectively would not provide copies of the Code to customers prior to loan contracts being signed. This meant that it would prove difficult for customers, when signing standard form contracts at a later date, to claim that they were misled.

The arrangement allowed the banks' Chief Executives, through their industry association, to publish the 2003 Code, which claimed banks would investigate

all complaints, whereas, in fact, they would only investigate a few, if any.

Banking in Australia: Unregulated and Unprotected Part 12 will comment on the CCMC members' response, in 2008, alleging that the pivotal document - the constitution - was problematic.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Russell Cousins', with a long horizontal flourish extending to the right.

Russell Cousins
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Australian Bankers' Problematic Code (ABPC) can be accessed at http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjpjonI9r_OAhXCjZQKHRKWD8gQFggdMAA&url=http%3A%2F%2Fwww.aph.gov.au%2FDocumentStore.ashx%3Fid%3D85a93159-bf61-4fae-8370-43fdee42cc53&usq=AFQjCNEYyxfQPfI9I9QUtEpYBcyvgRGujQ&sig2=iaflgQFLeZNgv292zPSxPQ