



19 December 2016

Mr Christopher Doogan AM
Independent Chair
Code Compliance Monitoring Committee
PO Box 14240
MELBOURNE VIC 8001

Dear Mr Doogan,

Re: Banking Codes and the Code Compliance Monitoring Committee

Bank Victims believes that ANZ Bank, National Australia Bank, Westpac and the Commonwealth Bank (the major banks) have, since 2004, not complied with the objectives of the first three codes when they were first adopted in 1993.¹

1993 Code of Banking Practice²

On 3 November 1993, the major banks published the first Code of Banking Practice (the 1993 Code), which was “intended to -

- i. describe standards of good practice and service;*
- ii. promote disclosure of information relevant and useful to Customers;*
- iii. promote informed and effective relationships between Banks and Customers; and*
- iv. require Banks to have procedures for resolution of disputes between Banks and Customers.”³*

2004 Code of Banking Practice⁴

Bank Victims refers to a complaint filed with a subscribing bank regarding practices and documents provided to a small business in 2004. It refers to the Facility Offer provided to the customer in 2004, which states that “*by signing this document, you*

¹ Noted in the Martin Committee’s banking review “A Pocket Full of Change” November 1991.

² Code of Banking Practice published in November 1993.

³ The writer has sighted complaints by bank customers that alleged subscribing banks breached the 1993 code.

⁴ 2004 Code of Banking Practice includes modifications of the 2003 Code of Banking Practice and was adopted at the same as the ABA and bank CEOs introduced the Constitution.

*accept the facilities on the terms set out in this facility offer and the General Standard Terms (standard terms)."*⁵

The standard terms state *"we may vary any provision of this facility agreement as we choose (other than any fixed interest rate). If we do, we must notify you as required or permitted by the Code of Banking Practice if it applies to the variation."*⁶ *"Relevant provisions of the Code of Banking Practice apply to this facility agreement if you are an individual or a small business"*.⁷

The small business is defined as one having *"less than 20 full time (or equivalent) people."*⁸

The 2004 Code of Banking Practice (the 2004 Code) referred to in the standard terms states this it 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"*.⁹ And *"provide[s] information to [customers] in plain language"*.¹⁰

The bank stated it *"will act fairly and reasonably towards you in a consistent and ethical manner."*¹¹ When referring to the 2004 Code, the bank said in Clause 34(b) that the CCMC's functions is *"(i) to monitor our compliance under this Code [and] (ii) to investigate, and to make a determination on, any allegation from any person that we breached this Code...."*¹²

The bank claimed it would *"ensure that the CCMC has sufficient resources and funding to carry out its functions satisfactorily and efficiently"*¹³. In supporting this, the bank stated it will *"have an internal process for handling disputes with [customers]. This process will be free of charge."*¹⁴

The bank also claimed that its *"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."*¹⁵ And that it would *"provide you with the above information in writing unless it has been mutually agreed that it can be given verbally."*¹⁶ Our client claims he did not agree to receive the banks response being provided verbally.

⁵ April 2004, Facility Offer, Submission 109, accessed at http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/bankingcomp2010/submissions.

⁶ Ibid, General Standard Terms, Clause 30.2, accessed at http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/bankingcomp2010/submissions.

⁷ Ibid, Clause 35.

⁸ Ibid, 'Meaning of words, small business...' at page16.

⁹ Ibid, Code of Banking Practice 2004, Clause 1.1.

¹⁰ Ibid, Clause 2.1(d).

¹¹ Ibid, Clause 2.2.

¹² Ibid, Clause 34 b.

¹³ Ibid, Clause 34 c.

¹⁴ Ibid, Clause 35.1.

¹⁵ Ibid, Clause 35.7.

¹⁶ Ibid, Clause 35.8.

On 31 May 2004, the bank, having already adopted the 1993 Code, adopted the 2004 Code.¹⁷

September 2004 Code of Banking Practice Statement

In September 2004, when the bank had adopted the 2004 Code, the Australian Bankers Association (ABA) published the following statement:

“Purpose

The [2004] Code of Banking Practice establishes the banking industry’s key commitments and obligations to its individual and small business customers on “standards of practice, disclosure and principles of conduct for their banking services.”¹⁸

“The Code is a good example of industry self-regulation and of the banking industry’s response to meeting the interests of customers in a dynamic and changing retail banking services market.

The Code is not legislation but when your bank adopts the code it becomes a binding agreement between you and your bank. In some respects, the Code provides for situations not covered by the law and in others goes further than the law in providing rights and obligations.

The ABA has established the Code Compliance Monitoring Committee which will monitor compliance and have the power to publicly name a bank which has been found guilty of a serious or systemic breach of the Code...

Key Commitments

Key commitments made by the banks in the Code include to continuously work towards improving the standards of practice and services in the banking industry, to promote better informed decisions about banking services and to act fairly and reasonably in a consistent and ethical manner...

The Code of Banking Practice gives customers rights that the bank must observe. The rights cover matters such as: disclosure of fees and charges at other terms and conditions¹⁹, disclosure is general information about banking services... [and about] complaints handling.

The [2004] code also provides for high standards of disclosure for prospective guarantors ...”²⁰

¹⁷ When the bank adopted the 2004 code there was evidence that it and other banks had breached the contract with customers.

¹⁸ Code of Banking Practice, accessed on 24 February 2010 at www.bankers.asn.au/default.aspx?ArticleID=906

¹⁹ The constitution notes this statement is not accurate.

²⁰ Code of Banking Practice, accessed on 24 February 2010 at www.bankers.asn.au/default.aspx?ArticleID=906. The five banks loan documents sighted by this review (Facility Offer, the GST and the 2004 Code) make no mention of the constitution of the CCMC, despite its later relevance many customers.

Submission by CCMC to Code Reviewer Jan McClelland (2008)²¹

In 2008, the ABA appointed Jan McClelland to carry out a review of Clause 34 of the 2004 Code. In its submission to McClelland on 31 March 2008, the CCMC noted its lack of authority to carry out its functions.²²

In its submission, the CCMC made the following statement:

*We "...consider that the existing constitution should be revoked for two reasons. Firstly, because the structure suggests that [the CCMC] is less than independent of subscribing banks. Secondly, provisions of the constitution vest unnecessary power in the Banking and Financial Services Ombudsman and CCMCA"*²³

"Bank's Obligations in the Code

Issues relating to the general application of the Code which the [CCMC] considers could be usually reviewed are:

"The weight to be given to the general commitment, to continuously work toward improving standards of practice and service in the banking industry (Clause 2.1) in interpreting the Code.

The effect of the substance of Clause 2.2

The CCMC has had cases where it has been satisfied a bank has not acted fairly and reasonably having regard to the ... contract.

The absence of any requirement in the code that banks should observe the terms and conditions of their contract with their customers

Suggestion by some banks that they have an option to choose provisions of the Code they will observe whilst maintaining a position that they subscribe to the Code (emphasis added by CCMC members).²⁴

It was the CCMC's "...firm view is that the constitution is problematic... to the best of its knowledge, the constitution has never been made public despite its apparently intended impact of the provisions of the Code, which was itself subject of very wide public consultation."²⁵

The ABA's statement and the CCMC's submission were not compatible. The ABA stated that the 2004 Code was a good example of industry self-regulation. On the

²¹ 11 March 2008, CCMC's Issues Paper prepared for Code review: Submission to the review of the Code of Banking Practice.

²² Code of Banking Practice 2004 'PART E: RESOLUTION OF DISPUTES, MONITORING AND SANCTIONS' Clause 34, page 18.

²³ 5 December 2010, *The Australian Bankers' Problematic Code*, Report to Council of Small Business Organisations of Australia, accessed at http://www.apb.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/bankingcomp2010/submissions.

²⁴ 11 March 2008, CCMC's Issues Paper prepared for Code review (Annexure A): Submission to the review of the Code of Banking Practice Overview.

²⁵ Despite these allegation subscribing banks failed to disclose the variations between the Code (that was a binding agreement), and the CCMCA's constitution.

other hand, the CCMC claimed that it was “less than independent of subscribing banks...and there was absence of any requirement in the code that banks should observe the terms and conditions of their contract with their customers”.²⁶

Point 1

When a statement is misleading:

It is well recognised principal at law that a statement is misleading even if literally true but it fails to say something that, if said, would alter the meaning of what was said.

The Australian Bankers’ Problematic Code (2010)²⁷

This paper was commissioned by the Council of Small Business Organisations of Australia (COSBOA) and published by the Parliament in December 2010. It refers to allegations, without access to the constitution of the CCMC²⁸. The constitution was not sighted by a non-bank person until July 2012, and not made public until November 2014.²⁹

“The 1993 code was written by the Australian Bankers’ Association (ABA) and failed to include recommendations from the Martin Committee that the banks did not like. The 2003 and 2004 (current) codes are, similarly, ABA documents which do not take into account government principles and suggestions.

The key body that implements the codes application and rules is the Code Compliance Monitoring Committee [CCMC]. However, an undisclosed body exists called the Code Compliance Monitoring Committee Association [CCMCA] which has drafted its own constitution that has the effect of limiting the activities of the [CCMC] to the disadvantage of customers³⁰.

...

The constitution defines narrowly the circumstances in which the [CCMC] reviews the banks compliance with the code. As a result very few unsatisfied complaints come to the attention of the CCMC or are ever investigated.

²⁶ 11 March 2008, CCMC’s Issues Paper prepared for Code review (Annexure A): Submission to the review of the Code of Banking Practice Overview, page 2 and page 5.

²⁷ 5 December 2010, *The Australian Bankers’ Problematic Code*, Report to Council of Small Business Organisations of Australia, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/bankingcomp2010/submissions

²⁸ The writer believes the Constitution was first provided to a non-bank person in July 2012.

²⁹ The impairment of customer loans Submission 61, accessed on 24 November 2016 at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions.

³⁰ 5 December 2010, *The Australian Bankers’ Problematic Code*, Report to Council of Small Business Organisations of Australia, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/bankingcomp2010/submissions.

...

“There is significant evidence suggesting that the ABA and hence the banks and bankers, have acted to retain control over the compliance procedures that would require them to deal fairly and openly with all their customers, including all small businesses...

This report recommends that the Senate or the Federal Government Treasurer commissions an inquiry into the issues raised herein. This government report would have specific intent of implementing legislation and procedures that would add a truly independent element to the governance and principles involving banks’ behaviour in dealings with all their customers. If that review find banks or bankers used the constitution or other practices to their customers’ disadvantage, the government report might recommend corrective action.”³¹

The Wilkie Bill (2012)

The proposed amendments to the Banking Act (2012), was filed in the Parliament following the publication of the Australian Bankers Problematic Code.

The legislation included the following:

“36A Minister to make Code

- (1) The Minister must, by legislative instrument, make the Banking Code of Conduct (the **Code**).*
- (2) The Code must set out standards to be complied with by ADIs in dealing with their customers (including guarantors).*

36B Complaints to APRA

- (1) A customer of an ADI may complain to APRA that the ADI has failed to comply with the Code in dealing with the customer.*
- (2) APRA may accept the complaint.*
- (3) APRA must accept the complaint if APRA is satisfied, on evidence provided by the customer:*
 - (a) that the ADI could have failed to comply with the Code; and*
 - (b) that the customer has taken reasonable steps to:*
 - (i) bring the failure to the attention of the ADI; and*
 - (ii) resolve with the ADI any matters arising from the failure; and*
 - (c) that one or more matters arising from the failure might not have been properly resolved.*

³¹ Ibid.

36C Investigation of complaints

(1) *If APRA accepts the complaint, APRA must:*

(a) *investigate the complaint; and*

(b) *notify the ADI in writing of:*

(i) *the complaint; and*

(ii) *the findings of the investigation.*

Note: Section 62 sets out APRA's powers to require information.

(2) *The notice must invite the ADI to provide APRA with a written response to the complaint within the period specified in the notice.*

(3) *APRA must give the customer a copy of:*

(a) *the notice; and*

(b) *any response provided by the ADI...*³²

In 2012, supporting documents referred to by Andrew Wilkie included allegations that subscribing banks have received 2.5 million complaints. This number was based on ANZ data in relation to its customers in 2007 and 2008.³³

Impairment of Customer Loan Submission 61- Attachment 2³⁴

In November 2014, Tasmanian Small Business Council (TSBC) filed a submission with the Joint Parliamentary Committee into impaired customer loans. It sets out the mechanism by which major banks could avoid having to investigate customers' complaints.³⁵

The submission states:

"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:

³² Andrew Wilkie (2012), "*Banking Amendment (Banking Code of Conduct) Bill 2012: A Bill for an Act to amend the Banking Act 1959, and for related purposes*".

³³ ANZ publication stated "*Customer complains to their Customer Response Centre increased from 36,889 in 2007 to 41,490. The increase was partly due to ... an increase in the number of customers requesting financial hardship.*" Accessed 16 February 2010 at <http://www.anz.com.au/about-us/corporate-responsibility/customers/products-services...>

³⁴ Ibid, refer footnote 2

³⁵ Code Compliance Monitoring Committee Association's Constitution dated 20 February 2004.

- 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.*

...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.

... Clause 8.1 Consideration of complaint about code breaches

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

The evidence referred to here, notes:

(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.

(c) if the CCMC thinks there is a more appropriate Forum to deal with the complaint.

This paper reveals that the relationship between the subscribing banks and their customers is unconscionable and unfair.”³⁶

Point 2

This submission identifies:

Clause 8.1 of the Constitution allowed major banks, at their discretion, to transfer complaints, which the CCMC was required to investigate, to other forums, which contradicted the clause 34 (i) of the Code. This meant that the CCMC was unable to name banks publicly for breaching the Code.

³⁶ 14 November 2014, the impairment of customer loans Submission 61, accessed at http://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions.

Changed Terms of Agreement (2004)³⁷

The above documents explain the intricate web of deception used by major banks to avoid having to comply with their customers' loan contracts, and having to investigate any complaints between 2004 and 2013.

The above review suggests that:

1. Loan contracts provided to customers by self-regulated banks between May 2004 and February 2014 were without full disclosure.
2. Bank CEOs could therefore increased profits by failing to investigate any complaints.
3. The Constitution of the CCMC changed the terms of the contract, suggesting ABA's 2004 statement was misleading.
4. Bank CEOs were officers of the CCMCA, and architects of arrangements to publish problematic statements.
5. The Constitution of the CCMC meant that its non-disclosure between 2004 and 2014 would have resulted in irreversible damage to many customers.

Point 3

Perverting the course of justice:

The banks that adopted the Constitution denied individual and small business customers' rights to have code breaches investigated outside the courts, at little or no cost.

Conclusion

In November 1991, the Martin Committee Review (the review) pointed out the inequality of laws and Courts to resolve bank disputes by all but a few of Australia's wealthiest people.

Prior to publishing its report, the Martin Committee expressed concerns for small businesses to redress banking disputes, noting: high cost, powerful bank positions, unnecessarily protracted proceedings, inability to continue legal action and failure to ensure adequate discovery.

The review quoted Former Governor General and High Court Justice Sir Ninian Stephen³⁸ in 1991, who said: "the Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court".³⁹

³⁷ Code of Banking Practice, together with a statement of impacts resulting from the introduction and progressive changes to the Code of Banking Practice.

³⁸ Sir Ninian Martin Stephen KG, AK, GCMG, GCVO, KBE, QC (born 15 June 1923) is an Australian jurist, who served as a Justice in the High Court of Australia before being appointed the 20th Governor-General of Australia.

³⁹ 5 December 2010, *The Australian Bankers' Problematic Code*, Report to Council of Small Business Organisations of Australia, accessed at

The code was therefore introduced as an alternative to courts with cheap, speedy, fair and accessible alternative for customers to resolve complaints justly.

Should you require any further information, please contact the writer at the email address below.

Yours sincerely,



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