



7 February 2017

Ms Louise Thomson
Secretary
National Australia Bank Limited
800 Bourke Street
DOCKLANDS VIC 3008

Dear Ms Thomson,

Re: Chris and Claire Priestley v NAB

We appreciate the commitment by bankers to be signatories to the Banking Oath, which led (or leads) to the decision made by the National Australia Bank (the bank) to review Chris Priestley and Claire Priestley's case.

We are writing to you, in your capacity as the bank's secretary, following a decision by Chris and Claire Priestley to appoint Bank Victims and its associates to seek a review of their case by the bank. We suggest there were inconsistencies when the bank took our clients to court without investigating their complaints and later selling their farm.

2004 Code: A Binding Agreement

The 2004 Code of Banking Practice (the code) was described by banks and their associations as being a binding contract between banks and customers. It described standards of good banking practices when banks are dealing with their individual and small business customers and their guarantors.ⁱ

The purpose of the code, according to the banks and their associations, is to "establish 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 service".ⁱⁱ

The code was published by the Australian Bankers Association (ABA), which noted its objectivesⁱⁱⁱ and has been confirmed in the courts system^{iv}.

The bank's Facility Agreement - part of its standard banking contract - acknowledges "*The General Standard Terms*" are a part of the contract: "*A legally binding contract is created between you and us*".

The General Standard Terms (Annexure B) of the standard banking contract sets out in clause 35 that:

“The relevant provisions of the Code of Banking Practice apply to this facility agreement if you are an individual or small business”.³

ABA director, David Bell, commenting on the code, stated that:

“Once a bank has adopted the code, it binds the bank contractually to the customer. So if a bank breaches the code, it has breached its contract to the customer... A bank must be sure it is ready to comply with its obligations under the revised code before it adopts it because the code is an enforceable contract between the bank and the customer”.⁶

It is evident that the code was intended to be part of a binding agreement between a bank and its customers. The bank’s individual and small business customers, without considerable resources, were entitled to believe that code breaches were contractual breaches.

The bank adopted the code on 31 May 2004^v, having previously adopted the 1993 Code.

Loan Contracts without Full Disclosure

The Facility Offer and attachments were part of the bank’s loan contract. The bank, by inviting customers to sign loan contracts, meant that an agreement was reached once a customer had paid the respective fees.

The Code Compliance Monitoring Committee (CCMC) was established by the ABA, which appointed members to “monitor code compliance and name banks found guilty of a serious or systemic breach of the Code”.^{vi} Subsequently, when the constitution (Attachment A) that sits under the CCMC was publicly revealed, it was found that this statement was incorrect.^{vii}

In order to demonstrate how the bank’s Chief Executive was able to vary the terms of the code, it is necessary to review the limited authority of the CCMC under Clause 34 of the code in terms of investigating code breaches. This clause states that the function of the CCMC will be: “(i) to monitor [the banks] compliance under this Code” and “(ii) to investigate, and to make a determination on, any allegation from any person that we have breached this Code...”^{viii}

In or about June 2004, at about the time that subscribing banks had adopted the code, the bank’s Chief Executive was one of several bank CEOs who authorised the Constitution, which varied the provisions of Clause 34 in the code.^{ix}

Of equal importance was the manner in which the bank varied the objectives of the 1993 Code, when introducing clause 35 of the code. The clause states the bank will “have an internal process for handling disputes with [customers]. This process will be free of charge.”^x

The Australian Bankers' Problematic Code: Part 3 (Attachment B), sets out the difficulties that our clients would have experienced in attempting to explain how the bank has avoided having to comply with the code.

The Priestley's Issues

Chris and Claire Priestley contended by attending Farm Debt Mediation (FDM) they would not be able to obtain credit in the local area to continue sowing crops and operate a viable farm. Dismissing their complaints sent to the bank's Chief Executive, the bank took them to court in 2012.

Our clients claim that when the bank commenced an action against them in the court, they had insufficient funds to employ specialist lawyers. Later in 2012 when they ran out of funds, they attended the New South Wales Supreme Court and made a failed attempt to explain how the bank misled them when they signed their 2004 and 2008 loan contracts due to lack of legal knowledge and skill as unrepresented litigants .

They lose the case as a result. , The banks, in 2013, sold their farm without crops at a discount and retained surplus funds (\$3 million) as penalty fees.

Constitution

The Code Compliance Monitoring Committee Association's Constitution includes a number of provisions by which the CCMC was bound. The Constitution was not included in our client's contract. Under clause 2.1 of the Constitution, it defines that:

"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."^{xi}

Clause 3.2 of the Constitution states:

*"Association Member must be Code Subscriber
Only a Code Subscriber may be an Associate Member"*

Clause 3.3 then states:

*"Membership of CCMC Association
An Association Member is each Code Subscriber which subscribes to this Constitution by giving a written instrument to that effect signed by its chief executive officer"*

Clause 3.7 states:

*"Function of meetings
The CCMC Association shall meet only for the purposes of:
a) Considering proposed amendments to this Constitution;*

- b) *Amending this Constitution; and*
- c) *For any other purpose that arises from this Constitution.”*

Clause 3.11 states:

“Representation at meeting

Each Association Member shall be represented at a meeting of the CCMC Association by:

- a) *The chief executive officer of the Association Member; or*
- b) *A senior executive officer of the Association Member appointed by instrument in writing signed by the chief executive officer...”*

Clause 8.1 states:

“Consideration of complaints 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:

- a) *To the extent that the complaint relates to an Association Member’s commercial judgment in decisions about lending or security...*
- 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...; or*
 - ii. *Was heard (whether as a standalone matter or as part of any process or proceeding) by another Forum...*
- c) *If the CCMC thinks there is a more appropriate Forum to deal with the complaint...”*

Our clients believe that the Constitution, governed by the bank's CEO, provided the bank with ample opportunity to transfer any allegation of impropriety, alleged code breach or complaint to a court and rendered the CCMC's authority powerless.

Morals and Ethics

In 2017, our clients are no better able to resolve their differences with the bank than they were in 2012. The commitment by senior executives and officers of the bank to be signatories of the Banking Oath provides farmers with an opportunity to present their case to senior members of the bank.

There are several issues that the bank might consider in relation to Chris and Claire Priestley's case.

The Banking Oath states:

“The Oath

Trust is the foundation of my profession.

I will serve all interests in good faith.

I will pursue my ends with ethical restraint.

I will help create a sustainable future.

I will help create a more just society.

I will speak out against wrongdoing and support others who do the same.

I will accept responsibility for my actions.

In these and all other matters;

My word is my bond.”

Our clients believe that there are several provisions in the Oath that provide them an opportunity to re-express some of their concerns.

Firstly, it introduces an opportunity for customers to direct concerns of impropriety to the banks senior executives in regards to ethics. Oxford English Dictionary defines ethics as:

“Moral principles that govern a person’s behaviour or the conducting of an activity”.^{xii}

Secondly, it allows customers to expect that all complaints will be investigated in circumstances where they were filed in good faith, involving issues which had damaged them and filed within a reasonable period of time. The CCMC submission of 31 March 2008 alleged the Constitution was problematic and, if correct, restricted the bank and the CCMC from investigating complaints and code breaches filed by customers. Only banks and the CCMC had evidence of such practice in the form of the Constitution that was inaccessible to customers at the time. Consequently, it is alleged that subsequent bank Chief Executives may have acted corruptly by not rectifying the CCMC’s 2008 allegations.

The Oxford English Dictionary defines corrupt as:

“Having or showing a willingness to act dishonestly in return for money or personal gain”^{xiii}

The most important initiative made by banks since the 1993 Code was introduced following the Martin Committee Review in 1991 was the Banking Oath. The Oxford English Dictionary defines oath as:

“A solemn promise, often invoking a divine witness, regarding one’s future action or behaviour”^{xiv}

Our clients can expect no more than that by the bank’s current senior executives and officers.

Conclusion

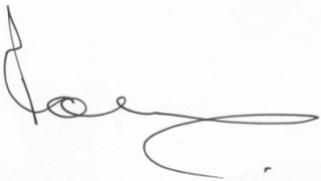
Bank Victims believes that the bank, since 2004, should never have been allowed to conceal relevant documents from customers. Having taken the Oath, this may be a suitable time for the bank and its association to introduce a transparent complaint resolution mechanism.

The information presented to the bank in this letter suggests that subsequent bank Chief Executives either introduced the Constitution, or allowed it to continue to void bank customers' rights to have complaints and code breaches investigated. It was alleged, in 2008, by the CCMC members that the Constitution was problematic. Yet, despite this revelation, no action was taken by the bank's Chief Executive or the ABA to rectify this allegation.

As you will appreciate, the Priestley's case requires members of the bank that have taken the Oath, to consider appropriate governance practices for one of Australia's major corporations.

As this matter is well known to the bank, Bank Victims requests your response by the EOD on Friday 17 February 2017.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Russell Cousins', with a stylized flourish at the end.

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Copy: Dr Ken Henry, Chair, AC National Australia Bank; Mr Andrew Thorburn, Chief Executive, National Australia Bank.

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- ⁱ 2004 Code of Banking Practice, clause 1.1.
- ⁱⁱ September 2014, Code of Banking Practice factsheet.
- ⁱⁱⁱ Australian Bankers' Association, "Code of Banking Practice – FAQs", January 2013, page1. Available at: http://www.suncorp.com.au/sites/default/files/Code_of_Banking_Practice_FAQs%5B1%5D_0.pdf. It states "When your bank adopts the Code, it will become a binding agreement between you and your bank."...Banks that adopt the Code are considered to be contractually bound by their obligations under the Code."
- ^{iv} *National Australia Bank Limited v Rice* [2015] VSC 10. Available from: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2015/10.html>.
- ^v These banks adopted the 2004 code and there is evidence they may have breached the contracts with their customers.
- ^{vi} September 2014, Code of Banking Practice factsheet.
- ^{vii} 2012 Date of obtaining constitution that was adopted by bank Chief Executives in 2004
- ^{viii} *Ibid*, Clause 34b
- ^{ix} Refer to Code Compliance Monitoring Committee Association Constitution, Clause 3: CCMC Association
- ^x *Ibid*, Clause 35.1
- ^{xi} Page 2, 2.1 Definitions the Code Compliance Monitoring Committee Association Constitution, dated 20 February 2004.
- ^{xii} Oxford English Dictionary definition of 'Ethics' Accessed on 7 February 2017 at <https://en.oxforddictionaries.com/definition/ethics>
- ^{xiii} Oxford English Dictionary definition of 'corrupt', accessed on 7 February 2017 at <https://en.oxforddictionaries.com/definition/corrupt>
- ^{xiv} Oxford English Dictionary definition of 'oath', accessed on 7 February 2017 at <https://en.oxforddictionaries.com/definition/oath>