



2 March 2017

Mr Shayne Elliott  
Chief Executive  
Australia and New Zealand Banking Group  
Level 9, 833 Collins Street  
DOCKLANDS VIC 3008

Dear Mr Elliott,

### **ANZ BANKS HOME LOAN CONTRACTS**

During the past two years, Bank Victims has commissioned independent research into the problematic practices of code subscribing banks.

There is evidence to suggest that the ANZ Bank (the bank) has been able to increase its profits from practices that were unconscionable and unfair. The following review includes details of how the bank, between 2004 and 2014, misled customers to increase profits.<sup>1</sup>

#### **Cicekdag v ANZ Bank**

In 2008, Mr and Mrs Cicekdag were invited to transfer their housing loan from RAMS to the bank. The bank did not require the Cicekdag's to sign a housing loan contract, instead they were asked to sign a Low Doc Loan of \$152,000. The information set out in the bank's loan contract was provided to our customers by the bank to sign when they attended its office in 2008.

The Low Doc loan (small business contract) included information stating Mr Cicekdag had a business and an annual income of \$65,000. Mr Cicekdag did not have a business, nor did he have an annual income of \$65,000. When he was asked to sign the contract, his only source of income was a disability pension. As a result, the Cicekdag's could not maintain monthly payments to the bank due to financial hardship, mental disability and alleged code breaches by the bank.

In 2013, Mr and Mrs Cicekdag presented information in relation to their dispute to the Financial Ombudsman Service (FOS).<sup>2</sup> When doing so, they were not advised by the bank or the FOS that they would lose their rights to have complaints investigated by the Code Compliance Monitoring Committee (CCMC) at no cost.

In 2016, the bank, through Gadens Lawyers, required Mr and Mrs Cicekdag to sell their house to repay the loan. The only other option they had was to transfer the bank's loan to another bank or financier. When they approached professional mortgage brokers, they were advised that given the history of their loan with ANZ Bank no bank or finance company would refinance their house.

### **Predatory Lending**

The banks' conduct – ignoring complaints, neglecting to verify loan information and appointing CCMC whereby they could not comply with Clause 34 – highlights the predatory nature of bank lending that aims to obtain profits in whatever way possible.

*“Predatory lending describes unfair, deceptive, or fraudulent practices of some lenders during the loan origination process.” Lenders made loans that they knew borrowers could not afford.”<sup>3</sup>*

The Cicekdag's argue that the bank should not have obtained a financial advantage from their loan. Had the bank relied on correct information when providing them with the loan contract, differences could have been dealt with at the time. The misleading and incorrect information included in the bank's loan contract suggests that it sought to obtain a benefit on the value of their house, which was considerably greater than \$152,000.

Bank Victims refers you to “Australia's ‘Banking Cartel Scandal’ The Rise of White-Collar Crime”, in which the submission alleges that the predatory lending in Australia is rampant.<sup>4</sup>

It states in its Executive Summary:

*“Lenders have been systematically targeting older people who owned their own home, were on low incomes and were debt free...”*

*During Parliamentary questioning, our regulators have consistently down-played the instances of mortgage fraud and sub-prime lending in Australia ... Of most concern is the apparent attempt by Lenders to demonise the consumer victims of Low Doc Loans...*

*ASIC are quick to unfairly blame brokers as seller/agents of the banks, after freely admitting: “Lenders are the engineers.” Sellers of product do not approve loans. Lenders approve the loans. The crime committed was in the approval process, involving a universal and compulsory computerised calculator to exaggerate incomes.”*

Predatory Lending practices were

*“taking advantage of the least educated and financially unsophisticated in our society by selling them costly mortgages and hiding details of the fees in the fine print incomprehensible to most people.”<sup>5</sup>*

It is arguable that the motives of the bank, when it invited the Cicekdag's to sign a Low Doc Loan when they did not have a small business, were profit driven and

unethical. This put the bank in a no lose situation. If the borrower could not pay back the loan, the bank could have exercised its foreclosure power to sell the borrower's property. The bank as the lender had a duty to ensure the information in the loan contract it secured was correct.

Predatory lending deceptively offers a loan that cannot be repaid, leading to the inevitable selling of the borrower's property by the bank to recover funds. The costs would include interest and charges at inflated amounts for the operation of the foreclosure. This pathway leaves the borrower with little to no remaining funds regardless of whether the property was worth more than the original loan. As a result, homeowners are left in danger of homelessness.

In 2011, it was reported there were 2.709 million homeowners with mortgages.<sup>6</sup> There is evidence that approximately 80% of these loans are held by the four major banks, with ANZ's share being 15.5%.<sup>7</sup>

### **Problematic 2004 Code**

When signing the loan contract with the bank in 2008, the Cicekdag's were bound by the 2004 Code of Banking Practice (the code).

The contract relied on the bank's commitment to comply with the provisions of the code. Clause 34 of the code outlined the investigative powers of the CCMC. There is now considerable information that subscribing banks could prevent the CCMC from investigating code breaches between 2004 and 2014.<sup>8</sup>

In the years between 2004 and 2014, the bank's Chief Executives were Mr John McFarlene (1997-2007) and Mr Mike Smith (2007-2015). It is alleged that the bank made commitments during this period that the code would be contractually enforceable<sup>9</sup> and a binding agreement.<sup>10</sup>

When the statements made by or on behalf of Mr McFarlene and Mr Smith there were substantial changes to the objectives agreed by the banks and the Australian Bankers' Association (ABA) when the banks adopted the first code in 1993. However, initiatives by the bank Chief Executives, between 2004 and 2014, as officers of the ABA, included a promise the bank will participate in establishing the CCMC, and that it would be an enforceable contract.<sup>11</sup>

In relation to the authority of the CCMC, the banks and the ABA stated in Clause 34(b) that the CCMC's function would be:

- “(i) Monitor our compliance under the code;*
- (ii) Investigate, and to make a determination on any allegation from any person that we have breached the code...”*

They further stated in Clause 34(c) *“the bank will ensure the CCMC has sufficient resources and funding to carry out its functions satisfactory and efficiently.”*

### **Changed Contract Provisions**

Copies of the Constitution were not made available to the banks customers until 2012. Previously, the Constitution had not been provided to the bank's individual and small business customers, including those with home loans.

This document suggests the CCMC was not independent, but governed by the bank Chief Executives. It is therefore alleged that the officers of the ABA, which were the owners of the Code,<sup>12</sup> were also architects of the Constitution. However, the Constitution significantly varied and possibly voided the "*contractual enforceability of the code.*"<sup>13</sup>

The CCMC's Constitution, in Clause 3, states:

- "3.1 The objectives of the CCMC Association are to establish, and to make provision for the operation, of the CCMC...*
- 3.2 Only a code subscriber may be an Association member;*
- 3.3 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 (or their duly appointed alternate, being a senior executive officer of the Code Subscriber...)"*

### **Constitution's limitations**

There was a disconnection between the contractual provisions in the code (included in the contract ANZ was selling to individual and small business customers between 2004 and 2014) and the Constitution.

The CCMC, in Clause 34, was required to investigate any allegation from any person (etc.). However, bank CEO's included the following restrictions in the Constitution that voided the CCMC's powers.

Clause 8.1 of the Constitution states:

- "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) ... will be heard ... 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... [it] may form the view that there is a more appropriate Forum to deal with the complaint...;*
- (d) which the CCMC has referred to the Association Member concerned, unless:*
  - (i) the Association Member has responded to the complaint;*
- (e) if the CCMC considers that the complaint is frivolous or vexatious; or*
- (f) if the complaint is based on the same events and facts as a previous complaint by the complainant to the CCMC, unless there is new information;"*

The CCMC was constrained by exclusions set out in the Constitution. The banks could simply direct customers to another 'Forum', thereby void the CCMC's authority to perform an investigation of the above case.

The Constitution defined 'Forum' as 'any court, tribunal, arbitrator, mediator... in any jurisdiction.' When linking this definition with Clause 8(b)(c), the decision made by banks to direct complaints and code breaches to another forum allows them to use the courts where their customers were under resourced.

### **Conclusion**

This case suggests the bank was willing to threaten its customers with foreclosure of their loan rather than resolving the Cicekdag's disputes as required of the bank in its contract. In these circumstances, the banks conduct appears to have been unlawful and intentional.

The banks early response would be appreciated.

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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## References

- <sup>1</sup> ANZ's Net Income as announced by ASX was \$5.709 billion in 2014 accessed on 2 March 2017 at <https://au.finance.yahoo.com/q/is?s=ANZ.AX&annual> up from \$2.815 billion in 2004 as stated in ANZ's Annual Report accessed on 2 March 2017 at [http://www.anz.com/documents/au/investor/AnnualReport\\_2004.pdf](http://www.anz.com/documents/au/investor/AnnualReport_2004.pdf)
- <sup>2</sup> 4 February 2013, Financial Ombudsman Service Case No. 307996
- <sup>3</sup> 25 January 2011, "*The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*", *Financial Crisis Inquiry Commission, Washington, D. C.: Government Printing Office.*
- <sup>4</sup> 29 March 2016, Denise Brailey "Australia's 'Banking Cartel Scandal' The Rise of White-Collar Crime", Banking and Finance Consumers Support Association (BFCSA) to the Senate Economics Standing Committee 2016 Inquiry into 'Penalties for White-Collar Crime'(submission 23), accessed at <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjmuKWhqpySAhXDwLwKHbbDA8wQFgglMAI&url=http%3A%2F%2Fwww.aph.gov.au%2FDocumentStore.ashx%3Fid%3Dbe84b97d-5d0a-41d4-acd7-d20fc6db345b%26subld%3D411906&usg=AFQjCNHC-5njXkKFW458M6su6AqDj-c9vw>
- <sup>5</sup> Ibid, page 36.
- <sup>6</sup> Australian Bureau of Statistics "Tenure Type and Landlord Type by Dwelling Structure", 2011 accessed on 2 March 2017 at [http://stat.data.abs.gov.au/Index.aspx?DataSetCode=ABS\\_CENSUS2011\\_B32](http://stat.data.abs.gov.au/Index.aspx?DataSetCode=ABS_CENSUS2011_B32)
- <sup>7</sup> 19 December 2016, The Australian 'Lenders see sanity return to home loans' written by Michael Bennet
- <sup>8</sup> 20 February 2004, Code Compliance Monitoring Committee Association's Constitution published by Mallesons Stephen Jaques, page 2 (Forum), page 2-3 (Clause 31-3.3),page14-15(Clause 8.1)
- <sup>9</sup> Steve Lewis and Ian Rogers (5 November 1993) "*A banking code emerges after 'unhappy head-butting session'*", Sydney Morning Herald.
- <sup>10</sup> September 2004, Code of Banking Practice Fact Sheets: [www.bankers.asn.au/Default.aspx?ArticleID=906](http://www.bankers.asn.au/Default.aspx?ArticleID=906), accessed on 6 November 2010
- <sup>11</sup> 34(a) of the 2004 Code of Banking Practice
- <sup>12</sup> 5 November 1993, Sydney Morning Herald's '*A banking code emerges after unhappy head-butting session*' by Steve Lewis and Ian Rogers.
- <sup>13</sup> Ibid.