



2 March 2017

Mr Andrew Thorburn  
Chief Executive Officer  
National Australia Bank Group  
Level 1, 800 Bourke Street  
DOCKLANDS VIC 3008

Dear Mr Thorburn,

**RE: Priestley v National Australia Bank (Agribusiness Contract)**

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 National Australia 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 obtain increased profits.<sup>1</sup>

**Background**

In 2004, the Priestley's signed an agribusiness loan contract with National Australia Bank (the bank). However, in 2010, they were unable to meet commitments under the contract due to natural disasters such as droughts and floods, which lasted for a number of consecutive years.

In 2010, under pressure from the bank to sell the farm without crops, the Priestley's filed complaints with the bank's Chief Executive.<sup>2</sup> At that time, the CEO was an officer of the Code Compliance Monitoring Committee Association (CCMCA) that governed the CCMC's authority under the Constitution. They were then directed to Farm Debt Mediation.<sup>3</sup>

By attending Mediation, they automatically, without their knowledge, lost their rights under Clause 8.1 of the Constitution to have complaints investigated by the CCMC at no cost.<sup>4</sup> The bank then commenced a successful action against them in the Supreme Court. As a consequence, it sold their farm at \$1 million less than its recent valuation and retained \$3 million of their equity in the farm for its legal and operation costs.

## **Problematic 2004 Code**

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

The bank's Chief Executives, Mr Frank Cicutto (1999-2004), Mr John Stewart (February 2004), Mr Ahmed Fahour (2004-2009) and Mr Cameron Clyne (2009-2014) were reported to have made commitments that the code would be contractually enforceable<sup>5</sup> and a binding agreement.<sup>6</sup>

During this period Mr Stewart, Mr Fahour and Mr Clyne were reported to be officers of the Australian Banker's Association (ABA). It is alleged that the ABA made substantial changes to the objectives set out in the 1993 Code. Regardless, the banks and the ABA made commitments that they would participate in establishing the CCMC.<sup>7</sup>

Under Clause 34 of the 2004 Code, the banks stated "we agree the CCMC's function will 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...*"<sup>8</sup>

Clause 34(c) reinforced these commitments, stating we "*will ensure that the CCMC has sufficient resources and funding to carry out its functions satisfactory and efficiently.*"

## **Changed Contract Provisions**

In July 2012, Bank Victims obtained a copy of the CCMCA's Constitution.<sup>9</sup> Previously the Constitution had not been provided to NAB individuals and small business when signing loan contracts.

This document suggests the CCMC was not independent, but governed by bank Chief Executives. It is therefore alleged that the officers of the ABA, which were owners of the Code,<sup>10</sup> were also architects of the Constitution. However, the Constitution significantly varied and possibly voided the "*contractual enforceability of the code.*"<sup>11</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 contractual provisions of the code (included in loan contracts NAB 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 CEOs 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... CCMC may form the view that there is a more appropriate Forum to deal with the complaint where the complaint alleges in whole or in part that an Association Member has breached any legislative provision;*
- (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 in the Constitution. The banks could simply direct customers to another 'Forum'. Between 2010 and 2014, the bank used this clause to void the CCMC's authority in the Priestley's case. The bank commenced an action against them in the court (another 'forum'), which meant the CCMC had no authority to investigate any alleged code breaches in the above matter.

## Forum

Clause 2.1 of the constitution defines 'Forum' as 'any court, tribunal, arbitrator, mediator... in any jurisdiction.' When including this definition in Clause 8(b)(c), the bank's decision to direct complaints and code breaches to another forum allows them to use the courts where their customers were under resourced.

Therefore, in the above case, by directing the Priestley's to Mediation, the bank knew its customers would not be able to have the CCMC investigate their allegations.

## Conclusion

This case demonstrates that the bank was willing to direct farmers like the Priestley's to the courts, rather than investigating their allegations and resolving disputes as agreed in the contract. The evidence suggests that the bank has been unwilling to review these practices that appear to have been intentional and unlawful.

Since 2014, when the Constitution was widely reported in submissions to the parliament,<sup>12</sup> it is alleged the NAB continued selling loan contracts without full disclosure. This paper provides evidence that the arrangement was architected by and for the benefit of banks that subscribed to the code.

We await your early response.

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

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- <sup>1</sup> National Australia Banks profits in 2014 were \$13,739 million as stated in their 2014 Annual Report accessed on 2 March 2017 at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/customer\\_loans/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions) up from \$3,177 million as stated in their 2004 Annual Report accessed on 2 March 2017 at <https://www.nab.com.au/content/dam/nabrwd/legacy/about-us/shareholder-centre/Report-archive/Annual-Review-2004.pdf>
- <sup>2</sup> 19 May 2010 letter from the Priestleys to Mr Cameron Clyne, CEO of NAB.
- <sup>3</sup> 25 May 2010 letter from James Stafford, Manager, Office of the Customer Advocate, NAB to the Priestley's
- <sup>4</sup> 20 February 2004, Code Compliance Monitoring Committee Association's Constitution published by Mallesons Stephen Jaques, page 14, Clause 8.1
- <sup>5</sup> Steve Lewis and Ian Rogers (5 November 1993) "*A banking code emerges after 'unhappy head-butting session'*", Sydney Morning Herald.
- <sup>6</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>7</sup> 34(a) of the 2004 Code of Banking Practice
- <sup>8</sup> 2004 Code of Banking Practice, Part E: Resolution of Disputes, Monitoring and Sanctions, page 18.
- <sup>9</sup> 27 July 2012, Steven Munchenberg, CEO of the ABA, wrote to Mrs Rosemarie Bayne, JMA Parties.
- <sup>10</sup> 5 November 1993, Sydney Morning Herald's '*A banking code emerges after unhappy head-butting session*' by Steve Lewis and Ian Rogers.
- <sup>11</sup> Ibid.
- <sup>12</sup> 14 November 2014, Parliamentary joint committee on Corporations and Financial Services 'The impairment of customer loans 'Submission 61 Attachment 2' by the Tasmanian Small Business Council, accessed on 2 March 2017 at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/customer\\_loans/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions)