Memorandum of Banking Self-Regulation

1. Australia's regulatory framework in banking is problematic, as major banks have let the community down too frequently, and in many ways.

2. It is noted members of the public should be able to trust their banks will act in their best interest when they turn to them for help. Unfortunately, this is not happening. The best interest of consumers is not appreciated by banks, which have failed to take steps to rectify problems and remedy failings. The current regulatory framework is inadequate to prevent unfair customer outcomes and provide redress for victims.

3. This failure demonstrates that there is a fundamental and systemic flaw in the self-regulation mechanism.

1991 Martin Committee's Report and 1993 Banking Code

4. In 1990, the Martin Committee[1] was set up to address Banking and Deregulation issues. Its 1991 report made recommendations to Parliament. The recommendations were specific and required banks to document practices so that individuals and small businesses would not have to resolve their disputes in courts due to the considerable financial differences between parties.

5. The Martin Committee's report established the foundation of the practices for the first banking code in 1993. It described standards of good practice and service, promoted disclosure of information relevant and useful to customers, and introduced procedures for resolution of bank and customer's dispute. The principles should not be changed since 1993, as governments and consumers have not agreed to vary them.

6. It is evidently the 1993 Code was part of the loan contracts between 1996 and 2003. It was reported the government would allow banks' ownership of the code and banks, in return, agreed the code would be contractual enforceable.

7. The Martin Committee Review made a number of recommendations in relation to the introduction of a Code of Banking Practice.

Some of the key recommendations included:[2]

> *16. where applicable, recommendations concerning the disclosure made in Chapter 21 also apply to other activities of bank-led conglomerates, including companies with which they have close associations;*
>
> *17, the Life-writers' Association and other representatives of financial advisers and agents should be invited, along with government and consumer representatives, to participate in a general review of quality control of financial advisers and agents; and*
>
> *18. the Commonwealth Government consult with industry and consumer groups in the development of a list of required features for industry-based dispute resolution procedures and establish a process through which the*

Government, the industry and consumer representatives can look at options for rationalising the various schemes and proposed schemes. [3]

Bank Victims' Comments:

8. Banks often failed to disclose or deny their close association with companies that act as agents. This was confirmed by the ASIC's submission of December 2014 to the Scrutiny of Financial Advice Inquiry, noting:

"The inherent conflict of interest created by vertical integration may not be readily apparent to clients, particularly if the product manufacturer and advice parts of the business operate under separate licences and business names. Roy Morgan Research found that 55% of surveyed consumers receiving financial advice from an entity owned by a large financial institution, but operating under a different brand name, considered it to be independent..."[4]

The Committee recommends that:[5]

40. banks further develop packages and advisory services that will assist small businesses to improve their financial management and planning;

41. small business representative organisations and relevant Commonwealth and State government departments, provide advice to small business about the products and service available from banks.

Bank Victims' Comments:

9. It is not uncommon for ordinary small business owners, who are not commercially sophisticated, to expect bank staff acting as skilled financial advisers and consider themselves as producers or traders with little or no interest in the financial management side of the business.[6] This being so, banks are therefore in a position to exercise significant influence over the financial position of customers.

The Committee recommends that: [7]

43. banks reassess their lending procedures affecting small business to ensure that sound proposals that meet usual credit criteria are funded; and

44. in reassessing small business loans banks should:

consult with the customer;

advise in writing any changes prior to them being made;

provide an appeal mechanism against any decision; and

give added emphasis, in the current economic climate, to assisting businesses to manage themselves out of difficulty where some prospects for improvement exist rather than taking precipitate action, (paragraph 15.60).

Bank Victims' Comments:

10. Under the 2004 Code, banks make undertakings to their customers with respect to the manner in which they would manage credit facilities and complaints under

clauses 25, 34 and 35[8]. In cases we examined, banks failed to assist or try to work with customers to help them overcoming their financial difficulties during the period of natural disasters, policy changes, and mediation, which breaches clause 25 of the 2004 Code.

The Committee recommends that:[9]

45. banks review their risk premiums on small business loans in the light of the lesser risk of some areas of small business and in loans, (paragraph 15.72)

The Committee recommends that: [10]

51. the banks ensure that farmers are made aware of the full range of products they have available by ensuring bank staff are familiar with the products and have the relevant expertise to advise customers on their application; and

52. the Department of Primary Industries and Energy, financial counselors, the National Farmers Federation and the State based organizations and government departments provide information to the rural sector about these products including independent assessments of their usefulness, (paragraph 16.17)

The Committee recommends that:[11]

74. banks should ensure that their assessment of risk and other related areas such as ability to repay are thoroughly investigated. Credit scoring systems should be amended to incorporate criteria such as income, or where it already exists, to strengthen this requirement. Bank loans officers should be adequately trained in risk assessment techniques. (paragraph 19.138)

Bank Victims' Comments:

11. We believe the above recommendation was incorporated into Clause 25.2 of the 2004 Code, which states: "*[b]efore we offer or give you a credit facility (or increase an existing credit facility), we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay it.*"

12. In cases we examined, banks provided customers with an unsustainable amount of debt. Its credit assessment and evaluating of customer's ability to meet repayment obligations was at best inadequate or at worst predatory. If the loan interest could not be met by customers without accepting further loans to cover interest costs, it meant this would inevitably result in the debt escalating to the point where they were trapped, as it could not be repaid or refinanced without selling their secured properties.

The Committee recommends that

49. The Australian Law Reform Commission examine the powers of the courts to deal with abuse of their processes and consider whether there is a need for legislation in this area to assist the courts to deal with the abuse of process,

and

50. The Senate Committee on Legal and Constitutional Affairs, as part of its inquiry into the cost of justice investigate the issue of the cost of justice in cases between banks and customers. The Committee will refer information it has taken on this issue to the Senate Committee, (paragraph 15.91)

Bank Victims' Comments:

13. The Martin Committee report noted the cost of holding banks to account if they breached consumer protections through the court systems was prohibitive to most customers. It recommended the creation of an alternative dispute resolution scheme that would enable customers to have disputes arbitrated cheaply, quickly, and fairly outside the court system.[12]

14. This was fortified in statements made by Former Governor General and High Court Justice Sir Ninian Stephen[13] 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"*[14]*.*

15. Federal Attorney-General George Brandis reinforced this concern, stating:

"*[U]nless you are a millionaire or a pauper, the cost of going to court to protect your rights is beyond you... the costs of legal representation an court fees mean that ordinary Australians are forced either to abandon their legitimate claims or enter the minefield of self-representation*."[15]

16. In cases we examined, customers still have to resort to the court to seek justice with no or less resource or legal skills compared to banks. This is likely for them to be defeated in the court.

The Committee recommends that:[16]

53. Farm organisations encourage farmers to seek opinions from appropriately qualified financial and other advisers. (Paragraph 16.44)

The Committee recommends that:[17]

54. The existing draft code of practice on the bank-farmer relationship be re-examined in consultation with the ABA, NFF, State farming associations, DPIE, rural counselors and the Trade Practices Commission. The final code should be authorised by the TPC;

55. bi-annual reviews of the Code of Practice governing bank-farmer relationships be undertaken to ensure the Code is achieving its original purpose; and

56. the Draft Code of Practice relating to bank-farmer relationship be amended to include pastoral companies and government business enterprises conducting similar business. (paragraph 16.70)

Bank Victims' Comments:

17. In cases we reviewed, once farmers are in default, there is almost no prospect for them to get out the difficult situation, as State or Federal assistance requires their banks' support, which they are unlikely to receive.

The Committee recommends that banks should:[18]

> *70. continue to offer training opportunities to their staff especially with regard to improvements in customer relations;*
>
> *71. speed up their implementation of effective complaint handling schemes and make known the existence of their complaint departments to their customers through brochures available in all bank branches;*
>
> *72. make greater use of information gathered through their complaint statistics to improve their performance; and*
>
> *73. publish customer complaints statistics in their annual reports. (paragraph 19.121)*

The Committee recommends that:[19]

> *81. the development of comprehensive procedures for resolving complaints and disputes be considered in the development of the code of banking practice. Banks should ensure that all staff are familiar with the bank's policies and procedures relating to all that these policies and procedures are clearly set out in staff manuals and are incorporated into both initial training programs and refresher programs. The issues identified in paragraph 20.123 above should be included in the development of internal dispute resolution procedures, (paragraph 20.124)*

Bank Victims' Comments:

18. In cases we reviewed, customers repeatedly filed complaints with their bank that were either dismissed or received no response. Under clause 7(b) of the Code, the bank had a duty to ensure all persons who receive these complaints are sufficiently well trained to have a suitable knowledge of provisions of the Code.

The Committee recommends that:[20]

> *75. the Australian Law Reform Commission be requested to conduct a review of the law of banker and customer, involving consultation with industry, regulatory authorities and consumer groups. In cases where statutory change is required the ALRC should draft recommendations for appropriate legislation; and*
>
> *76. a code of banking practice, contractually enforceable by bank customers and subject to ongoing monitoring by the Trade Practices Commission, be developed as a result of a process of consultation between the banking industry, consumer organisations, Commonwealth regulatory agencies and relevant State government authorities. The consultative process should take place under the auspices of the Trade Practices Commission. Monitoring should have regard to the degree of the provisions of the code in the light of*

changing circumstances, (paragraph 20.51)

Bank Victims' Comments:

19. We believe the 2004 and 2014 code of banking practice did not receive widespread support from consumer organizations.

The Committee recommends that:[21]

78. all banks adopt a system of regular audits of all branches. Such audits should be designed to, amongst other things, check availability of information to customers, the ability of staff to answer questions about products and bank practices and the courtesy of staff, (paragraph 20.74)

The Committee recommends that:[22]

94. the principle of disclosure be incorporated into a code of banking practice, (paragraph 21.34)

Bank Victims' Comments:

20. The cases we reviewed suggest banks failed to ensure the availability of information that customer ought to know as demonstrated in the facts that: 1. banks failed to include a copy of banking code with the loan contract; 2. The CCMC's Constitution was concealed from customers prior to 2014.

The Committee recommends that:[23]

79. The participating banks in the Australian Banking Ombudsman Scheme should increase the monetary threshold to $200,000 and remove the exclusions relating to small proprietary companies. The threshold should be kept under review; and

80. a proposal eventually to establish an ombudsman to cover the whole financial services industry should be investigated by this Committee. In terms of development, such a scheme should give priority to ensuring access by consumers of retail or consumer products and services of all financial institutions, rather than, in the first instance, to incorporated entities, (paragraph 20.114)

Bank Victims' Comments:

21. As a private company, the Financial Ombudsman Service Limited is unaccountable for its decisions. As was ruled in *Mickovski v Financial Ombudsman Service Limited & Anor* [2012] VSCA 185, FOS decisions cannot be subjected to judicial review.[24] As a result, a complainant has no avenue for redress even if the FOS rules incorrectly or unfairly in its' arbitration of a dispute. The FOS is an unaccountable private company funded by Australian financial institutions, lacking transparency and independence. ASIC, which refers bank complaints to the FOS, has abrogated its regulatory role to a private company funded and staffed principally by Australian financial institutions.

The Committee recommends that:[25]

> *95. a requirement for plain English documents be incorporated in the code of banking practice. Plain English documents should be produced urgently by the Australian Law Reform Commission working wherever possible with State law reform commissions and in consultation with the banking industry, consumers and users. Priority should be given to producing important consumer documents such as the mortgage and the guarantee documents. (paragraph 21.51)*

Bank Victims' Comments:

22. Banks promise to "provide information to [customers] in plain language"[26]. This is not correct. Inclusion of ambiguous definitions of terms muddied the framework set out in the Code, had the effect – and arguably intent – of obscuring the wording in the code so that customers with limited knowledge could argue that it was not in 'plain language'.

23. The ABA published the code with wording that was redefined in the penultimate section of the code under definitions. This will have confused and misled customers, who believed they had rights to avoid the cost of resolving disputes in the courts.

24. The term 'dispute' is widely used throughput the code. Without reading the definition, bank customers could assume it refers to services and practices, which may not be the case under the 2004 Code. In clause 40, 'dispute' means a complaint in relation to a banking service."[27] However, this is later defined more accurately as 'banking service', for the purpose of this definition in the code, "means any financial service or product provided by us".[28]

The Committee recommends that:

> *103. the House of Representatives amend the resolution of appointment of the House Standing Committee on Finance and Public Administration to include a responsibility for reviewing the banking industry. The name of the Committee should be amended to House Standing Committee on Banking, Finance and Public Administration. (paragraph 23.28)*

Bank Victims' Comments:

25. There have been public inquiries into banking and financial sector in Parliament in recent years and a significant number of submissions have been filed with the Parliament. There appears to be no serious effort being taken by the ABA and banks to address the systemic and structural problems of banking industry.

2000 Taskforce on Industry Self-Regulation

26. In August 2000, the government published the report prepared by the Taskforce on Industry Self-Regulation in Consumer Markets. It considered the introduction of self-regulation in the banking and finance sector.

27. The taskforce acknowledged that "*self-regulation may not be appropriate in all circumstances... community cynicism regarding industry regulating itself may lead*

to a distrust of self-regulatory schemes unless schemes operate effectively and consumers have confidence in them".[29]

28. In making the decision to introduce the self-regulation, the government would have considered the importance of maintaining standards of banking practice, which enhanced the competitive position of banks, reduced costs of regulation to the government and reinforced safeguards necessary for customers.

29. The report addressed important principles in complaint handling, stating:

> *"The Taskforce considers that a business should provide clear and accessible information to consumers on any independent customer dispute resolution mechanism to which the business subscribes.*[30]
>
> *Such independent customer dispute resolutions mechanisms should be:*
>
> *(a) Accessible*
>
> *(b) Independent*
>
> *(c) Fair*
>
> *(d) Accountable*
>
> *(e) Efficient, and;*
>
> *(f) Effective.*

30. The submissions filed by Bank Victims all noted that the ABA's 2004 Code and Constitution meant banks, whilst embracing self-regulation, failed to meet these requirements.

2004 CCMC Constitution (20 February 2004)

31. The key body that implements code compliance and rules is the CCMC. However, the CCMC's Constitution was not included in the 2004 codes and was not made public until 2014 by a submission to the parliament.

32. The concealment of the Constitution meant that banks could filter complaints, thereby limiting the authority, independence and power of the CCMC at the banks' discretion.

2004 Code of Banking Practice (14 May 2004)

33. The 2004 Code, published in May 2004 by the ABA, introduced practices not consistent with the principles of Taskforce on Self-regulation. The decision by banks and the Financial Ombudsman Service (FOS) to appoint code regulators[31] meant the CCMC could not independently investigate any allegations from any person that subscribing banks breached the code.

34. The 2004 Code was reinforced by 'The Code of Banking Practice Factsheet' (the Factsheet).[32] It made no reference to either the Martin Committee recommendations or the CCMC's Constitution, instead claiming to set out the purpose, background and key commitments of the 2004 Code.

35. The Factsheet states *"the ABA has established the [CCMC] which will monitor [code] compliance and have the power to publicly name a bank which has been found guilty of a serious or systemic breach of the Code..."*[33]

36. Without the Constitution, it might be alleged the commitments were untruthful and unable to be challenged by customers in the courts.

Predatory Lending [34]

37. There have been a number of allegations referred to earlier parliamentary and senate inquiries, alleging banks had a predisposition for withdrawing customers' loans in circumstances where their client has sufficient equity to protect the bank.

38. The allegations noted the banks employed (or threatened to employ) enforcement measures such as receivership, the court system or foreclosure, to gain unjust profits not only from recovering funds, but also from high interest rate charged by banks during the conflict. In each case, customers involved can be left destitute, bankrupt and homeless.

39. The conduct of the banks highlights the predatory nature of bank lending, which aims to obtain profits in whatever way possible.

40. The predatory lender offers loans which, in many circumstances, cannot be repaid, leading to the inevitable sale of borrower's property by the bank to recover loans. In doing so, banks charge inflated operation costs and interest. Consequently, this leaves customers without sufficient funds to protect their rights in the court.

41. Bank Victims' submissions filed with the Ombudsman raised concerns banks were involved into predatory practices. They provided the evidence their banks concealed relevant documents from Farm Debt Mediation, courts and them in circumstance when it might be concluded their bank's conduct was predatory. It will disappoint the parliament and the senate that the Ombudsman was unable to consider allegations in such circumstances.

2008 The Queensland Farm Finance Strategy (1 February 2008)

42. The document is the product of a consultative process between the banking industry and rural industry organizations in Queensland.

43. The purpose of the strategy is for financial institutions ("financiers") and providers of credit to farmers; farmers and their financial advisers and financial counsellors and representative organizations to work together to:

- Promote objective assessment of financial viability of Farming Operations;
- Resolve financial problems as they arise; and
- Promote a mechanism to achieve a timely and dignified conclusion to matters where a financial support relationship is brought to an end so as to avoid the potential for conflict between the Farmer and Financier.

44. The strategy recognizes both the farmers and financiers are in business and their relationship is based and defined by contracts which govern provision of credit. This Strategy also recognizes and identifies the following as key elements of a sound relationship between the Farmers and financiers:

- Access to and the use of professional advisers and the adoption of sound financial management practices by the farmer;
- The early recognition of financial problems; and
- A willingness by the parties to negotiate to resolve financial problems in a fair and reasonable manner including the availability of mediation prior to commencing enforcement action with respect to a farm mortgage by financier.

45. The QFF, Agforce Queensland and the ABA will prepare information about the [FDM] Strategy and make it accessible too rural organizations and financial institutions... the ABA will prepare protocols for the Queensland Farm Debt Mediation Scheme.[35]

46. The ABA and bank Chief Executives developed and controlled the Code Compliance Monitoring Committee Association's Constitution. It is noted they were supporting the Queensland Government and farmers that introduced FDM protocols. Bank Victims' clients attended FDM in both Queensland and NSW whilst the banks were in breach of their loan contracts. Also, in both cases, the banks concealed the Constitution from the mediator and them, despite agreeing to attend honestly and sign an agreement that required them act in good faith.

47. In both cases the banks agreed to be bound by the Queensland farm debt strategy. When attending FDM, neither bank advised the other parties attending they were in breach of their code responsibilities, and there is no evidence banks disclosed to the other arties attending that under the secret Constitution they could avoid having to comply with the 2004 loan contract and the Code.

2014 Code of Banking Practice (1 February 2014)

48. In January 2013, the 2014 Code and CCMC Mandate were published. At that time, the ABA noted the Mandate was the equivalence of the 2004 Constitution. The 2014 Code stipulates that the CCMC was retroactive for 12 months in terms of its ability to investigate earlier code breaches.[36]

49. In 2014 the CCMC had no jurisdiction to investigate 2004 Code breaches, as code breaches will have exceeded the 12-month jurisdiction period CCMC agreed to be bound by. In these circumstances, the ABA, having concealed the Constitution for ten years, now published a code that took from customers their rights to have 2004 Code breaches and complaints investigated. This means banks could avoid complying with government principles set out in the Martin Committee's banking review in 1991. The ABA and banks also ignored the Taskforce on Self-Regulation essential requirements if they were to remain being self-regulated.

Submission 61, Parliamentary Joint Committee on Corporations and Financial Services of 19 August 2015

50. Part A in this submission presents a history of banking in Australia, and explains how self-regulation has failed to protect customers, allowing banks to use practices such as constructive default. In more recent submission, it is also claimed the same banks have been involved in 'pure asset lending, which is a type of predatory lending.

51. Part B of the submission reports on a document drafted dated 14 November 2014, and accessed on 19 August 2015, which relates to impairment of customer loans. It refers to problems within banking loan contracts issued to customers by Australia's leading banks between 2004 and 2014.

52. Bank Victims found the government failed to address the significant damages caused to small businesses and farmers since self-regulation was introduced, leaving many in the parliament to claim the government should resign.

ABA's Responsibility in terms of Disclosure

53. Prior to the Australian Bankers' Association (ABA) publishing the 2004 Code, it had introduced the Code Compliance Monitoring Committee (CCMC) Association's Constitution (the Constitution). The CCMC's function is to monitor bank's compliance under the 2004 Code and was operated under the Constitution. However, unlike the 2014 CCMC Mandate, the Constitution had never been made public until 2014.

54. The CCMC is a relevant regulator because customers are entitled to be informed that when disputes arise, they have rights to file complaints to the CCMC and that the Constitution allowed banks to change relevant terms of their loan agreement.

55. In the 13 June 2017 CCMC's Submission filed with the Senate Economics Reference Committee - inquiry into consumer protection in the banking, insurance and financial sector, the CCMC confirms the Code and the Constitution were "*documents developed and controlled by the ABA*".

56. This admission is important, as there are a number of banking inquiries in the Senate and the Parliament. The admission by the CCMC suggests cases being considered by the courts should allow the ABA and the CCMC to explain whether there has been injustice to customers.

Systemic Failure of Institutional Arrangement

57. Whether looking at banking regulation, disclosure, or standard form contracts, the self-regulatory system in Australia for the finance industry has failed. Governments or all political persuasions, both state and federal, have not adequately protected consumers from being abused by dishonest and unconscionable actions by the banks.

58. ABA, the CCMC and Banks set the rules of their own game and have the financial resources to outgun any legal efforts made by consumers to bring the banks to account for their abuse of power.

59. Martin Committee endorsed deregulation of financial markets on the precondition that consumer protections were put in place to protect individuals and small business. It stated that government must ensure "*[a]dequacy of redress available to [consumers] in cases of dispute with their bank*".[37]

Failure to Rectify Problems

60. Several reviews by independent or semi-independent persons have recommended change to impose greater transparency and / or increased government regulation. However, these have not been implemented, and incorporation of original principles of the voluntary self-regulated code or low cost dispute resolution procedures appears to have not been seriously considered.

61. In 2014, the Financial Systems Inquiry (the Murray Review) outlined severe problems with current banking systems in Australia. Many of the subsequent recommendations concerned inadequacies of self-regulation, recommending the government acts to strengthen consumer protections.

Summation

62. Since 2014, it was widely reported major banks were selling loan contracts without full disclosure. No action was taken by the government or the bankers association to address the problems that have occurred during the previous ten years.

63. The systemic flaws in the system enable or tolerate banks to manipulate regulators, ignore the importance of internal governance and policies, instead allowing the public to lose confidence in banks and their codes. The banks and bankers can indulge themselves through unconscious and unethical conduct with impunity.

64. Ms Kate Carnell is the Australian Small Business and Family Enterprise Ombudsman and will have advised the government that the Marten Committee principals remain in place today and damages caused by self-regulated banks cannot be justified.

65. Bank Victims and its clients require response from the government outlining what steps it intends to take in order to rectify deceitful banking practices.

66. Bank Victims believes the above information is correct.

Russell Cousins
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References

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[3] Ibid xxxiii
[4] ASIC's submission of December 2014 to the scrutiny of Financial Advice Inquiry, Submission No. 88, at [245].
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[7] Ibid xxxix
[8] Clause 25: Provision of Credit; Clause 34: Monitoring and Sanctions; Clause 35: Internal Dispute Resolution.
[9] Ibid xl
[10] Ibid xlii
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[12] Ibid.
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[35] ABA Chief Executive in 2008 was Mr David Bell.
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