



7 August 2017

The Secretary
Small Business and Family Enterprise Ombudsman
GPO Box 1791
CANBERRA ACT 2601

Dear Sir/Madam,

Re: [REDACTED] V NAB: Facts & Opinions

1. Thank you for providing Bank Victims an opportunity to inform you of details of [REDACTED] [REDACTED] contracts with the National Australia Bank (NAB) (attached).
2. Bank Victims are not lawyers and have not provided legal advice to the [REDACTED]. As such, the facts and opinions are separated and explicitly stated for each section. The facts provided are referenced with supporting evidence.
3. The [REDACTED] were farmers at Walgett NSW before NAB obtained a ruling from the court to sell their farm located on the lower Macquarie river floodplain. Their business was on 22,000 acres of land consisting of 8200 acres of dry land farming area, 1100 acres of irrigation and the remainder was for grazing operations.¹
4. In 2004, the [REDACTED] signed a Farmers Choice Loan Contract² with NAB. The bank statements note there was offer, acceptance and consideration, which meant that the contractual obligations were binding on both parties. However, in April 2010, they could not meet their repayments under the contract due to natural disasters such as droughts and floods, which lasted for a number of consecutive years.
5. They were encouraged by the bank to attend Farm Debt Mediation (FDM), and later taken to the court by the bank and lost their farm. The bank was operating under the 2004 Code of Banking Practice (the 2004 Code) but did not follow due process to investigate their complaints put verbally to its Narrabri office before attending FDM.
6. The [REDACTED], like millions of other bank customers, were bound by the Australian Bankers' Association's Modified 2004 Code.

¹ River Staation Partnership Brochure compiled by the [REDACTED]s.

² 1 October 2004, Farmer's Choice: Package Agreement, National Australia Bank.

BOOK ONE

Part One:

██████████s' Contract with the NAB

Facts

7. September 2004 – the ██████████s signed a Deed of Family Settlement:
 - Under it, they received 3 properties and 2 water licences from a larger conglomerate of properties called ██████████';
 - They also adopted responsibility for debt previously secured over ██████████ as a condition of settlement;
 - The ██████████s approached the NAB to obtain funds, using their assets as security.
8. 1 October 2004 – the ██████████s signed a contract (Farm Management Account Facility) with the NAB.³ This provided them with a loan of \$3 million to purchase the balance of the farm from their family. The contract included two parts: a facility offer, which included the Farmers Choice Package.
9. At the time of signing the contract, the properties transferred to the ██████████s had been valued at approximately \$7.3 million.
10. August 2006 – the NAB loaned the ██████████s a further \$1,200,000 to purchase the neighbouring property ("Larrimah").⁴
11. February 2008 – in order to provide additional funding to the ██████████s, NAB required a property valuation. This was undertaken by ██████████, and agreed by the bank, estimating the combined value of the properties to be \$9.5 million.⁵ The bank used this valuation to advance a further \$400,000 to the ██████████s.
12. 2 April 2008 – the NAB imposed new loan package on the ██████████s. It contained elevated default interest rates and a new repayment schedule,⁶ which the ██████████s later found they could not meet. The new contract included a facility offer and the Farmers Choice loan contract. They do not recall when (or if) the bank ever provided them with a copy of the 2004 Code of Banking Practice (the 2004 Code). However, they do recall being provided a copy of it in late 2012 prior to attending the Supreme Court before Garling J.

³ 1 October 2004, "Farm Management Account Facility Approval Advice", ██████████, Agribusiness Manager, National Australia Bank Limited. Outlines the facility limit to the ██████████s as \$1 million. This is the date that the ██████████s obtained these documents.

⁴ 4 December 2012, Affidavit of Dr Evan Jones 4 December 2012, Supreme Court of NSW, page 4-5.

⁵ 2 February 2008, 'Valuation of River Staation Partnership Properties: "Riverview", "Glen Acre", "Wombullion" And "Larrimah"', ██████████.

⁶ 2 April 2008, 'Letter of Offer for ██████████ & ██████████ carrying on business under the name of River Staation Partnership'. Confirmed by Mr ██████████ Agribusiness Manager, National Australia Bank.

13. April 2009 – as of this date, the [REDACTED] s' NAB loan consists of:⁷
- Farm Management Account: Limit \$1,000,000
 - Market Rate Facility: \$1,050,000
 - Fixed Bill Facility: \$1,500,000
 - Floating Bill Facility: \$2,000,000

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14. 1 October 2004 – the [REDACTED] s signed standard form loan contract (Farmers Choice Loan) with the NAB. The contract incorporated provisions from the 2004 Code, which was published by the ABA in early May 2004. It was adopted by the bank on 31 May 2004.⁸
15. September 2004 – the ABA claims the code was contractually binding. The 2004 Code of Banking Practice Fact Sheets states: *“the Code is not legislation but when your bank adopts the code it becomes a binding agreement between you and your bank.”*⁹ The Code sets out the bank’s key commitments and obligations to customers as well as its standards of practice, disclosure and principles of conduct.¹⁰
16. Under the 2004 Code, NAB made certain undertakings to the [REDACTED] s (particularly with respect to the manner in which it would manage the credit facility and complaints under clauses 25, 34 and 35¹¹).
17. The Code Compliance Monitoring Committee (CCMC) Association’s Constitution (the Constitution) was not provided to the [REDACTED] s by the bank at the time of signing the 2004 contract. The CCMC is the body responsible for monitoring and investigating breaches of the Code.
18. Note – the NAB was fully aware, during the drought period (2004-2009), that:
- The [REDACTED] s had no source of income other than funds generated by farming operations carried on their properties;
 - The [REDACTED] s had no working capital other than funds provided by NAB.

⁷ RSP Loan History with NAB.

⁸ 1 October 2004 *“Farmer’s Choice Package Agreement”*, National Australia Bank. Outlines the terms of the contract, clause 15 outlines that the Code of Banking Practice is part of the contract.

⁹ September 2004, Code of Banking Practice Fact Sheets:

www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010.

¹⁰ Ibid. *“Key commitments made by 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 conduct of the bank and the customer and the banking services contract are taken into account ...”*
“The Code ... gives customers rights that banks must observe. The rights cover matters such as disclosure of fees and charges at other terms and conditions ... disclosure is general information about banking services...copies of documents... [and] complaints handling.”

¹¹ Clause 25: Provision of Credit; Clause 34: Monitoring and Sanctions; Clause 35: Internal Dispute Resolution.

Part Two:

Financial Hardship Period

Facts:

19. September 2004 to 26 December 2009 – the area where the ██████'s properties were located was in a state of drought.¹² However, when water was available (such as irrigation water from Macquarie River),¹³ their properties could generate significant income from cotton and wheat crops.
20. 12 April 2010 – the NAB advised the ██████s they had exceeded the limit on their Farm Management Account by \$23,897 (total sum \$1,023,897.12), which must “be returned to order as a matter of priority but no later than 30 April 2010”.¹⁴
21. 14 April 2010 – the ██████s deposited \$10,000 into the Farm Management Account.¹⁵
22. 16 April 2010 – the ██████s filed a verbal complaint at the NAB’s Narrabri office claiming the bank would not consider their cotton budget and was treating them unfairly.¹⁶
23. The Code explicitly states complaint resolution can be delivered verbally.¹⁷ At the time they outlined the complaint, they requested the bank to provide them with a written copy of it.¹⁸ The NAB agreed to forward them a written copy when it was sent to higher powers within NAB.¹⁹ The bank subsequently denied the request.²⁰ Without any legal background, the ██████s decided to take their complaints further.
24. 19 May 2010 – the ██████s filed a written complaint with the bank’s Chief Executive, expressing concerns about the NAB’s unwillingness to appreciate the problems they were facing with droughts and now the floods.²¹ The 23-page document details these concerns, including the bank’s encouragement for them attend Farm Debt Mediation (FDM), its lack of assistance in supplying funds to plant crops and timing for them to sell their property at a fair price.

¹² NSW Droughts Map from 2004 to 2009.

¹³ 24-26 March 2010, emails between the ██████s and NAB Agribusiness Managers regarding “Glenacre benefitting from Barwon floods and Marthaguy”.

¹⁴ 12 April 2010, ██████, NAB Agribusiness Manager, to the ██████s, reiterating that the bank will no longer provide further funding and offering Farm Debt Mediation as an option.

¹⁵ 1-30 April 2010, Farm Management Account Balance Summary, NAB.

¹⁶ 16-21 April 2010, emails between the ██████s and ██████, NAB Agribusiness Manager.

¹⁷ Clause 35.8 of the Code of Banking Practice states: “We will provide you with the above information in writing unless it has been mutually agreed that it can be given verbally.”

¹⁸ 18 April 2010, email from ‘River Staation’ to ██████, NAB Agribusiness Manager.

¹⁹ Ibid.

²⁰ 21 April 2010, letter from ██████, NAB Agribusiness Manager to the ██████s.

²¹ 18-21 April 2010, emails between the Priestleys and ██████, NAB Agribusiness Manager. It states the history of ██████’s relationship with NAB, loans, cropping plan, the concerns regarding misleading approach and NAB promotions, and request for help.

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25. 2005 to 2009 – through the [REDACTED]'s assets, NAB received drought relief assistance from the NSW government for a total of \$470,000, as Walgett area had experienced its most serious drought on record.²²
26. While the weather pressures were stressful for farmers, the [REDACTED]s felt their farms had some economic protection from the ravages of the weather.
27. They believe the NAB is the most experienced agribusiness bank in the region. It had a prominent agribusiness reputation that would allow it to understand investment in a weather dependent business comes with an element of risk. This means that profits are only achievable once the severe weather passes, and they could again plant and harvest crops.
28. In 2008, the bank was provided a copy of the [REDACTED]s farm's valuation, It noted the farm was worth \$9.5 million. By 2010, they owed the NAB only \$5.5 million,²³ thereby providing the bank with sufficient collateral in the land itself.
29. From 2009, they were trying to continue farming despite problems experienced with the drought. In an attempt to generate profits, they approached the bank for funds.²⁴ It was essential for them to generate income by planting crops.²⁵ The NAB denied the loan²⁶ and told them to sell the farm without crops.²⁷
30. From early 2010, there were prospects to recover from financial hardship they were experiencing, as heavy rains followed the drought period they were suffering from for the past six years eased the negative effects of the drought. However, they believe the bank had a different agenda, wanting them to sell their farm and repay the debt. They resisted, believing the properties were viable and they did not wish to sell them at a discount.
31. Under clause 25 of the 2004 Code, the bank had a duty to help them overcome their '*financial difficulties*'.²⁸ When the drought broke in 2010, the bank did not assist them to continue growing cotton and wheat, nor did it work with them to refinance their loan despite them being able to recover from the drought and repay the loan.²⁹ Instead, the bank directed them to FDM in order to call their Farmers Choice Loan in.
32. At that time the drought broke, the [REDACTED]s were negotiating a farming partnership with the Australian Management Company³⁰ and later with members of their local

²² 4 December 2012, Affidavit of Dr Evan Jones 4 December 2012, Supreme Court of NSW, page 5.

²³ 16 May 2010, [REDACTED], on behalf of the [REDACTED]s, to [REDACTED], NAB Agribusiness Manager.

²⁴ 18 February 2010, [REDACTED] emailed to [REDACTED], NAB Agribusiness Manager regarding 'cotton update'.

²⁵ 6 May 2010, "Cotton's on to a price high, hopefully harvest" and seminar information.

²⁶ 3 April 2009, [REDACTED], NAB Agribusiness Manager to the [REDACTED].

²⁷ 18 May 2010, [REDACTED], NAB Agribusiness Manager to the [REDACTED].

²⁸ Refer to clause 25.2 of the Code of Banking Practice.

²⁹ 16 April 2010, [REDACTED], NAB Agribusiness Manager to the [REDACTED]s.

³⁰ 2 February 2010, [REDACTED], Managing Director, Agricultural Management Company Pty Ltd, to [REDACTED] regarding "Proposal-Capital Raising & Marketing for [REDACTED] Partnership".

Aboriginal community.³¹ Throughout this period, the bank made no attempt to support them going forward with these arrangements, despite deals potentially allowing them to keep part of their farms and being able to repay the banks debt.

33. The [REDACTED]s believe they demonstrated to the bank they were entitled, under clause 25.2 of the Code, to be assisted in relation to 'financial difficulties' in 2010.³² Their views were supported in 2012 when the leading agronomist in the north-west who provided them with its "Report on financial impact of the NAB's actions on River Staation Partnership operated by [REDACTED]'s 'Glenacre" Walgett NSW".³³ It states the [REDACTED]s farm would turn a profit in normal years. Having received this report, NAB dismissed it and continued prosecuting them in the court, without acknowledging or accepting they had rights under the Modified 2004 Code.
34. With the reputation of being the leading rural lending institution in Australia, it seems NAB was not fully aware and prepared for this type of lending risk, prior to making a decision to finance the [REDACTED]s' farming operation in 2004. It had even assisted the [REDACTED]s with the purchase of an adjoining property in 2006. Given it was now in a no lose situation by simply calling in the loan and selling the farm to recover its debt, it's practices were at best irresponsible or at worst predatory.³⁴

³¹ 11 April 2012, [REDACTED], OAM, Chairperson, Walgett Gamilaraay Aboriginal Community Party, to [REDACTED].

³² 19 May 2010, "Letter of Concern to Mr [REDACTED] CEO NAB from [REDACTED] 19 May 2010", email from [REDACTED] to NAB. It states the history of [REDACTED]'s relationship with NAB, loans, cropping plan, the concerns regarding misleading approach and NAB promotions, and request for help.

³³ November 2012, 'Report on financial impact of the NAB's actions on River Staation Partnership operated by [REDACTED]'s 'Glenacre" Walgett NSW"' Compiled by Greg Rummery, Agronomic Consultant, Greg Rummery Consulting Pty Limited.

³⁴ 4 December 2012, Affidavit of [REDACTED] 4 December 2012, Supreme Court of NSW, page 9.

Part Three:

Attending Farm Debt Mediation

Facts

35. 21 April 2010 – the [REDACTED]s were unable to pay in full an amount of approximately \$24,000 owing to the bank on one of their loans. The bank's Agribusiness Manager advised the [REDACTED]s, who had no legal background, to raise their concerns at Farm Debt Mediation.³⁵
36. Late May 2010 – the [REDACTED]s agreed to attend FDM with the bank to resolve their disputes.³⁶
37. 1 July 2010 – they then travelled to Sydney to meet a more senior NAB Agribusiness Manager to discuss the complaints they sent to the Chief Executive.³⁷ At Sydney, the bank again advised them that FDM was the most appropriate forum to resolve these complaints.
38. 21 July 2010 – the [REDACTED]s attended mediation with the NAB. They understood that in these circumstances parties had to attend in good faith, but noted they attended under pressure.³⁸
39. When they signed the Notice of Farm Debt Mediation, the [REDACTED]s recall that the Farm Management Account was recorded at \$1,013,937.12.³⁹
40. At mediation, the [REDACTED]s entered a repayment plan – they agreed to repay their indebtedness to the bank in full by April 2011.⁴⁰ However, they farm suffered from torrential rain that caused floods in November 2010.⁴¹ This virtually destroyed their significant wheat crop.⁴² In these circumstances they could not generate sufficient cash flow to comply with the FDM repayment agreement with the bank.

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41. In April 2010, the bank failed to use its Internal Dispute Resolution under Clauses 35.7 and 35.8 of the Code to investigate the [REDACTED]s' complaints, and, instead, it

³⁵ 21 April 2010, Letter from [REDACTED] to [REDACTED] and [REDACTED], confirming that bank will be issuing invitation to Farm Debt Mediation.

³⁶ 25 May 2010, Mr [REDACTED] Manager, Office of the Customer Advocate, National Australia Bank, wrote to the [REDACTED]s. *"I understand that NAB has recently offered you Farm Debt Mediation with respect to this issue. I have been instructed that you have accepted this offer and NAB is now awaiting your choice of mediator. This is the proper forum for the resolution of these matters and I trust it will bring about the right outcome for all involved."*

³⁷ 19 July 2010, Letter from [REDACTED] to [REDACTED], CEO NAB Agribusiness, complaining the treatment by NAB Agribusiness managers; 20 July 2010, Email from [REDACTED], CEO NAB Agribusiness, to the [REDACTED]s suggesting their complaints can be handled at FDM.

³⁸ 21 July 2010, Head of Agreement between NAB and the [REDACTED]s.

³⁹ 1-30 April 2010, Farm Management Account Balance Summary, NAB.

⁴⁰ 21 July 2010, Heads of Agreement between NAB and the [REDACTED]s.

⁴¹ November 2010, Record rainfall and widespread flooding, Australia Government Bureau of Meteorology.

⁴² November 2012, 'Report on financial impact of the NAB's actions on River Station Partnership operated by [REDACTED]'s 'Glenacre' Walgett NSW' Compiled by Greg Rummery, Agronomic Consultant, Greg Rummery Consulting Pty Limited, page 2.

encouraged them to attend FDM.⁴³ In these circumstances, with full knowledge of the 2004 Code and Constitution, the bank, notwithstanding the role supposedly played by its Agribusiness Managers, pushed the ██████s into FDM without advising them of their rights of due process and the purpose the 2004 Code.

42. The ██████s reluctantly agreed to attend FDM under the impression they had no alternative but to accept a situation where, at least, they had proved to the bank they were committed to saving their farm. They now believe the bank misled them.
43. For them, living in a small community like Walgett and attending FDM, they were not able to obtain funding advances from other businesses in the area. This was due to lenders not investing funds for cropping when the farmers were at risk of losing their land, and thereby suppliers' products and funds could end up being restricted by the bank at its discretion.
44. In the FDM process, the bank imposed a repayment plan that allowed it to increase its interest charges to a punitive level,⁴⁴ which the ██████s subsequently found could not be met by them.
45. When attending mediation, the ██████s did not know the bank's Chief Executive was a member of the Code Compliance Monitoring Committee's Association. Under its Constitution, the bank could void the CCMC's authority and powers to investigate the ██████s complaints in relation to code breaches. Under Clause 8.1(b)(i) of the Constitution, the CCMC had no authority to investigate the ██████s' complaints as they had attended mediation.⁴⁵
46. The ██████s attended FDM in the belief that their complaints would be taken into account during the negotiations. This was not the case. The bank simply used the FDM process as a trigger for enforcement proceedings. The farmers contend that the sole purpose of the mediation was to negotiate a settlement for farm debt without it having to consider their complaints. The bank failed to inform the mediator or NSW Rural Assistance Authority they advised the ██████s that FDM was the appropriate forum for resolving their complaints.
47. Under the Farm Debt Mediation Act and the 2004 Code, in order to achieve a fair and equitable mediation, farmers and banks need to act honestly and in good faith throughout the process. Therefore the ██████s and the NAB were required to attend and act in good faith,⁴⁶ presenting all relevant information to the attending

⁴³ 25 May 2010, National Australia Bank's Mr ██████ letter to Mr ██████ & Ms ██████.

⁴⁴ 21 July 2010, Heads of Agreement between NAB and the ██████s.

⁴⁵ Clause 8.1 of the CCMCA Constitution states:

"8.1 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:

(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, and the Forum may make a final determination as to whether a breach of the Code has occurred."

⁴⁶ References of 'Good Faith' in *Farm Debt Mediation Act 1994* (NSW).

parties. The bank failed to follow this practice having advised the [REDACTED]s that, by attending FDM, its customers would lose their rights under clause 8.1 of the Constitution to have the CCMC investigate complaints and alleged code breaches. Neither the ABA, when it published the 2004 Code, nor banks when adopting it, advised customers (farmers) that if the attended mediation any rights they might have under the Modified 2004 Code would be voided.

48. When facing highly experienced legal representatives of the bank, the [REDACTED]s were at a significant disadvantage in terms of their case argument, the law, logic, their strategy and speaking.
49. The [REDACTED]s found FDM was not necessarily the proper forum for investigation of complaints and it is not a free service as the 2004 Code commits to. The bank and its lawyers failed to advise them or Justice Garling of this fact when allegations of code breaches were brought to his attention by the [REDACTED]s in their attempt to obtain justice.
50. They now believe FDM is a special category which requires proactive support from the Federal and State governments. Since the implementation of New South Wales Rural Assistance Authority's 1994 FDM Act and the Queensland Rural Assistance Authority Mandate of 1 February 2008, mediation has failed farmers. The [REDACTED]s believe the NAB, having agreed to attend FDM in good faith, misled the mediator and them by failing to investigate or explain why it failed to investigate their complaints prior to attending FDM. The [REDACTED]s also believe NAB's decision to conceal the Constitution (and disclose changed provisions in the Constitution) from them in 2004 and 2008 when they signed loan contracts was unfair and potentially unlawful.

Part Four:

Attending the Supreme Court

Facts

52. July ~ November 2011 – the ██████s attempted to refinance their farming business and this resulted in a proposal for a joint partnership with the Brewarrina and Walgett local Indigenous Community.
53. 12 September 2011 – the bank did not wait for an Indigenous Community’s feasibility study being considered at that time, instead commencing an action against its clients in the NSW Supreme Court to recover its debt and possession of their farm.⁴⁷
54. 11 April 2012 – during the Supreme Court proceedings, additional correspondence by the ██████s was provided to the legal counsel for the bank, which required it to investigate their complaints.⁴⁸ They received no response to this correspondence or their other complaints filed during 2012.
55. 10 December 2012 – The Hon. Garling J found in favour of the bank, holding that the ██████s failed to substantiate their legal defence(s) against NAB and its claim for possession.⁴⁹ He released his decision where, in Conclusion, he stated:
- *“43 What they have put before the Court on this application is certainly deserving of close attention by the senior management of the NAB, because if the ██████s are correct, and their complaints have not been listened to and dealt with appropriately, then the NAB may well be exposed to both, damage to its reputation and as well, suggestions that its publicity campaign which describes itself as “the leading Agri-Business bank” may not have any substance.*
 - *44 Nevertheless, the matters which the ██████s now seek to raise do not, in the form in which they are advanced, constitute an arguable defence against the NAB’s legal claim for, and its entitlement to, orders for possession of the farming properties. At their highest, it is possible that they may form a basis for a claim for damages, although the evidence presently before the Court does not suggest that any such claim is likely to be successful.”⁵⁰*
56. 19 November 2012 – the ██████s filed a notice of motion seeking to stay execution of the writs of possession, and a notice of intention to appeal. By then, they were self-represented litigants. They attempted to defend NAB’s statement of claim but were unable to satisfy the court of defences to the requisite standard.

⁴⁷ 7 September 2011, Notice to Occupier, NSW Supreme Court. Case Number:2012/29621.

⁴⁸ 11 April 2012, the ██████s wrote to Ms. ██████i, Dibbs Barker.

⁴⁹ 10 December 2012, ‘National Australia Bank Ltd v ██████’ Judge Garling Decision File number: 2011/292621.

⁵⁰ Ibid.

57. Early 2013 – the NAB took possession of the ██████s' farms and sold them at a price below market value as noted by the bank's own valuation.⁵¹ The bank retained surplus funds (\$3 million) from the sale of the properties as penalty fees,⁵² claiming it is still owed an additional \$1 million by the ██████s.

Opinion

58. By 2012, the NAB, having directed the ██████s to attend FDM, still had ample time to reconsider its position and investigate complaints. Regardless, without resources to properly respond to the bank's practices, the ██████s spent the year travelling to Sydney and attempting to defend their rights in the court.
59. November 2012 - a copy of Mr Greg Rummery's report⁵³ and a complaint alleging code breaches dated 23 November 2010 were provided to the bank and the court. The bank continued to prosecute them, without admitting that it had breached the Modified 2004 Code.
60. During the Supreme Court hearing, the ██████s were frustrated matters discussed at FDM could not be referred to third parties.
61. Throughout most of the case, the ██████s had no knowledge of the Constitution, or that the 2004 Code and Constitution were documents developed and controlled by the ABA, possibly for the benefit of its directors. They also had insufficient funds to obtain specialist legal representatives to present a defence at a standard the Court would accept. They travelled by road and train to Sydney for most of the year, and attended the Court hoping it might find in their favour. During this period, the bank was represented by one of Sydney's most highly respected legal firms.⁵⁴
62. At court, the bank, while being a party to practices introduced by the ABA and banks in 2004, failed to admit it benefited by concealing the Constitution from farmers. The bank failed to admit to the court, as a result of the Constitution (clause 8.1), that the CCMC was powerless to comply with due process and investigate the ██████s complaints, as they had attended FDM in 2010 and the court in 2012.
63. The ██████s, at the late stage of the proceedings, failed to argue successfully the bank did not adhere to provisions in the 2004 Code, which formed a part of their loan contract with farmers. In December 2012, the ██████s provided filed a copy of the Constitution with the court, as the bank already had this document. As unrepresented litigants, they were not able to explain to the court how the bank used this document, which the ABA introduced in February 2004, to vary the contractual terms of the loan contracts signed by them in 2004 and 2008.

⁵¹ 7 May 2013, Court of Appeal, NSW Supreme Court filed by ██████ and ██████, case number: 2013/00074328.

⁵² 2 July 2013, NAB to the ██████s "Default demand and Notice under section 71x of the Water Management Act 2000(NSW)".

⁵³ November 2012, 'Report on financial impact of the NAB's actions on River Station Partnership operated by ██████'s 'Glenacre' Walgett NSW' Compiled by Greg Rummery, Agronomic Consultant, Greg Rummery Consulting Pty Limited.

⁵⁴ NAB was represented by Dibbs Barker Solicitors.

64. What the ██████s, in 2012, knew:
- Their property was worth between \$10-12 millions;
 - The flood following the drought meant it extended the disaster period;⁵⁵
 - The bank would not permit them obtaining crop finance to sow crops; and
 - By attending FDM in 2010, they could not refinance or obtain local funds.
65. What the ██████s did not know:
- The bank's decision to direct them to FDM meant the CCMC had no powers to investigate code breach allegations;
 - The banks Chief Executive's overriding powers under the Constitution meant the CCMC would not investigate contract and code breaches;
 - The ██████s could not successfully explain to the court how NAB breached their contract.

Estoppels surrounding Garling J's Decision

66. The bank may argue ██████s be estoppled from bringing forward claims set out in Part One of this submission under principles of Anshun Estoppel or Issue Estoppel. However, they were put in a position of financial and emotional disadvantage that impaired their ability to appeal the decision at the time of their case being heard.
67. The ██████s lacked legal knowledge and skills that allowed them to make claims outlined above, nor could they afford to employ a legal professional with requisite skills. The issues were of great significance and without relevant documents, issue estoppels might be refused as it results in injustice.
68. It can be understood the ██████s, without necessary resources or appropriate legal representation, could not raise the issue in previous proceedings.
69. The ██████s maintain that they should be permitted, under 'special circumstances' to reopen information in Part One above, as they maintain that by not bringing forward various causes of action was *not* a result of negligence, inadvertence or even accident, but the result of concealed documents and their extreme mental and financial hardship.

⁵⁵ Floods are beneficial and detrimental at the same time to the farming business. They can, on the one hand, provide much-needed water storage for farming, on the other, they bring damage to crops.

BOOK TWO

Part Five:

Complaints to NAB and the CCMC

Facts

70. 19 May 2010 – the ██████s filed a number of complaints against the conduct of the NAB⁵⁶, which, had they known of their rights, meant they would have acted more diligently when referring to the CCMC for an investigation. Those complaints included:
- (a) The NAB failed to honour its commitment to them and to assist them despite the fact their farms were beset by drought and other natural disasters.
 - (b) In February 2008 the NAB's Agribusiness Manager refused to allow them to engage in wheat swaps that would have produced higher income from that year's crop.
 - (c) In May 2008 the bank refused to allow them to pay the contractor who cleared land on the recently acquired "Larrimah", even though it added to the value of the properties.
 - (d) On 3 April 2009 the bank advanced \$450,000 to them for payment of 2008 creditors and not for financing 2009 crops.
 - (e) Notwithstanding the drought breaking in late December 2009, the NAB refused to provide assistance to them to take advantage of the improved conditions to plant cotton and wheat crops.
71. 19 July 2011 – ██████ wrote to the banks Chief Executive complaining the bank's indifference of their hardship and its untimely use of FDM.⁵⁷
72. 11 April 2012 – the ██████s alleged the bank failed to deliver on promises in the 2004 Code, including acting reasonably and fairly toward them, by allowing them to benefit from 'financial hardship' provisions (clause 25.2) of the 2004 Modified Code.⁵⁸
73. 26 June 2012 – the ██████s wrote to the CCMC alleging the bank breached the 2004 Code.⁵⁹ They outlined their case to CCMC and requested it to investigate their complaints as required under the Code. At that time, they were not aware of the

⁵⁶ 19 May 2010, "Letter of Concern to Mr ██████ CEO NAB from ██████ and ██████ 19 May 2010", email from River Staation to NAB.

⁵⁷ 19 July 2011, Letter to Mr ██████ from ██████.

⁵⁸ 11 April 2012, "NAB v C&C ██████; Request NAB comply with our contract set out in the Code of Banking Practice", from ██████ and ██████ to ██████, Dibbs Barker. It alleged that NAB breached the Code clause 2.2 and requested an investigation.

⁵⁹ 26 June 2012, Glenacre River Staation's ██████ writes to Chief Executive Officer, Code Compliance Monitoring Committee, Dr ██████.

Constitution, and their letter only referred to Clause 34 of the 2004 Code that set out the duties of the CCMC.⁶⁰ No other specifics were mentioned.

74. 29 June 2012 – the CCMC responded,⁶¹ informing them the CCMC was unable to investigate their matter as it was beyond its limitations.⁶² The CCMC listed limitations that were not disclosed to the ██████s prior to them signing the banks loan contracts in 2004 and 2008. This is the first time they were aware of the limitations, which the CCMC had not substantiated, but simply stated.
75. 27 July 2012 – The ABA’s Chief Executive wrote a letter to other complainants, and dealt with the provisions of the Constitution. He states

“Following from the independent review of the Code of Banking Practice that commenced in 2007 the independent reviewer recommended that the terms of reference of the CCMC should be consistent with the compliance monitoring, investigation and reporting functions of the CCMC and the Code.”⁶³

Despite this recommendation, the ██████s believe the Constitution had not been provided to farmers who signed the bank’s loan contracts between 2004-2014.

76. 23 May 2012 – ██████ wrote to NAB’s Chief Executive, reiterating their rights under financial hardship provision in the Code and stating they endured three natural disasters in the last three years.⁶⁴
77. 14 August 2012 – ██████ again wrote to the bank’s Chief Executive requesting he instructed the CCMC to investigate their alleged code breaches, since procedural limitations were not part of the Code”.⁶⁵
78. 22 November 2012 – ██████ again wrote to the bank’s Chief Executive, this time stating *“I now make a final demand that you bring to the attention of the Court complaints that you failed to investigate as set out in the Code of Banking Practice and justify the reasons why you breached the Code.”*⁶⁶ The letter raised specific clauses she said the bank breached, including 1.1, 2.1(d), 2.2, 7(b), 8, 34(b), 35.7 and 35.8.
79. 31 January 2014 – the ██████s wrote to the CCMC’s Chief Executive, requesting an investigation into their complaints.⁶⁷ The letter, specifically, addressed concerns

⁶⁰ Ibid.

⁶¹ 29 June 2012, Code Compliance Monitoring Committee’s Investigation Manager, Mr ██████ responds to the ██████s via email.

⁶² Ibid.

⁶³ 27 July 2012, *“Code of Banking Practice and Compliance Monitoring Committee”*, a letter from ██████ to ██████. It further explains the validity of the Constitution and the functions of the Code.

⁶⁴ 23 May 2012, letter to Mr ██████ from ██████.

⁶⁵ 14 August 2012, *“Request for an investigation of alleged Code breaches”*, a letter from ██████ to ██████, CEO, NAB. It requests Mr ██████ to instruct CCMC to investigate the Code Breaches since the procedural limitations are not part of the Code.

⁶⁶ 22 November 2012, Glenacre River Staation’s letter ‘Re: Code of Banking Practice and National Australia Bank’s breach of contract’ to NAB CEO, Mr ██████.

⁶⁷ 31 January 2014, ‘Re: ██████ and ██████ complaints to the Code Compliance Monitoring Committee (CCMC)’ to Dr ██████, General Manager, CCMC.

raised with the CCMC in 2012, in addition to the Constitution's implications on the authority of the CCMC. It claimed clauses of the 2004 Code and Constitution were used by the bank to assist it disregarding their family's contractual rights.

80. 31 March 2014 – the CCMC declined to investigate matters raised by the [REDACTED]s in their letter of 31 January 2014.⁶⁸ The CCMC's grounds for its decision, were:

“a) the concerns you raised with the CCMC in 2014 (and the events giving rise to them) substantially overlapped with the concerns had already raised with the CCMC in 2012. In addition, these concerns had already been considered by the Supreme Court of New South Wales and had also been brought to the attention of the Australian Securities and Investigations Commission (ASIC) and the Senate Economics References Committee.

b) The CCMC cannot provide the outcomes you sought, namely:

An investigation into the CCMC members, the CCMC Mandate and Constitution, and the Code;

An investigation into the NAB directors/board members generally regarding their role in the Code Compliance Monitoring Committee Association, the Code and the ABA; or

An investigation into NAB's conduct under the Code by a person/entity separate from the CCMC and that pending the outcome of that investigation Parliament be notified and all litigation involving NAB be suspended.”⁶⁹

81. The [REDACTED]s wrote several letters to the bank, attempting to outline their concerns. These letters provide context to the circumstances that have occurred since 2010, in which the [REDACTED]s alleged the bank failed to honour a binding agreement they signed with it in 2004 and 2008.⁷⁰

82. 4 July 2014 – their first letter stated:

“Upon signing a Standard Facility Offer, we became protected by the provisions of the Code of Banking Practice.

...Between 2004 and 2009 we suffered from an extraordinary series of bad seasons... [However], we believed that the Bank was the most experienced agribusiness bank in the region.

...[Later] we believed that our relationship with the Bank had broken down due to filing our complaint. ...we resisted the Bank's call to attend mediation, [and] felt we were being bullied into it and had no choice but to accept ... On 21 July

⁶⁸ 31 March 2014, Email from [REDACTED] to River Staation Farms.

⁶⁹ Ibid.

⁷⁰ 2 September 2014, [REDACTED] and [REDACTED] Three Letters Sent To Our Bank' submission (Submission DR 334) to Access to Justice Arrangements accessed on 12 December 2016 at <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test2/submission-counter/subdr334-access-justice.pdf>

2010, we attended the mediation with the Bank in good faith, but noted that we did so under pressure.

What we were unaware of at the time was the fact that the bank could use [this] mediation to ensure that our complaints would never be investigated by the CCMC...No farmers... could ever have known about the [banks] problematic constitution.

...The Court [in 2012] found against us... the Court had faith that the Bank's lawyers, as officers of the Court, would not have kept such a potentially corrupt arrangement [as the problematic constitution] from a Senior Judge in the Supreme Court."⁷¹

83. 4 August 2014 – their second letter stated:

"[The] Code Compliance Monitoring Committee Association's constitution, that the [banks, in 2004,] approved, allowed [them] to 'keep [the constitution] hidden' from agribusiness customers...

The covert constitution made the contract between the bank and us misleading and deceptive. No agribusiness customer would sign a financial contract ... knowing this was the case. [The constitution] gives the bank a free hand to do as it likes ... which is unconscionable and corrupt. This is exactly what happened in our case.

... We require the bank to honour its contract with us and investigate our complaints and to provide us with a written copy of its report, as promised in the code and required in our contract...

[My brother and] I have read the Australian Bankers Problematic Code paper, which suggests that agribusiness customers have no rights outside the courts, due to the introduction of a deceptive and unconscionable contract."⁷²

84. 12 August 2014 – their third letter stated:

"When the bank failed to investigate the complaints we had no recourse, as it was a controlling agent and one of the principle financiers of the Australian Bankers Association, the Financial Ombudsman Service and the Code Compliance Monitoring Committee.

All these bodies were aware of a corrupt relationship between banks and the Code Compliance Monitoring Committee Association's constitution, a document approved by the banks directors in 2004."⁷³

85. 23 June 2016 – the ██████s filed another complaint with the CCMC in relation to specific breaches of the 2004 Code.⁷⁴ The complaint raised concerns, in addition to previous claims of code breaches, that NAB breached Clauses 25.1 and 25.2.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

86. 4 November 2016 – the CCMC replied stating it will not take further action in relation to ██████'s allegations unless they fall “*within limits of [the CCMC’s] jurisdiction*”.⁷⁵
87. 9 November 2016 – the ██████s asked the CCMC to clarify what its jurisdictions are. They claim the CCMC did not respond.⁷⁶
88. 16 June 2017 – on behalf of the ██████s, Bank Victims filed complaints with the CCMC in relation to specific breaches of the 2004 Code,⁷⁷ alleging the CCMC has not investigated alleged code breaches set out below, which are:
- *Clause 2.1(d): information in plain English*
 - *Clause 2.2 acting fairly and reasonably*
 - *Clause 7 Staff training and competence*
 - *Clauses 25.1 and 25.2 provision of credit and financial difficulty*
 - *Clause 34 Monitoring and Sanctions*
 - *Clauses 35.7 and 35.8 dispute resolution”*
89. 16 June 2017 – again on behalf of the ██████s, Bank Victims filed a submission to Select Committee on Lending to Primary Production Customers detailing allegations of unfair and unprincipled banking practices.⁷⁸ The ██████s allege NAB breached the loan contract, did not attend Farm Debt Mediation in good faith, and concealed relevant documents.

Opinion

90. From April 2010 to January 2013, the ██████s had repeatedly filed complaints with the bank. Under clause 7(b) of the Code, the bank had a duty to ensure all persons to whom the complaints were addressed were trained to have a suitable knowledge of provisions of the Code. However, this was not the case when dealing with their complaints by the bank. They were either dismissed or received no response.
91. The ██████s believe the banks Chief Executive, as a Code Compliance Monitoring Committee Association member, understood the Constitution could preclude them from having complaints investigated by the CCMC.
92. They also believe the bank and the CCMC did not investigate their complaints, as the Constitution provided an alternative. They had not sighted the Constitution until late 2012. When they did, they noted clause 8.1 allowed the bank to direct a complaint to another forum and as a result, the CCMC would not consider an investigation of such complaint.

⁷⁴ 23 June 2016, ██████ wrote to Investigation Officer, CCMC.

⁷⁵ 4 November 2016, ██████, Independent Chair CCMC, letter to Mr ██████, Case No: CX3680.

⁷⁶ 9 November 2016, Counter Corruption Analysts letter to CCMC’s ██████ ‘Re: ██████ & ██████ v National Australia Bank’.

⁷⁷ 16 June 2017, Bank Victims, on behalf of the ██████s, filed a submission to Select Committee on Lending to Primary Production Customers.

⁷⁸ 16 June 2017, Bank Victims, on behalf of the ██████s, wrote to Secretary, CCMC.

93. The [REDACTED]s have filed several complaints with the CCMC since 2012. However, none was investigated based on a claim:

1) by the bank the allegations had been investigated by the Court, ASIC and Parliament;⁷⁹ and

2) the 2013 Mandate precludes the CCMC from investigating allegations more than 12 months old.⁸⁰

This was the first evidence the ABA had appointed the CCMC without authority to investigate 2004 Code breaches.

94. The [REDACTED]s requested NAB to provide them copies of reports in relation to specific points set out in the above letters and confirm their specific complaints were investigated by the above three institutions, as the CCMC stated:

“These concerns had already been considered by the Supreme Court of New South Wales and had also been brought to the attention of the Australian Securities and Investigations Commission (ASIC) and the Senate Economics References Committee.”

While the CCMC’s claim in relation to jurisdictions under the Mandate to investigate 2004 Code breaches has no relevance to the [REDACTED]s case, they also claim they have not received copies of the above three reports.

⁷⁹ 4 July 2016, CCMC’s Investigation Manager, Mr [REDACTED] responds to the [REDACTED]’s complaints. “Code of Banking Practice (the Code), breach concern Code subscriber: National Australia Bank Limited (NAB) Your client: Ms [REDACTED] and her brother, Mr [REDACTED] (the [REDACTED]’s) Our ref: CX 3680.”

Ibid.

Part Six:

ABA's 2004 Code and Constitution

Facts

95. 1990~1991 – the Review of Banking and Deregulation by the Martin Committee was commissioned by the Federal Government. It recognised that the cost of holding banks to account for breaches of consumer protection 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 their disputes arbitrated cheaply, quickly, and fairly outside the court system.⁸¹ The result was the creation of the 1993 Code of Banking Practice, which has been subsequently revised three times.
96. 3 November 1993 – the first code was published.⁸² The government and banks noted that the purpose of the new code was to foster good relations between banks and customers.⁸³ It would promote good banking practice by formalising the standards of disclosure and conduct which banks that adopt the code would observe.⁸⁴
97. 1 August 2000 – the Industry Self-Regulation in Consumer Markets report was released by the Taskforce on Self-Regulation.⁸⁵ It considered the introduction of self-regulation in the banking and finance sector. When the government introduced its recommendations banks were provided an opportunity to administer themselves and establish standards of practice that would enhance their competitive position. The concept was justified in the basis that:
- “Good practice in self-regulation can be understood as significantly improving market outcomes for consumers at the lowest cost to businesses.”⁸⁶*
98. 12 August 2003 – the Revised 2003 Code was published.⁸⁷
99. 29 August 2003 – the NAB adopted the Revised 2003 Code.⁸⁸
100. 20 February 2004 – the ‘Code Compliance Monitoring Committee Association’s Constitution’ (the Constitution) was documented and provided to the ABA by its lawyers.⁸⁹

⁸¹ November 1991, The Martin Committee’s ‘A Pocket Full of Change: Banking and Deregulation’.

⁸² 3 November 1993, Australian Banking Association’s ‘1993 Code of Banking Practice’.

⁸³ Ibid, page 1, states “The [1993] Code seeks to foster good relations between Banks and customers and to promote good banking practice by formalizing standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their Customers.”

⁸⁴ Ibid, page 1. The objectives of the 1993 Code is intended to:

i. “describe standards of good practice and service;

i. promote disclosure of information relevant and useful to customers;

ii. promote informed and effective relationship between banks and customers; and

require banks to have procedures for resolution of disputes between banks and customer.”

⁸⁵ 1 August 2000, ‘Industry Self-Regulation in Consumer Markets’, Report prepared by the Taskforce on Industry Self-regulation, Accessed on 11 January 2017 at

<http://archive.treasury.gov.au/contentitem.asp?ContentID=1131>

⁸⁶ Ibid, page 59.

⁸⁷ 2003 Code of Banking Practice, Australian Bankers’ Association.

⁸⁸ Date of Adoption.

101. 22 May 2004 – the ABA released the Modified 2004 Code of Banking Practice without including the Constitution.⁹⁰
102. 31 May 2004 – the NAB adopted the 2004 Code without advising the bank’s farming customers there was a Constitution and that varied some principles and practices in the 2004 Code.⁹¹
103. 31 January 2013 – the ABA published an amended 2013 Code, alongside the CCMC Mandate.⁹² The ABA advised banks customers the CCMC’s Mandate was replacing the Constitution without justifying its lack of transparency since 2004.⁹³
104. 1 February 2014 – the amended 2013 Code and CCMC Mandate published a year earlier came into effect.⁹⁴
105. 19 August 2015 – in submission 61 filed with the Parliamentary Joint Committee on Corporations and Financial Services on ‘*the impairment of customer loans*’⁹⁵, there are concerns identified to Parliament in relation to the 2004 Code and Constitution. This submission, in its conclusion, suggests “*the relationship between subscribing banks and their customers is unconscionable and unfair.*”⁹⁶
106. 30 March 2016 – another submission, this time filed with the Senate inquiry into ‘*criminal, civil and administrative penalties for white collar crime*’, suggests there are inconsistencies and inadequacies in criminal, civil and administrative penalties for corporate and financial misconduct in the banking sector. It reviews oversight by the industry that fails to penalise banks for misconduct and wrongful gains, and notes bankers, in many cases, have immunity from prosecution.⁹⁷
107. 16 March 2017 – there are similar concerns identified in a submission filed with ‘*enquiry into consumer protection in the banking, insurance and financial sector*’. It refers to the Taskforce on Industry Self-Regulation and outlines the dispute resolution mechanisms that it considered important for banks when resolving customers’ complaints. This paper allows the reader to appreciate the complexity the ABA relied

⁸⁹ 20 February 2004, ‘Code Compliance Monitoring Committee Association Constitution’ published by Mallesons Stephen Jacques.

⁹⁰ 22 May 2004, ‘2004 Code of Banking Practice’, ABA.

⁹¹ Date of Adoption.

⁹² 31 January 2013, under the heading ‘*Improved Code of Banking Practice*’ Accessed on 17 January 2017 at <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice>.

⁹³ 31 January 2013, ‘2013 Code of Banking Practice and CCMC Mandate’ accessed on 11 January 2017 at <http://www.ccmc.org.au/2013/01/31/ccmc-media-release-publication-of-the-abas-revised-code-of-banking-practice-and-ccmc-mandate/>.

⁹⁴ 31 January 2013, under the heading ‘*Improved Code of Banking Practice*’ Accessed on 17 January 2017 at <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice>.

⁹⁵ 19 August 2015, ‘The impairment of customer loans Submission 61-Attachment 2’, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions.

⁹⁶ Ibid, page 33.

⁹⁷ 30 March 2016, *criminal, civil and administrative penalties for white collar crime Submission 42*, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/~link.aspx?id=4B71ABE5941E4868B9C7F092524FB7FF&z=z

on when it published the Modified 2004 Code without including the Constitution. In doing so, the ABA allowed banks to deny customers due process.

108. 13 June 2017 – the CCMC filed a response to the above submission. It provides an insight into the CCMC’s responsibilities under various codes. The response, when read in light of the ABA’s decision to publish the 2004 Code and conceal the Constitution, makes potentially misleading statements regarding the CCMC’s apparent role in monitoring code compliance. It states:

The CCMC is

‘an independent compliance monitoring body’.

“The Code is a voluntary code of conduct which sets standards of good banking practice for the subscribing banks to follow when dealing with persons who are, or who may become, an individual or small business customer of a Code-subscribing bank, or a guarantor.

Once a bank subscribes to the Code it becomes mandatory for that bank to comply with [it] and the obligations under the Code are incorporated into the contracts between the bank and those customers to whom the Code applies...

The Code, [and] the Constitution ... are documents developed and controlled by the ABA.

Where [the TSBC submission] refers to specific Code breach allegations ..., I can confirm these allegations were dealt with professionally and appropriately...

The CCMC’s investigations and monitoring work examines whether a bank has complied with its Code obligations.”

109. 18 July 2017 – the CCMC, in responding to a case similar to ██████s whereby the customer was bound by the 2004 Code, noted it could not investigate the matter as “12 months had passed between when the CCMC considered [our clients] had become aware of the events giving rise to their allegation and the time [our clients] first contacted the CCMC”.⁹⁸ There is nothing in the 2004 Code whereby the CCMC could not investigate code breaches if ‘12 months passed’ between when the time a complaint was filed with the CCMC and when the customers had become aware of events giving rise to it.

Opinion

110. Under Clause 34(b)(i) of the 2004 Code, the ABA requires the CCMC to monitor the NAB’s compliance under the code.

⁹⁸ 18 July 2017, Ralph Haller-Trost, CCMC’s Investigation Manager, wrote to Mr Russell Cousins, Bank Victims Pty Ltd.

111. Clause 35 of the 2004 Code provides an internal process of handling disputes with a customer that would meet certain standards set out in AS4269-1995,⁹⁹ or other industry dispute standard or guideline which ASIC declares to apply to the Code.
112. Under clause 35.7 of the 2004 Code, the ABA notes the NAB has a duty to investigate any complaints made by the [REDACTED]s. Clause 35.8 of the 2004 Code requires the NAB to provide the [REDACTED]s with a copy of its response. The Clause 34(b)(ii) of the Code notes the CCMC's functions "*was to investigate and to make a determination from any person that the NAB had breached this code*".
113. The ABA's 2004 Code was subject to the Code Compliance Monitoring Committee Association Constitution (of 20 February 2004).
114. Under the Constitution the CCMC was absolved and removed from any responsibility or obligation to investigate or otherwise to monitor the conduct of the bank in a particular dispute if that dispute was removed to another forum.
115. The Modified 2004 Code sets out ABA's commitments for NAB to follow on standards of practice, disclosure and principles of conduct. The ABA was clear on this, claiming that when the bank adopts the Code, it becomes a binding agreement between bank and customer.
116. The fact that NAB did not provide the [REDACTED]s with a copy of the Constitution when they signed the 2004 and 2008 contracts potentially makes its actions dishonest and deceitful. The [REDACTED]s claim they obtained a copy of the Constitution in late 2012, by which time they had already filed complaints about the bank's conduct with FDM and the court. When attending the court before Garling J and attempting to explain context to the damages caused to them by the Constitution, the [REDACTED]s claim the bank's response was vexing and frustrating, as it remained silent.
117. It is quite possible that no farmers knew about the arrangement the ABA and banks had when they introduced the Constitution, which code-subscribing banks had kept out of reach of farmers since February 2004.
118. Prior to the Modified Code being released in May 2004, the [REDACTED]s had no idea the ABA obtained the Constitution three months prior to publishing the 2004 Code. Nor could they have believed the banks Chief Executives were administering the CCMC, which the bank kept from them and other farmers.
119. The ABA's sophisticated drafting of the Constitution would have also puzzled bank staff, as it provided a mechanism for the NAB to negate customer's rights to have the CCMC investigate customers' complaints and code breaches at no cost. The CCMC was also responsible for failing to investigate the [REDACTED]s' complaints and alleged code breaches.

⁹⁹ AS 4269-1995, Complaints handling Standards Australia.

120. The [REDACTED]s believe the CCMC was the relevant body to monitor code breaches at no cost, and was responsible to ensure due process. They know now that when entering into contracts with NAB, provision 8.1(b) of the Constitution allows the bank to advise the CCMC it intended to use ‘another forum’ to have their complaints investigated. This removed the CCMC’s powers to have the [REDACTED]s’ complaints investigated free of charge, as required under the 2004 Code.
121. The [REDACTED]s believe the CCMC is the relevant body that provides a free complaint monitoring service. They are now aware that when they entered into the loan contracts, provision 8.1(b) of the Constitution provided a means for NAB to remove their rights under the Code by advising the CCMC it intended to apply to ‘another forum’ for the [REDACTED]s’ complaints to be considered. This provided NAB with a mechanism to effectively remove the CCMC’s duty to have the [REDACTED]s’ complaints investigated.
122. It is possible no bank customer was aware of this arrangement when the [REDACTED]s signed loan contracts with the bank in 2004 and 2008, nor in 2010 when they attended FDM. At that time, the Constitution had not been made public. The NAB however was aware of this and accommodated these unfair arrangements, as this information and mechanism was known to the ABA and its directors.
123. The ABA claims the CCMC Mandate, introduced in 2013, included many provisions from the Constitution. In addition, it applied a ‘12 month rule’, which prohibits the CCMC from “commencing a compliance investigation... if the person making the allegation was aware of the events to which the allegation relates, or would have become aware of them if they had used reasonable diligence, more than 1 year before the person making the allegation first notified the CCMC in writing”¹⁰⁰ Like clause 8.1(b) of the Constitution, this effectively stopped code breach investigations from being carried out if the event occurred during the previous decade.
124. On 11 March 2008, the CCMC members filed submissions with the Banking Code Review carried out by Ms Jan McClelland, stating:
- “The Committee considers that the existing constitution should be revoked for two reasons. Firstly, because the structure suggests that the Committee is less than independent of subscribing banks. Secondly some provisions of the constitution vest unnecessary power in the Chairmen of the Banking and Financial Services Ombudsman (BFSO) and the CCMCA.”¹⁰¹*
- “The Committee’s firm view is that the constitution is problematic.”¹⁰²*
125. In 2010, NAB failed to advise the [REDACTED]s of their rights when their disputes in relation to successive droughts and natural disasters arose. In 2004 and 2008, when the Priestleys signed loan contracts, they trusted NAB and had no idea the 2004

¹⁰⁰ 21 March 2016, [REDACTED], Code Compliance Analyst, Code Compliance and Monitoring Committee, wrote to Mr [REDACTED], Customer representative, regarding case CX 3410.

¹⁰¹ 11 March 2008 CCMC review of the Code of Banking Practice. Annexure A Page 2.

¹⁰² Ibid, Annexure B, Page 1.

Code (and Constitution) was developed and controlled by the ABA. While the ABA advised bank customers they had rights to have complaints dealt with to *'their satisfaction'* under clause 35 of the 2004 Code,¹⁰³ the Constitution denied customers' rights of due process.

126. These arrangements demonstrated in the submissions filed with the Parliament and Senate since 2015 require some form of 'deceit', either by words or conduct, as to intentions of person who uses deception. For the purposes of this submission, deception, if found to exist, could be either intentional or reckless (as per Crimes Act 192B(2)).
127. The contracts between the ██████s and NAB, without disclosing the Constitution, were impeding on their rights. As a result, allegations of misleading or deceptive conduct, in accordance with Section 192E of the Crimes Act,¹⁰⁴ through the use of deceit to cause financial disadvantage may apply to the contract they signed. It is further alleged NAB, in failing to provide full contractual disclosure, had benefited from the arrangement as it prohibited the ██████s' contractual rights and place them in a position of financial disadvantage, i.e. Hardship.¹⁰⁵
128. This damaged the ██████s' rights to have the bank and the CCMC investigate their complaints and alleged code breaches, despite the ABA's public statements claiming the 2004 Code was a binding agreement. They allege NAB failed to exercise the care and skill of a diligent banker when concealing copies of relevant documents from them when they signed the 2004 and 2008 loan contracts.
129. It is evident banks have not been adequately supervised by regulators appointed by the ABA and the FOS since 2003; inadequate enforcement was in place to name a bank for breaching the 2004 Code; no effective remedy or mechanism to compensate the ██████s who suffered damages due to bank's potentially misleading practices.
130. On 13 June 2017, the CCMC filed a response to the submissions published with the *'Enquiry into consumer protection in the banking, insurance and financial sector'*. It stated that once a bank subscribes to the code it becomes mandatory for that bank to comply with it. The CCMC then states it examines whether banks comply with code obligations and that it deals with allegations professionally and appropriately within the context of the framework provided by the 2004 Constitution. The ██████ found this an extraordinary statement that demonstrated the CCMC was governed by the bank Chief Executives and the Construction, which was not part their or the other farmers' loan contacts since the ABA published the 2004 Code.

¹⁰³ Refer to Clause 35.7 of the 2004 Code of Banking Practice.

¹⁰⁴ Section 192E Crimes Act 1900 (NSW) sets out the criminal offence of fraud as follows:

"A person who, by any deception, dishonestly:

(a) obtains property belonging to another, or

(b) obtains any financial advantage or causes any financial disadvantage,

is guilty of the offence of fraud.

¹⁰⁵ S192E(1)(b) of Crimes Act 1900 (NSW) states, 'obtains any financial disadvantage or causes any financial disadvantage', is satisfied if the accused: "obtain[s] a financial advantage for oneself or for another person, and induce a third person to do something that results in oneself or another person obtaining a financial advantage, and keep a financial advantage that one has..."

Moving Forward

131. This review is consistent with the Australian Small Business and Family Enterprise Ombudsman's report of February 2017. It notes a third of cases it investigated were "*representative of poor bank practices and possible unconscionable conduct on the part of the banks involved.*"¹⁰⁶
132. The [REDACTED]s have asked us to request a determination by the Australian Small Business and Family Enterprise Ombudsman on whether their bank professionally and appropriately managed their account as required under their contracts.
133. They also request a determination to find whether the ABA, CCMC and their bank collectively caused them damages as a result of the 2004 Code of Banking Practice and Constitution denying them due process.

Should you require further information please contact the writer.

Yours sincerely,

[REDACTED]

[REDACTED]

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¹⁰⁶ 3 February 2017, Media Release, "*Carnell report into banking practices released Joint media release with The Hon Michael McCormack MP Minister for Small Business*".