



29 August 2017

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

Dear Sir/Madam,

Re: [REDACTED] v. Rabobank: Facts & Opinions

1. Thank you for providing Bank Victims an opportunity to inform you of details of Mr [REDACTED] and Mrs [REDACTED] (the [REDACTED]s) contracts with Rabobank (the bank).
2. Bank Victims are not lawyers and have not provided legal advice to the [REDACTED]s. As such, the facts are referenced with supporting evidence and the opinions have been separated and explicitly stated for each section.
3. Mr [REDACTED] and Mrs [REDACTED] were a registered partnership, and trading as [REDACTED] and [REDACTED] (the Partnership) (ABN [REDACTED]) and until the events referred to here were farmers and graziers registered under Primary Industry Activities for taxation and other purposes with the Australian Government. Their farms 'Ballabay Station' and 'Laurel Vale' were located at Pentland and Prairie Queensland before Rabobank sold them on 16 June 2017.
4. The [REDACTED]s entered into an 'All in One' line of credit contract with the bank in 2005 and signed new contracts in 2009 and 2012 respectively. Since 2011, their farming business had been seriously affected by the drought and the controversial Livestock Export Ban.
5. In 2014, the [REDACTED]s were encouraged by the bank to attend Farm Debt Mediation (FDM). However, they were unable to meet their repayments under the agreement reached at mediation and lost their farms. They believe the circumstances in which the bank sold their farms without investigating their complaints was unfair and unconscionable.
6. The lack of disclosure by the Australian Bankers' Association (ABA) in regards to the rights the [REDACTED]s had under the 2004 Code of Banking Practice (the Code) when

they signed Loan Contracts in 2009 and 2012 were not dealt with professionally and appropriately.

Part One:

Contract with Rabobank

Facts

7. On 29 September 2005, when signing the 'All in One' line of credit contract, the bank provided the [REDACTED]s with a copy of its 'Rural Facility Management Guide (dated 2004)' and the Facility Offer.¹ The loan, signed by the [REDACTED]s on 13 October, was \$700,000.² Inclusive was also a Letter of Offer dated 7 October 2005 and Rabobank's Standard Loan Terms (dated 9 February 2004) and/or Standard Line of Credit Terms (dated 1 October 2004).³ A copy of the relevant Standard Loan Terms and/or Standard Line of Credit Terms was also enclosed.
8. In the Code of Conduct by the Rabobank Group dated 6 November 2007, it states:

"Transparency regarding rates and conditions is an important starting point; unclear and hidden clauses may not be used in contracts

*The Rabobank Group will not engage in any activities that are designed to mislead governmental agencies, tax authorities or third parties. It shall also not participate in the provisions of services relating to funds gained from criminal acts."*⁴
9. On 23 February 2009, the amount of the loan had escalated to \$2,585,000 when the [REDACTED]s signed a new contract.⁵ In the 'Acceptance and Acknowledgement' page, the bank asked them to acknowledge receiving a copy of multiple documents before signing,⁶ which did not include a copy of the ABA's 2004 Code of Banking Practice, nor was the code referred to in the bank's letter of offer.⁷
10. The Standard Loan Terms outlined in the One Standard Line of Credit Terms (dated September 2008)⁸ and its Conditions of Use (dated September 2008)⁹ received by the [REDACTED]s were confusing. They claimed they did not obtain the legal advice because they trusted the bank.

¹ 9 February 2004, Standard Loan Terms – *Rural Term Loan*, Rabobank Australia Limited

² 29 September 2005, Letter of Offer- Schedule (All in One Account), Rabobank Australia Limited.

³ 9 February 2004, Standard Loan Terms – *Rural Term Loan*, Rabobank Australia Limited

⁴ 6 November 2007, '*Code of Conduct – Rabobank Group*' Rabobank Australia Limited, pages 10-11

⁵ 23 February 2009, Letter of Offer, 'All in one account 1246117-00', Rabobank to the [REDACTED]s.

The clients sought to purchase a second farm within 2 hours (200km) of the first farm. The bank approved the purchase and increased the loan limit to \$2,585,000.00.

⁶ Standard Loan Terms and/or Standard Line of credit Terms, Conditions of Use, Visa Debit Conditions of Use, Rabobank internet Conditions of Use, Trade Facility Conditions (if applicable) and the Standard Fee schedule together with a copy of this Letter of Offer prior to signing this Acceptance and Acknowledgement.

⁷ 29 September 2005, Letter of Offer- Schedule (All in One Account), Rabobank Australia Limited.

⁸ September 2008, '*All In One – Standard Line of Credit Terms*', Rabobank Australia Limited

⁹ September 2008, '*All In One – Conditions of Use*', Rabobank Australia Limited

11. On 31 July 2012, the bank approved a further advance and variation to the contract where the loan limit was increased to \$3,850,000.00.¹⁰

Opinion

12. Until recently, the ████████s had no knowledge of the bank's duties in relation to complaints handling, and the Code Compliance Monitoring Committee (CCMC)'s responsibilities in relation to investigating alleged code breaches. They, like other farmers, had no idea that the CCMC Association's Constitution (the Constitution), kept from farmers until recently, was being administered by their bank's Chief Executive as a member of the ABA. The bank was therefore in a position to directly influence the '*independence and administration*' of the CCMC.
13. The 2004 Code was not referred to by the bank, let alone being provided to the ████████s at the time of signing the 2009 and 2012 contracts. They later found out Rabobank subscribed to the 2004 Code on 22 September 2008.¹¹ Despite making complaints with the bank, they were not provided information relating to either the 2004 Code or Constitution by the bank's staff.
14. In September 2004, the ABA made a public statement that the Code was contractually binding.¹² The Code sets out subscribing banks' key commitments and obligations to customers as well as standards of practice, disclosure and principles of conduct.¹³
15. Under the 2004 Code, the bank made certain undertakings to the farmers (particularly with respect to the manner in which they would manage the credit facility and complaints under clauses 25, 34 and 35¹⁴). However, under the Constitution, ████████ and ████████ later discovered the bank did not have to comply with these clauses.
16. The ████████s accept the bank on occasions may have had signage stating the Code was available in its offices. However, it was not brought to their attention, nor was there an explanation as to the relevance of the Code at the bank's nearest

¹⁰ 31 July 2012, 'Letter of Offer', Rabobank Australia Limited, reference no. 122065

¹¹ Australian Bankers Association, 'Banks that have adopted versions of the Code of Banking Practice', accessed 17 August 2017 <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice/Banks-that-have-adopted-versions-of-the-Code-of-Banking-Practice>

¹² September 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, accessed on 6 November 2010 at www.bankers.asn.au/Default.aspx?ArticleID=906.

¹³ 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."

¹⁴ Clause 25: Provision of Credit; Clause 34: Monitoring and Sanctions; Clause 35: Internal Dispute Resolution.

branch. Without reading provisions of the Code, the [REDACTED]s, like other farmers, would be entitled to believe it explained the banks' operating practices, not customers' contractual rights. Regardless, the bank did not provide such explanation.

17. The [REDACTED]s believe the bank and its staff had a duty to brief them on the Code when signing loan contracts in 2009 and 2012, as clause 7 of the Code requires the bank's staff to be briefed on its overarching provisions.¹⁵ Silence and withholding of such important information in relation to due-process that customers ought to know and that is relevant to their rights under the contract is misleading, deceptive or likely to mislead or deceive, which breaches ASIC Act section 12DA¹⁶.

¹⁵ Clause 7 Staff training and competency states: "*We will ensure our staff (and our authorised representatives) will be trained so that they: (b) have an adequate knowledge of the provisions of this Code.*"

¹⁶ Australian Securities and Investments Commission Act 2001 - Sect 12DA Misleading or deceptive conduct.

Part Two:

Financial Hardship Period

Facts

18. By early 2013, the [REDACTED] s' two farms were becoming stressed due to severe drought. At the time, [REDACTED] and [REDACTED] were also seriously affected by the problems being experienced in Northern Australia with the 2011 Livestock Export Ban.¹⁷ There was no protein in grass, no cattle market and cattle yards no longer conducting cattle sales due to the ban. Their first farm experienced very hot and windy conditions. It was very hard to establish new Lucerne crops. As a result, the [REDACTED] s were forced to travel to Tully, far north Queensland to cut and cart hay back to livestock on two farms.
19. On 8 August 2012, the Australian Prudential Regulation Authority released a paper titled '*Regulatory reporting of Loans where hardship concessions are granted*,' it states:

"APRA is aware that authorised deposit-taking institutions (ADIs) are obliged under consumer laws and banking codes to consider hardship variations to credit contracts for borrowers experiencing temporary financial difficulty. Hardship concessions granted by ADIs typically include a reduction in the interest rate or payment, lengthening of loan maturity, or full or partial deferral of interest for a temporary period.

*APRA expects ADIs to monitor trends in request for, and approvals of, hardship concessions and to conduct regular assessment of the default and loss characteristics of these loans. This means that ADI must have in place data and system to allow it to readily identify, measure and report internally on hardship arrangements."*¹⁸
20. On 2 September 2013, the [REDACTED] s applied for Special Drought Assistance of up to \$650,000 from Rabobank.¹⁹ The bank chose not to respond.
21. On 29 January 2014, the bank imposed new conditions and account arrangements on the [REDACTED] s.²⁰
22. In 2014, the [REDACTED] s applied for the QRAA drought concessional loan, which was offered by the Federal Government on the condition of the support from their bank.²¹ However, the bank refused to support them due to security reasons.

¹⁷ 9 June 2011, Australian Broadcasting Corporation, '*Industry hit hard by live export ban*' by [REDACTED], [REDACTED] and [REDACTED], accessed on 17 August 2017 at <http://www.abc.net.au/news/2011-06-08/industry-hit-hard-by-live-export-ban/2750768>

¹⁸ 8 August 2012, Australian Prudential Regulation Authority '*REGULATORY REPORTING OF LOANS WHERE HARDSHIP CONCESSIONS ARE GRANTED*', Pages 1 and 3.

¹⁹ 2 September 2013, [REDACTED] email to Rabobank's Mr [REDACTED].

²⁰ 29 January 2014, [REDACTED], Branch Manager, Rabobank Townsville, wrote to the [REDACTED] s.

23. From December 2013 to November 2014, the [REDACTED]s were charged with 10.4% interest rate, which was reduced to 6.4% and the difference between 10.4 and 6.4 of interest charges during the above period was refunded to them only after they signed the mediation agreement.
24. On 20 October 2014, the [REDACTED]s commissioned the Ray White Rural Townsville to conduct a valuation of their farms.²² The first farm was valued at \$2,025,000 and second at \$1,320,626.²³
25. In April 2016, Rural Debt and Drought Taskforce addresses drought and debt in rural Queensland. It states:

“In recent years rural and regional Queensland has shown signs of increasing financial dislocation and consequential social decline. This is a problem coming from a combination of natural disasters and poor policy settings at both state and federal level. This has had a significant and widespread impact on the rural sector along with dependent communities.

Political and successive government have acknowledged this but failed to properly identify the source. The problem become both more visible and acute in the western cattle industry following the impact of the drought and live export ban.

There is little doubt that the following deregulation in 1983-84 the banks, in pursuit of market share in the face of heightened competition, made loans based on security levels offered by existing equity but without sufficient regard to the capacity of clients to repay.

Extraordinary seasonal conditions overlaid with live cattle export ban have gripped industry, substantially exacerbating debt burdens following the GFC.

Drought

The very dry years of the early part of this century were punctuated by a number of natural disasters including cyclones and extreme floods and then a slide back into dry years. By 2015 drought had impacted upon 85% of the State. Farmers were exposed to further financial stress to manage their enterprises through adverse seasonal conditions.

Inaccessible and Inadequate Drought Assistance

The criteria for assistance were often seen as too restrictive, with producers contesting viability assessments by QRAA. Many producers have not applied for assistance because they considered they would not meet the criteria.

²¹ 26 September 2014, Queensland Government, Queensland Rural Assistance Authority, ‘Drought Concessional Loans Scheme’ QRAA Reference: [REDACTED] (attached)

²² 21 May 2017, MEMO OF NTH QLD FARMERS, Prepared by [REDACTED], page 6.

²³ Ibid.

Concerns were expressed in some areas that the loans are too small and too short to make an effective difference. Problems were identified in coordination with negotiations with Banks and QRAA. Issues were also raised regarding the inaccessibility of Farm Household Allowance to many because of the net assets limit.

Live cattle export Ban

The northern beef industry was subject to market failure in 2011 when the Australian Government banned live cattle exports. This distressed the industry in Northern Australia. As farmers sought markets elsewhere in Queensland, cattle values fell dramatically. Policy driven market failure in northern Australia generated an industry contagion effect, depressing cattle values state-wide. Combined with the drought this added significant pressure to already present financial troubles.

Recommendations

- That the state make strong argument to the Federal Government that any drought that lasts longer than two years be declared a natural disaster.

Financial sector conduct

Examples of inconsistency of approach and attitude have been identified across different banks in Queensland. Throughout the consultation process and in submissions, numerous issues were raised where producers felt they had been unfairly treated by banks. Conduct was of particular relevance where businesses identified as 'at risk'. A need was highlighted to ensure that an effective framework/code of conduct was in place so that lenders and borrowers could work through mediation/exit processes in a fair and equitable way. Receivers and their actions after foreclosure were cited as areas of particular concern.

Of particular concerns were assertions of improper conduct or even illegal actions of some of the operations in this space.

It is noted that the chairman saw the need to provide a number of submission to the Federal Inquiry into the impairment of Customer loans and that a recommendation that the full powers of a Royal Commission be provided to ascertain with clarity the legality or otherwise of all allegations."²⁴

²⁴ April 2016, Rural Debt and Drought Taskforce Chairman's Report 'Addressing debt and drought problems in rural Queensland' pages vi – 4 accessed on 17 August 2017 at <https://publications.qld.gov.au/dataset/rural-debt-and-drought-taskforce-report/resource/fea23ad0-e069-4484-91ce-d1d762decc48>

Opinion

26. The bank claims an understanding of “*the distinctive needs of agribusiness and the cyclical nature of agriculture*”,²⁵ yet failed to comprehend the impact of the live cattle trade suspension and the severe drought the ██████s were suffering from. It was widely accepted that natural disasters and policy changes are integral parts of farming in Australia, and can make it impossible for farmers to meet their repayment commitments.
27. It is not uncommon for farmers, who are not commercially sophisticated, to expect bank staff acting as skilled financial advisers and consider themselves as rural producers with little or no interest in the financial management side of the business.²⁶ This being so, banks are therefore in a position to “*exercise significant influence over the financial position of rural customers*”.²⁷
28. Further, as the Martin Committee’s 1991 report points out, “*farmers are often tied to a particular bank for a long period of time during which the balance of power in the bank’s favor can be used regularly for different reasons. As indicated, banks chargers and fees may be imposed at the bank’s discretion and interest rates and margins may be adjusted by the bank.*”²⁸ This practice of changing conditions, varying interest rates and margins discreetly and unilaterally had been demonstrated by the bank throughout the period of the contracts the ██████s had with the bank.
29. In addition, the bank exercised its superior power to unilaterally vary the contracts and impose new conditions on the ██████s that they found difficult to meet. The bank’s 29 January 2014 letter to them was worded in such way that it sounded like an ultimatum. The letter states “*any breach of these conditions will leave the bank with no option other than to seek to progress the account to FDM to establish a firm, agreed strategy for debt reduction*”.²⁹
30. In 2010, having not been provided a copy of the 2004 Code and the Constitution, the ██████s had no knowledge that the bank, under clause 25.2 of the Code, had a duty to help them overcome ‘*financial difficulties*’.³⁰ However, the bank knew it was required to comply with the 2004 Code but failed to accept its responsibilities.

²⁵ Rabobank webpage under the title “International Rural”, accessed at <https://www.rabobank.com/en/products-and-solutions/international-rural/index.html>

²⁶ November 1991, the Martin Committee’s ‘*A Pocket Full of Change: Banking and Deregulation*’: 16.41.

²⁷ Ibid.

²⁸ Ibid.

²⁹ 29 January 2014, ██████, Branch Manager, Rabobank Townsville, wrote to the ██████s. The new conditions was that the debt amount was to be increased by \$15,000- per month but the account was not to exceed \$4,220,000- by the end June 2014. The agreed excess was conditional upon the loan balance is to be returned to within the original limit of \$3,850,000- by 30 June 2014 or an unconditional contract of sale of either of their farms is received by 30 June 2014.

³⁰ Refer to clause 25.2 of the Code of Banking Practice.

31. According to the CCMC's Annual Reports, the code breaches in relation to the 'financial difficulties' have been the focus/highlights of the CCMC's agenda since 2005.³¹ The [REDACTED]s now believe, having read the 2004 Code, their problems during the extended hardship period should have been directed to the CCMC by the bank, as this would have made it unnecessary to attend FDM.

³¹ 2005-2006 Annual Report Highlights: "The Committee held an inquiry into bank compliance with clause 25.2 of the Code, which deals with customers in financial hardship." 2006-2007 Annual Report Highlights: "The Committee continued to advance an awareness of Code issues, through: continuing to monitor the appropriateness of bank responses to handling customers in financial difficulty." 2007-2008 Annual Report Highlights: "The Committee's work contributed to the following examples of improved banking practice: • improved arrangements for dealing with customers in financial difficulty;"

Part Three:

Attending Farm Debt Mediation

Facts

32. The Queensland Farm Finance Strategy states:

“The Purpose of this Strategy is for financial institutions (‘Financiers’) and other providers of credit to Farmers, Farmers and their respective advisers and financial counsellors and representatives organisations 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.*

2.4 Commitments:

To achieve resolutions of financial problems, all parties to this strategy will at all times endeavour to:

- Communicate openly and honestly;*
- Share information and documentation, where appropriate;*
- Treat each other with dignity, respect and courtesy;*
- Act in good faith.”³²*

“Publication:

The QFF, Agforce Queensland and the ABA will prepare information about this Strategy to make it accessible to rural organisations and financial institutions. QFF, Agforce Queensland and the ABA will prepare “Protocols for the Queensland Farm Debt Mediation Scheme.

Information on this Strategy and the “Protocols for the Queensland Farm Debt Mediation Scheme” will also be posted on the QFF, Agforce Queensland and ABA Internet Sites.

The following financial Institutions have agreed to observe and be bound by the processes and procedures provided for in this strategy from 1 February 2008 or such date as shown:

Rabobank Australia Ltd [inclusive of 11 other banks]”³³

³² 1 February 2008, Queensland Rural Assistance Authority, ‘The Queensland Farm Finance Strategy’ Page 3, accessed on 17 August 2017 at <https://www.qff.org.au/wp-content/uploads/2016/11/Queensland-Farm-Finance-Strategy-2008a-130710-June-2016-ed1.pdf>

³³ 1 February 2008, Queensland Rural Assistance Authority, ‘The Queensland Farm Finance Strategy’ Page 11, accessed on 17 August 2017 at <https://www.qff.org.au/wp-content/uploads/2016/11/Queensland-Farm-Finance-Strategy-2008a-130710-June-2016-ed1.pdf>

33. The Queensland Farm Debt Mediation Scheme Protocols, states:

“8. The mediator takes over the administrative arrangements for the mediation as per this Agreement.

8.1 *This will include arranging a premeditation conference*

8.1.1 *The premeditation conference will define the issues to be resolved by the mediation, the location and timing of the mediation, the participants and the cost sharing arrangements.*

8.1.2 *The premeditation conference can be by phone hook up.*

8.1.3 *If no issues are identified the mediator will conclude the process.*

9. *All parties are to enter the mediation in good faith and will endeavour to conclude the mediation process as rapidly as possible. Unless otherwise agreed by the parties, mediation is to be concluded within 3 months of the Notice being given, or two months of a mediation being appointed.”*³⁴

34. *“The Queensland Parliament’s Finance and Administration Committee recommended that the Minister inform the House how the Government Bill would ensure that farmers are clearly informed, prior to any mediation taking place, about what acting in good faith means under the legislation; examples of acting in good faith and not acting in good faith for the purposes of the legislation, and possible consequences of not acting for the purposes of the legislation, and possible consequences of not acting in good faith for the purposes of the legislation. In Queensland the farmer and the mortgagee must have participated in the mediation ‘in good faith’ for it to have been a ‘satisfactory mediation’.”*³⁵

35. On 2 July 2014, the [REDACTED]s were served a notice to attend FDM with the bank to resolve the disputes. Gadens Lawyers states that they have attached a service of notice pursuant to clause 3.1 of the Queensland Farm Debt Mediation Scheme.³⁶ At the point in which the notice was issued, the Facility Account balance that was outstanding was:³⁷

Loan Facility Account No. 1246117-00 - \$4,356,648.39

Loan and Security Agreement (002-0106720-001) - \$52,326.14

³⁴ Ibid, page 1.

³⁵ 23 March 2017, Rural Assistance Authority, Farm Debt Mediation Act 1994 (NSW) Review: Consultation Paper.

³⁶ 2 July 2014, Gadens lawyers, ‘Rabobank Australia Limited & Rabo Equipment Finance Limited and [REDACTED] and [REDACTED]’ reference [REDACTED] 201409606

[REDACTED] Ibid, enclosed document ‘INTENTION TO TAKE ENFORCEMENT ACTION IN RESPECT OF FARM MORTGAGE’ Page 2.

36. On 6 November 2014, at the Mediation, the [REDACTED]s signed ‘*Deed of Forbearance and Acknowledgement*’ in which the bank required them to sell either farm during the next seven months.³⁸
37. On 24 November 2014, valuations were conducted by Honnef North Australian Valuations upon bank’s instruction.³⁹ The first farm was valued at \$2,500,000, and the second at \$2,200,000.⁴⁰
38. In July 2015, Legal Aid Queensland filed a submission to Parliamentary Joint Committee on Corporations and Financial Services Inquiry, ‘*Impairment of Customer Loans*’. It states:

“Legal Aid Queensland’s Farm and Rural Legal Service (FRLS) provides advice and assistance to Queensland rural producers and rural based businesses who have severe debt related problems or are in dispute with their lenders, or are otherwise facing financial hardship directly related to their business of primary production. The service is free of charge. No income or asset tests apply.

Increase in rural producers with severe debt problems

Many FRLS clients have had properties which have been in their families for generations. Despite farmers being given time to sell properties by banks, many have been unable to sell them. If sale is achieved, it is often at significantly reduced prices. Often the clients have little to no equity remaining and are often left with significant debt still owing to banks and unsecured creditors. Approximately 80% of Queensland is currently drought declared.”⁴¹

Opinion

39. We note the Mediation process in Queensland requires all parties to agree with the ‘*Mediation Rules*’ when signing the Farm Debt Mediation Agreement. The rules state “*All parties are to enter the mediation in good faith and will endeavour to conclude the mediation process as rapidly as possible.*”⁴² The bank therefore had a duty to make it clear to the [REDACTED]s and the Mediator, when attending FDM, if it, for any reason, failed to use its Internal Dispute Resolution under Clauses 35.7 and 35.8 of the Code, which required it to investigate their complaints.
40. The [REDACTED]s believed they were damaged when they attended FDM. They now believed the bank did not comply with the Queensland Farm Finance Strategy by

³⁸ 6 November 2014, Gadens lawyers, ‘*Deed of Forbearance and Acknowledgement*’ page 5.

³⁹ 21 May 2017, MEMO OF NTH QLD FARMERS, Prepared by [REDACTED], page 6.

⁴⁰ Ibid.

⁴¹ July 2015, Legal Aid Queensland ‘*Impairment of customer loans*’ Submission by Legal Aid Queensland to Parliamentary Joint Committee on Corporations and Financial Services Inquiry, pages 2 and 4 accessed on 17 August 2017 at <http://www.aph.gov.au/DocumentStore.ashx?id=555d10df-d57a-4e74-9ef8-834a768bbd67&subId=402229>

⁴² 1 February 2008, Queensland Rural Assistance Authority ‘*The Queensland Farm Finance Strategy*’ Page 3 Paragraph 9, accessed on 17 August 2017 at <https://www.qff.org.au/wp-content/uploads/2016/11/Queensland-Farm-Finance-Strategy-2008a-130710-June-2016-ed1.pdf>

failing to attend the mediation honestly and in good faith. This is despite Rabobank's Code of Conduct requiring it to "offer a safe environment to actively broach discussions of risks and dilemmas and to cooperate transparently on responsible solutions."⁴³

41. The agreement to sell either farm within a short timeframe was not in the bank's or the ██████'s best interest as the farms were suffering severe drought and forced sales would not achieve the agreed market values. The timeframe under these circumstances was unrealistic and unattainable, as the problems ██████ and ██████ were experiencing continued.
42. When facing the legal representatives of the bank, the ██████s, even with the help of legal aid, were in a significantly less powerful position in terms of their argument, the law, logic, strategy and speaking. They were given the impression by the bank that there were no other options available to them at the time and felt they were pressured to sign and absorb an 18-page agreement. At mediation, they felt were listened to but not heard; they believe they were treated as second grade citizens by condescending bank lawyers and officers.
43. When attending FDM, the ██████s, like other farmers, had no knowledge their bank's Chief Executive was a member of the CCMC's governing body. Under the Constitution, their bank could void the CCMC's powers to investigate complaints in relation to any code breaches. Under Clause 8.1(b)(i) of the Constitution, the CCMC had no authority to investigate complaints once farmers had attended mediation.⁴⁴
44. It can be argued that identifying "bad faith" is more feasible than proving "good faith" (or lack thereof). Firstly, the bank simply used the FDM process as a trigger for enforcement proceedings. The ██████s contend that the sole purpose of the mediation was to negotiate a settlement for farm debt without it having to consider their complaints. Secondly, the bank failed to disclose the Constitution and the significant importance of it, as well as the conflict of interest involving its managers. Thirdly, the bank used its superior bargaining power and resource to coerce the ██████s into signing an agreement that was oppressive, unreasonable and unfair and that put them in a disadvantaged position. All these facts indicate the bank did not act in good faith.

⁴³ 6 November 2007, 'Code of Conduct – Rabobank Group' Rabobank Australia Limited, pages 31.

⁴⁴ 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."

Part Four:

Failure to Investigate Complaints

Facts

45. On 25 May 2015, GBAC Advisory Pty Ltd, as a representative of the [REDACTED]s, raises concerns of Rabobank's misconduct via email to their Brisbane Branch.⁴⁵ These concerns include: Rabobank's poor assessment in the case (whereby they continued to lend to a farm recording losses in consecutive years), Rabobank's failure to acknowledge their hardship, Rabobank imposing duress throughout FDM and change of termination date on the loan from 30 September 2020 to 31 May 2015.
46. On 23 September 2015, Rabobank writes to the [REDACTED]s stating:
- "We require Rabobank's debt repaid in full. We are struggling to see how this could occur without the sale of one or both of the properties. We are open to an acceptable proposal regarding how to maximise the sale price of the properties both for debt repayment for Rabobank and any equity retention for you. We do not accept that we are in any way to blame for your predicament or your debt levels."*⁴⁶
47. On 30 September 2015, GBAC representative for the [REDACTED]s sent an email to APRA requesting it investigate Rabobank's loan facilities provided to the [REDACTED]s. It states:
- "Please investigate why we were so misled as to the affordability of the loans offered to us; whether the bank was negligent in its duty of care to us as customers; whether the bank failed to do what the code of banking conduct required in assessing our ability to cope with the loans and whether it failed to meet what we expect are APRA's prudential lending guidelines for deposit-taking institutions, to provide wise and prudential investment of those deposit funds."*⁴⁷
48. A reply was sent from APRA on the same day stating that the email has been referred to the supervisor of Rabobank Australia Limited.⁴⁸
49. On 7 October 2015, APRA replied to GBAC Advisory stating that after discussing it internally it would appear possibly more aligned to ASIC's remit.⁴⁹
50. On 22 October 2015, ASIC determines not to take matter further on grounds of insufficient information. It states:

⁴⁵ 25 May 2015, GBAC Advisory Pty Ltd email to Brisbane@rabobank.com.

⁴⁶ 23 September 2015, Rabobank's Mr [REDACTED] email to [REDACTED].

⁴⁷ 30 September 2015, GBAC email to APRA.

⁴⁸ 30 September 2015, APRA's, info officer, Mr [REDACTED] email to GBAC's Mr [REDACTED].

⁴⁹ 7 October 2015, APRA's, info officer, Mr [REDACTED] email to GBAC's Mr [REDACTED].

“We have looked at the alleged misconduct and the information you provided, as well as the material provided by your consultant... We also gathered additional information from public and confidential sources, as appropriate. On their own, your concerns and our subsequent inquiries are not enough for us to prove misconduct.”⁵⁰

51. On 30 October 2015, The ACCC, in responding to Mrs ██████████'s email of 30 September 2015 (reference number: ██████████), refers the matter to ASIC as ASIC has the powers to protect consumers against providers of financial products and services.⁵¹
52. On 30 October 2015, the ██████████s wrote to various members of Rabobank stating they will continue to raise concerns of misconduct by the bank. Further to the matter, the ██████████s responded to quotes provided by members of Rabobank in relation to their matter. It states:
- “Rabobank Quote - ‘Rabobank’s farm loan facilities are second-to-none. No matter what your farming, banking or finance needs may be, we can provide you with a range of options to help meet your specific farming and banking needs!’*
- Not once have we been offered a range of options to help meet our specific farming and banking needs: -*
- We are in one of the worst droughts seen in Australia ever.*
 - There has been the Live Export Ban and the Global Financial Crisis. The live export ban hit 7th June, 2011.”⁵²*
53. On 17 November 2015, FOS wrote to the ██████████s stating they were voided from investigating the matter as the loan exceeds \$2,000,000 and the settlement agreement had already been reached between the Applicant and Rabobank.⁵³
54. On 9 December 2015, GBAC, on behalf of the ██████████s, filed a complaint with the CCMC through its website.⁵⁴
55. On 21 March 2016, the CCMC replied by noting that they were unable to investigate complaint as it was out of their jurisdiction, as specified in the CCMC Mandate’s Clause 6.2(a)(vi) i.e. ‘12 month rule’.⁵⁵ The ‘12 month rule’ denotes that, if complaint

⁵⁰ 22 October 2015, Australian Securities & Investments Commission, ‘Rabobank Australia Limited (ACN 001 621 129)’ letter to Mrs ██████████, reference ██████████, Page 1.

⁵¹ 30 October 2015, ACCC email to Mrs ██████████, Reference: ██████████.

⁵² 30 October 2015, ██████████ and ██████████ write to Mr ██████████, Secretary, Rabobank, Ms ██████████, Director, Rabobank and Mr ██████████, Director, Rabobank, Page 2.

⁵³ 17 November 2015, Financial Ombudsman Service Australia letter to Mr ██████████, Case Number ██████████.

⁵⁴ The complaint was filed through the CCMC’s online complaint submission system. A copy of the script is attached.

⁵⁵ 21 March 2016, Code Compliance Monitoring Committee’s, Code Compliance Analyst, Ms ██████████ letter to Mr ██████████, CCMC reference: ██████████.

matters are known by the person making the allegation for a period longer than a year before being raised with the CCMC, they are therefore removed from investigation.

56. On 18 April 2016, CCMC's Code Compliance Analyst wrote to the [REDACTED]'s' representative providing further details regarding their decision to not investigate their matter, stating:

"The CCMC considers that Mr and Mrs [REDACTED] would have become aware of the events to which the allegation relates at the time they participated in Farm Debt Mediation with Rabobank on 6 November 2014. That is, Mr and Mrs [REDACTED] were clearly aware of their financial difficulties in meeting their obligations under the facility at that time and, on that basis, that Rabobank may not have exercised the care and skill of a diligent and prudent banker when it assessed and formed its opinion about their ability to repay the facility. They had professional legal advice and representation at the mediation."⁵⁶

57. On 9 June 2017, the [REDACTED]s wrote an Open Letter intended for Rabobank, outlining their story and detailing allegations of Rabobank's misconduct. The letter concludes stating:

"As we are whistleblowers, we require the bank's immediate response and agreement to withdraw our properties from sale until it and its Customer Advocate consider the above allegations and allow us sufficient time to provide a response.

We would then like to enter into meaningful mediation for the purpose of obtaining a fair and just settlement and, if possible, the return of all or part of our land."⁵⁷

58. On 13 June 2017, the CCMC filed a submission with the Senate Economics Reference Committee, stating:

"The Code, the Constitution and the Mandate are documents developed and controlled by the ABA.

Where the Submissions refer to specific Code breach allegations that were raised with the CCMC, I can confirm that these allegations were dealt with professionally and appropriately within the context of the framework provided by the Constitution or Mandate that applied at the time."⁵⁸

⁵⁶ 18 April 2016, Code Compliance Monitoring Committee's, Code Compliance Analyst, Ms [REDACTED] letter to Mr [REDACTED], CCMC reference: [REDACTED].

⁵⁷ 9 June 2017, [REDACTED] and [REDACTED] 'Open Letter to Banks Not Acting in Good Faith Prior to Selling Farms' Page 6.

⁵⁸ 16 March 2017, 'Enquiry into consumer protection in the banking, insurance and financial sector', submission 107, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Consumerprotection/Submissions

59. On 15 June 2017, Rabobank's Customer Advocate responded to the [REDACTED]'s' Open Letter, whereby the bank raised 6 points of concern and refused to withdraw the property from sale. Rabobank states:

"Neither the Bank nor its legal representatives had an obligation to inform you or the mediator that, by attending the mediation, you would lose your rights under the CCMC 'Constitution' to have your complaint investigated at no cost...

...Based on my analysis, I have concluded that the Bank has acted in an appropriate manner in relation to this case. It is my view that the Bank and its advisors have acted diligently in its interactions with you, throughout the relationship.

In the circumstances, I do not intend to make any representations to the Bank on your behalf to the effect that the properties be withdrawn from sale by the receivers tomorrow.⁵⁹

60. On 16 June 2017, the [REDACTED]'s filed a second Open Letter, this time to be filed with the Senate Select Committee on Lending to Primary Production Customers. The Open Letter contains the primary arguments of the first letter, those being: the CCMCA Constitution, FDM and Predatory Lending practices. The letter states its intention as:

"We request an immediate review of bank's complaint-handling practices prior to and when attending FDM, as our bank failed to comply with due-process. We assert the bank acted in bad faith by selling our farms without investigating 2004 Code breaches, which supports requests for this letter be treated as an urgent unresolved dispute.⁶⁰

61. On 16 June 2017, Bank Victims, on behalf of the [REDACTED]'s, wrote to the CCMC stating:

"We also note that parties attending mediation signed a Deed of Forbearance, however, it is alleged the bank concealed the Constitution from our clients and the mediator. As such, it is alleged the bank failed to comply with due process, and breached:

- *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*

⁵⁹ 15 June 2017, Rabobank Customer Advocate, Mr [REDACTED], 'Open Letter sent to Rabobank dated 9 June 2017' Pages 2-3.

⁶⁰ 16 June 2017, [REDACTED] and [REDACTED], 'Open Letter to Our Bank Alleging Failure to Act in Good Faith Prior to Selling Our Farm' Page 1.

- *Clauses 35.7 and 35.8 dispute resolution*⁶¹

62. On 19 June 2017, Bank Victims, on behalf of [REDACTED] and [REDACTED], filed a submission to the Senate Inquiry on Lending to Primary Production Customers attaching recent correspondence filed with the CCMC. The submission states:

*“As this submission refers to systemic practices by banks to avoid having to comply with due process and banks have taken farmers to Farm Debt Mediation when concealing relevant documents, our clients at Charters Towers would like to appear before the senate and provide a detailed explanation.”*⁶²

63. On 5 July 2017, the CCMC responded to Bank Victims’ letter of 16 June, stating:

“The CCMC is the independent body that monitors compliance with the Code. Part of its role is to investigate allegations that a bank may have breached its Code obligations. If the CCMC find a breach, it will work with the bank to reduce the likelihood of that breach occurring again. Importantly, the CCMC cannot:

- *Mediate or resolve individual disputes*
- *Review or change decisions by other forums, including the Financial Ombudsman Service (FOS) Australia;*
- *Decide rights and entitlements between consumers and their providers, even if it finds a breach;*
- *Provide compensation, redress or issue fines; or*
- *Provide advice.”*⁶³

64. On 7 July 2017, Bank Victims responded to the CCMC’s letter of 5 July 2017 stating:

“We do not accept, under the 2004 Code, the CCMC cannot review or change decisions by other forums in relation to six points in our letter of 16 June 2017, including the FOS for the following reasons:

1. *The [REDACTED]’s contract was signed in 2009 and their bank is bound by 2004 Code. The latter does not stipulate in clauses that the CCMC could only investigate code breaches under certain conditions.*
2. *The CCMC Constitution was not disclosed to the [REDACTED]’s until 2017. Clause 34 of the 2004 code defines the CCMC’s role and functions, which is monitoring code compliance and naming the bank for code breaches, etc.*

⁶¹ 16 June 2017, Bank Victims Mr [REDACTED] letter to Secretary, Code Compliance Monitoring Committee, ‘Code Compliance Monitoring Committee reference: [REDACTED]’.

⁶² 19 June 2017, Bank Victims Mr [REDACTED] submission ‘Re: Select Committee on Lending to Primary Production Customers’ to Select Committee on Lending to Primary Production Customers

⁶³ 5 July 2017, Code Compliance Monitoring Committee, Investigations Manager, Mr [REDACTED]’s letter to Mr [REDACTED] ‘The CCMC’s role’ Page 1.

3. Other forums, including FOS, sometimes made decisions in relation to disputes that are not related to code breaches. Therefore, their decisions do not exclude the CCMC from reviewing or conducting an investigation on relation to alleged claim of code breaches.⁶⁴

65. On 10 July 2017, Rabobank's Head of Special Asset Manager filed a submission with the Senate Select Committee on Lending to Primary Production Customers in response to Bank Victims senate submission. The submission raised a chronology of events as well as Rabobank's claim they have acted appropriately with regards to the [REDACTED] case, stating:

"At the outset, the Bank notes that it does not agree with the majority of the matters set in the [REDACTED]'s submission.

...The [REDACTED]s refer to the exercise of the care and skill of a diligent and prudent bank. We assume this is a reference to the obligation contained in clause 27 of the Code... This obligation relates to the granting of, or an increase in, a facility. The allegation made by the [REDACTED]s in referencing the Code does not relate to the granting of a facility or an increase in same. Accordingly, the Bank cannot respond further to this allegation as the Codes does not relate to the allegation made."⁶⁵

66. On 12 July 2017, the [REDACTED]s filed their own submission through Bank Victims to the Senate Select Committee on Lending to Primary Production Customers. The submission, again, alleges misconduct in relation to the FDM process, lack of disclosure of contractual documents and a chronology of events with the bank and opinions on those events. The [REDACTED]s, in their submission's conclusion, state:

"It is evident banking practices have not been adequately supervised by self-regulated banks and Federal regulators. There was no enforcement in place to name banks for breaching the contract and the Code, nor was there an effective mechanism to compensate farmers who suffered damages due to misleading or deceptive banking practices."⁶⁶

67. According to Martin Committee's 1991 report,

"[T]he significant power imbalances which exist between banks and many of their customers. These power imbalances are particularly important when a dispute arises between a customer and a bank. Some of the manifestations of these imbalances for consumers seeking redress include that:

⁶⁴ 7 July 2017, Bank Victims letter to Secretary Code Compliance Monitoring Committee 'Re: [REDACTED] v Rabobank ([REDACTED])' Page 1.

⁶⁵ 10 July 2017, Rabobank's Head of Special Asset Manager, Mr [REDACTED], files submission 'Response to [REDACTED] submission to the Senate Committee' with the Senate Select Committee on Lending to Primary Production Customers Pages 1-2.

⁶⁶ 12 July 2017, [REDACTED]s file submission 'Re: [REDACTED] v Rabo: Facts & Opinions' through Bank Victims to the Senate Select Committee on Lending to Primary Production Customers, Page 6.

- *the banks control nearly all relevant information and documentation;*
- *banks have access to specialist advice and legal assistance and resources to pursue disputes to the end, whereas customers, particularly poorer customers, do not;*
- *banks tend to have inherent faith in their internal operating systems and bankers may be reluctant to admit failures in those systems;*
- *in many cases the bank's interest in resisting any claim outweighs that of an individual customer in pressing it, in that the bank is protecting its system whereas the customer is seeking redress on a one-off basis;*
- *because banks know they can outlast most customers, both in terms of will and resources, there is often little incentive for banks to settle a dispute, even if the bank would be likely to lose any eventual case; and*
- *in matters which are litigated the bank, as a repeat player, is in a position to select a particular matter to run to a hearing in order to obtain a favorable precede"⁶⁷*

Opinion

- 68.** From May 2015 to July 2017, the ██████████s had filed complaints with ASIC, ACCC, APRA, FOS, and the CCMC. However, all these regulators dismissed their complaints due to various reasons:
- APRA suggests the issue should be raised with ASIC
 - ACCC suggests the issue should be raised with ASIC
 - ASIC suggests the information provided not enough for it to prove misconduct
 - FOS voids investigating the matter as the loan exceeds \$2,000,000 and the settlement agreement had already been reached between the Applicant and Rabobank
 - The CCMC is unable to investigate the issues due to '12 month rule'
- 69.** Since 2015, the ██████████s had repeatedly filed complaints with the bank. These were either dismissed or received no response. Under clause 7(b) of the Code, the bank had a duty to ensure all persons to whom complaints were addressed were trained to have a suitable knowledge of provisions of the Code.
- 70.** In Rabobank's response to the ██████████s' submission 43, Head of the Asset Management appears to emphasize that the bank had given the ██████████s ample opportunities to refinance the debt or sell the farms. However, all these so-call

⁶⁷ November 1991, the Martin Committee's 'A Pocket Full of Change: Banking and Deregulation', 20.64.

opportunities were attached with strict conditions within limited timeframe that were unreasonable, unattainable and unfair.

71. Further, the bank's decision of withholding credit from the [REDACTED]s undermined their effort and made it commercially impossible for them to refinance with any other financial institution. In addition, living in a small rural community, the [REDACTED]s were not able to obtain funding advances from other businesses in the area. This was due to lenders not investing funds on farms when the farmers were at risk of losing their land, as suppliers' products and funds could end up being restricted by the bank at its discretion.
72. The [REDACTED]s believe the bank's Chief Executive, as a Code Compliance Monitoring Committee Association member, understands the Constitution could be used to avoid having their complaints investigated by the CCMC.
73. They also believe the bank and the CCMC did not investigate their complaints, as the Constitution provided an alternative. They had also not sighted the Constitution until recently. When they did, they noted clause 8.1 allowed the bank to direct a complaint to another forum such as Mediation and as a result, the CCMC would be powerless to investigate such a complaint.

Part Five:

ABA's 2004 Code Denies ██████'s Due Process

Facts

74. From 1990 to 1991, a Review of Banking and Deregulation by the Martin Committee was commissioned by the Federal Government. It recognised 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 disputes arbitrated cheaply, quickly, and fairly outside the court system.⁶⁸ The result was the creation of the 1993 Code of Banking Practice, which has been subsequently revised three times.
75. On 3 November 1993, the first code was published.⁶⁹ The government and banks noted the purpose of the new code was to foster good relations between banks and customers.⁷⁰ It would promote good banking practice by formalising the standards of disclosure and conduct which banks that adopt the code would observe.⁷¹
76. On 1 August 2000, the Industry Self-Regulation in Consumer Markets report was released by the Taskforce on Self-Regulation.⁷² 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.”⁷³*
77. On 20 February 2004, the Constitution was documented and provided to the ABA by its lawyers.⁷⁴

⁶⁸ Ibid.

⁶⁹ 3 November 1993, Australian Banking Association's '1993 Code of Banking Practice'.

⁷⁰ 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.”*

⁷¹ 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.”*

⁷² 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>

⁷³ Ibid, page 59.

⁷⁴ 20 February 2004, 'Code Compliance Monitoring Committee Association Constitution' published by Mallesons Stephen Jacques.

78. On 22 May 2004, the ABA released the Modified 2004 Code without including the Constitution.⁷⁵
79. Under Clause 34(b)(i) of the 2004 Code, the ABA claims the CCMC's responsibility is to monitor bank's compliance under the Code. Under Clause 34(b)(ii), the ABA states the CCMC's function is "*to investigate and to make a determination from any person that the bank had breached this code*".
80. Clause 35 of the Code provides an internal process of handling disputes with customers that meets standards set out in AS4269-1995,⁷⁶ or other industry dispute standard or guidelines the ASIC declares apply to the Code.
81. In September 2004, the ABA claims the code is 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.*"⁷⁷ The Code sets out key commitments and obligations to customers by banks, as well as its standards of practice, disclosure and principles of conduct.⁷⁸
82. On 22 September 2008, Rabobank adopted the 2004 Code without advising its customers of the Constitution that varied principles and practices in the 2004 Code.⁷⁹
83. On 31 January 2013, the ABA published an amended 2013 Code alongside the CCMC Mandate.⁸⁰ The ABA advised subscribing banks' customers the CCMC's Mandate was replacing the Constitution without justifying its lack of transparency since the 2004 Code was published.⁸¹
84. On 1 February 2014, the amended 2013 Code and CCMC Mandate came into effect.⁸²
85. On 19 August 2015, submission 61 filed with the Parliamentary Joint Committee on Corporations and Financial Services notes in '*the impairment of customer loans*'⁸³,

⁷⁵ 22 May 2004, '2004 Code of Banking Practice', ABA.

⁷⁶ AS 4269-1995, Complaints handling Standards Australia.

⁷⁷ September 2004, Code of Banking Practice Fact Sheets:

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

⁷⁸ 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."

⁷⁹ Date of Adoption.

⁸⁰ 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>.

⁸¹ 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/>.

⁸² 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>.

there are concerns identified to Parliament in relation to the 2004 Code and Constitution. Its conclusion suggests *“the relationship between subscribing banks and their customers is unconscionable and unfair.”*⁸⁴

86. On 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 the banks and bankers, in many cases, have immunity from prosecution.⁸⁵
87. On 16 March 2017, there are similar concerns identified in a submission filed with the *‘enquiry into consumer protection in the banking, insurance and financial sector’*.⁸⁶ It refers to the Taskforce on Industry Self-Regulation and outlines dispute resolution mechanisms it considered important for banks when resolving clients’ complaints. It allows the reader to appreciate the complexity the ABA relied on when it published the Modified 2004 Code without including the Constitution. In doing so, the ABA allowed banks to deny customers due process.
88. On 13 June 2017, the CCMC filed a response to the above submission.⁸⁷ 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

⁸³ 19 August 2015, Tasmania Small Business Council, ‘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.

⁸⁴ Ibid, page 33.

⁸⁵ 30 March 2016, ‘*Enquiry into 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

⁸⁶ 16 March 2017, ‘*Enquiry into consumer protection in the banking, insurance and financial sector*’, submission 107, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Consumerprotection/Submissions

⁸⁷ 13 June 2017, ‘*Enquiry into consumer protection in the banking, insurance and financial sector*’, response to submission 107, accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Consumerprotection/Submissions

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."⁸⁸

89. On 18 July 2017, the CCMC responded, stating "12 months had passed between when the CCMC considered the [REDACTED] had become aware of the events giving rise to their allegation and the time [your representative] first contacted the CCMC".⁸⁹

Opinion

90. Under the 2004 Code, Rabobank made undertakings to its customers, including the [REDACTED]s, with respect to the manner in which it would manage the credit facility and complaints under clauses 25, 34 and 35⁹⁰. However, the bank failed to assist or try to work with the [REDACTED]s to help them overcoming their financial difficulties during the period of drought, livestock ban, and mediation, which breaches clause 25 of the 2004 Code.
91. Rabobank's refusal of QRAA support for the [REDACTED]s undermined the commercial viability of their operation, which breaches clause 25 and 2 of the 2004 Code.
92. Under Clause 35.7 of the Code, the ABA states banks have a duty to investigate any complaints made by the customers. Whilst, Clause 35.8 of the Code requires the bank to provide the customer with a copy of its response. The banks failed to do so.
93. The ABA's Code Compliance Monitoring Committee Association's Constitution was not provided to the banks customers, including the [REDACTED]s, at the time of signing loan contracts since 2004.
94. The ABA's 2004 Code was subject to the Code Compliance Monitoring Committee Association's Constitution of 20 February 2004. However, the [REDACTED]s believe neither the ABA, nor the bank and the CCMC have made it clear whether the constitution was part of the loan contract. Under the Constitution, the CCMC could be

⁸⁸ Ibid.

⁸⁹ 18 July 2017, [REDACTED], CCMC's Investigation Manager, wrote to Mr [REDACTED], Bank Victims Pty Ltd.

⁹⁰ Clause 25: Provision of Credit; Clause 34: Monitoring and Sanctions; Clause 35: Internal Dispute Resolution.

removed from responsibility or obligations to monitor code breaches of the Rabobank if a dispute was transferred to another forum.

95. It is suggested no Rabobank customer knew about the Constitution that the ABA, CCMC and the bank introduced in 2004 and that the bank kept out of the reach of its customers until 2014.
96. The [REDACTED]s believe the Constitution allowed the Rabobank to advise the CCMC they used the mediation, which was ‘another forum’, and reached a settlement. This removed any requirement of the CCMC to investigate their complaints under the 2004 Code.
97. The ABA claims the 2013 CCMC Mandate included provisions from the Constitution. In addition, the ABA, when it published this present code, applied a ‘12-month rule’. It 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”⁹¹
98. In 2009 and 2012, when the [REDACTED]s signed the Rabobank loan contract they have no idea that the 2004 Code and the Constitution were developed by the ABA for the benefit of banks and managed by its directors. While the ABA advised customers of rights to have complaints dealt with to ‘their satisfaction’ under clause 35 of the 2004 Code,⁹² the Constitution denied its clients’ due process. On 11 March 2008, the CCMC filed submissions with Code Reviewer, Ms [REDACTED], 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.”*⁹³
99. These arrangements demonstrated in submissions filed with the Parliament since 2015 some form of ‘deceit’, either by words or conduct, as to intentions of persons who use deception. For the purposes of this submission, deception, if found to exist, could be either intentional or reckless (as per Crimes Act 192B(2)).
100. The [REDACTED]s believe Rabobank, by concealing the Constitution, obstructed their rights. In addition, under Section 192E of the Crimes Act⁹⁴, they allege the ABA, CCMC and the bank caused them financial disadvantage.⁹⁵

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

⁹² Refer to Clause 35.7 of the 2004 Code of Banking Practice.

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

⁹⁴ 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

101. On 13 June 2017, the CCMC responded to the ‘*Enquiry into consumer protection in the banking, insurance and financial sector*’. It states once a bank subscribes to the code it becomes mandatory for the bank to comply with it, and the CCMC examines whether banks comply with code obligations. Of important concern to the [REDACTED]s, however, is that while the CCMC claims to deal with allegations professionally and appropriately, it is within the context of the 2004 Constitution. They found this extraordinary, as it demonstrates it is still governed by the ABA and its Constitution and the bank Chief Executives.

(b) obtains any financial advantage or causes any financial disadvantage, is guilty of the offence of fraud.

⁹⁵ 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...”

Part Six:

Predatory Lending Practice

102. Definition

“The predatory lending “describes unfair, deceptive, or fraudulent practices of some lenders during the loan origination process.

Lenders made loans that they knew borrowers could not afford.”⁹⁶

103. Predatory Lending practices are:

“taking advantage of the least educated and financially unsophisticated in our society by selling them costly mortgages and hiding details of the fees in the fine print incomprehensible to most people.”⁹⁷

104. We refer you to “Australia’s ‘Banking Cartel Scandal’: The Rise of White-Collar Crime”, in which the submission alleges predatory lending in Australia is rampant.⁹⁸

105. Clause 25.2 of the Code 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.”

106. The bank provided the [REDACTED]s with an unsustainable amount of debt between 2006 and 2012. Its credit assessment and evaluating of [REDACTED] and [REDACTED]’s ability to meet repayment obligations was, at best inadequate, or, at worst predatory. If the loan interest could not be met by the [REDACTED]s without acceptance of further loans to cover it, 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 one or both farms.

107. With the claiming of understanding the distinctive needs of agribusiness, it seems Rabobank 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 2005, 2009 and 2012. Given it was now in a no lose situation by simply calling in the loan and selling the farms to recover its debt, its practices were at best irresponsible or at worst predatory.

⁹⁶ 25 January 2011, [“The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States”, Financial Crisis Inquiry Commission, Washington, D. C.: Government Printing Office.](#)

⁹⁷ Ibid, page 36.

⁹⁸ 29 March 2016, [REDACTED] “Australia’s ‘Banking Cartel Scandal’ The Rise of White-Collar Crime”, Banking and Finance Consumers Support Association (BFCSA) to the Senate Economics Standing Committee 2016 Inquiry into ‘Penalties for White-Collar Crime’(submission 23), accessed at <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjmuKWhqpvSAhXDwLwKHbbDA8wQFggIMAI&url=http%3A%2F%2Fwww.aph.gov.au%2FDocumentStore.ashx%3Fid%3Dbe84b97d-5d0a-41d4-acd7-d20fc6db345b%26subId%3D411906&usq=AFQjCNHC-5njXkKFW458M6su6AqDj-c9vw>

108. The failings in debt management were not solely of the [REDACTED]'s making. The bank's credit evaluation was defective and it did not exercise a duty of care when providing loans that were not affordable. This was predatory lending, which inevitably led to the foreclosure of customers' loans and the sale of their properties, rendering [REDACTED] and [REDACTED] homeless and penniless, dependent on government welfare.

Moving Forward

109. The [REDACTED]s have asked us to request a determination from the Australian Small Business and Family Enterprise Ombudsman on whether Rabobank professionally and appropriately managed their account as required under their contracts.
110. They believe practices introduced by the ABA, CCMC and Rabobank denied them due process. The systemic issues such as failed self-regulation, deceitful bank codes and a concealed constitution caused them significant damages.
111. It is apparent how important the report in February 2017 by the Australian Small Business and Family Enterprise Ombudsman. It claimed a third of cases investigated by the ASBFE Ombudsman were “*representative of poor bank practices and possible unconscionable conduct on the part of the banks involved.*” The [REDACTED]s believe their case falls into this category.

Should you require further information please contact the writer.

Yours sincerely,

[REDACTED]

[REDACTED]
Director, Bank Victims Pty Ltd

[REDACTED]

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