THE AUSTRALIAN BANKERS'

PROBLEMATIC CODE

Part 3b:

Report to Council of Small Business Organisations of Australia

Dated 5 December 2010

EXECUTIVE SUMMARY

The Fairness of Bank / Customer Relationships in Australia

This report examines, and makes recommendations in respect of, the extent to which customers of Australian banks are assured of fair treatment and full disclosure of facts that are relevant to their transactions.

Before 1981, the activities of Australian Banks, including the manner in which they dealt with their customers, were subject to detailed regulations imposed by the Federal Government. Following the 1981 Campbell Committee report, the extent of this regulation was significantly reduced.

After the stock market crash in 1987, it was feared that deregulation had gone too far. An alternative approach was sought to ensure that bank customers received fair treatment, and the Government assigned responsibility for suitable recommendations to a committee chaired by Stephen Martin.

In its 1991 report the Martin Committee concluded that the banks should be required to establish a formal system of self regulation based on a government approved Code of Banking Practice. It further cited the high cost of resolving disputes, in the courts, between banks and their customers; and stressed the importance of an effective, low cost, complaints resolution procedure.

The first such Code of Practice was established in 1993 but not adopted until 1996. It was substantially revised in 2003, and further modified in 2004. Despite a review in 2005 and further reviews in 2008, the 2004 code is essentially still in force.

A detailed history is included in the main body of this report.

SIGNIFICANT ISSUES

1. The 1993 code was written by the Australian Bankers' Association ('ABA') and failed to include recommendations from the Martin Committee that the banks did not like. The 2003 and 2004 (current) codes are, similarly, ABA documents which do not take into account government principles and suggestions.
2. The key body that implements the codes application and rules is the Code Compliance Monitoring Committee ('the Committee'). However, an undisclosed body exists called the Code Compliance Monitoring Committee Association ('the Association') which has drafted its own constitution that has the effect of limiting the activities of the Committee to the disadvantage of customers.
3. Despite appearances to the contrary, this report suggests that the code is not enforceable at law and does not constitute the elements of the contracts (written agreements) between the banks and their customers.
4. The constitution defines narrowly the circumstances in which the Committee reviews the banks compliance with the code. As a result very few unsatisfied complaints come to the attention of the Committee or are ever investigated.
5. Several reviews by independent or semi-independent persons have recommended change to impose greater transparency and / or increased government regulation.

However, these have not been implemented, and incorporation of original principles of the voluntary self-regulated code or low cost dispute resolution procedures appears to have been seriously considered.

6. Although voluntary codes and self-regulation could work effectively, this report suggests this has not happened since 2003. The introduction of weasel-words and the constitution meant banks can filter complaints, thereby limiting the authority, independence and power of the Committee at their discretion.

RECOMMENDATION

There is significant evidence suggesting that the ABA and hence the banks and bankers, have acted to retain control over the compliance procedures that would require them to deal fairly and openly with all their customers, including all small businesses. There are also a number of specific incidents which would not appear to have been handled in accordance with the spirit of the code as originally recommended by the Martin Committee, or in accordance with banks' customers, and the public interest in general.

This report recommends that the Senate or the Federal Government Treasurer commissions an inquiry into the issues raised herein. This government report would have specific intent of implementing legislation and procedures that would add a truly independent element to the governance and principles involving banks' behaviour in dealings with all their customers. If that review find banks or bankers used the constitution or other practices to their customers' disadvantage, the government report might recommend corrective action.

FOREWARD

THE PROBLEMATIC CODE OF BANKING

The Fairness of Bank / Customer Relationships in Australia

This report has its genesis in submissions sent to Jan McClelland on 11 March 2008 by the Bankers' Code Compliance Monitoring Committee. The Committee members noted in their submissions sent to Ms McClelland, the code reviewer, that their authority set up under clause 34 of the code to monitor bank compliance was undermined by the Bankers' unpublished constitution which imposed qualifications and restrictions on them. The Committee stated its '*firm view is that the constitution is problematic*'.

The Committee expressed views that its powers were inappropriate and inconsistent with its advertised role and did not reflect the unworkable practices. The McClelland Report was published following these submissions and the Committee's previous years' Annual Report that reinforced a commitment to '*investigate and make a determination on any allegation by any person that a bank has breached the code'*. In the same Annual Report, however the Committee stated it had '*yet to receive a complaint from a small business*' without commenting on this abnormality or why they believed this was the case.

A JOURNEY BEGINS - 1981

In 2009, the Council of Small Business Organisation of Australia considered the Committee's remarks that the code was *problematic* as it represents 2.4 million small businesses. These businesses saw deregulation introduced following the 1981 Campbell

Committee and the improved standards of customer protection set out in the Martin Committee's Report in 1991.

Martin cited the inequality of laws and Courts to resolve bank disputers by all but a few of Australia's wealthiest people. Prior to publishing its report, the Committee expressed concerns for small business to redress banking disputes noting: high cost, powerful bank positions, unnecessarily protracted proceedings, inability to continue legal action and failure to ensure adequate discovery. Stephen Martin quoted Former Governor General and High Court Justice Sir Ninian Stephen in 1991 who said: '*the Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court*'. The code was therefore introduced as an alternative to Courts with cheap, speedy, fair and accessible alternative for customers to resolve complaints justly.

Form the code's inception it was evident banks only conceded to the legislators' that they publish best practices, making it clear the code was only capable of being used as a shield, not a sword. In a Channel 9 interview on 20 June 1993, the Australian Banker's Association's Chair, Don Argus, said the government's code was complex estimating the cost of implementation to be $300 million. He added however: '*if civil penalties were attached then whoever is doing business is going to have to cover themselves for the potential of very large claims on civil penalties*'.

FIRST SIGNS: BANKERS '*HI-JACK*' CODE

This report looks at the Richard Viney review which provided the first sign of Bankers imposing lopsided principles. In his 2001 report, Viney describes '*banking service*' to mean '*any service*' provided by banks. Contrary to Viney's recommendations, the 2003

code re-defined '*banking service*' as a '*financial service*' or product. This is later used by banks to limit dispute resolution duties in the code to investigating complaints in relation to a '*financial service or product*'; the role of the Banking and Financial Services Ombudsman's ***capped*** external dispute service. In clause 40, it states '*dispute means a complaint in relation to a banking service*' inviting customers to believe a '*dispute*' has a limited boundary. A '*complaint*' on the other hand embraces all code clauses.

This sounds obscure but shows how bankers intended to disregard the 1991 legislators that intended banks publish a code that set '*standards of good banking practice for subscribing banks to follow*'. The redrafted '*dispute*' definition meant banks intended to only investigate a very few of the 39 clauses and 250 code sub-clauses in the code. They did not, for instance, intend to comply with clause 35.7 and use the '*dispute resolution process to investigate all complaints*'. Nor did they intend complying with clause 2.2 to '*act fairly and reasonably towards their customers in a consistent and ethical manner*' because, like most other clauses, ethics is not a '*financial service or product'*.

SCARRED CODE: BANKERS 2004 CONSTITUTION

The 2003 wriggle-words didn't go far enough with the pending appointment of the Code Compliance Monitoring Committee in 2004. The modified 2004 code was varied; only very slightly however so the constitution could be used to impose restrictions on the newly appointed Committee. In one step, Bankers' overturned the Committee's powers, independence and authority and highlighted a less important need for banking ethics.

This report suggests that from 20 February 2004, while Bankers told customers they were bound by the code when signing contracts, it was not true. Form that date, all small

businesses signing a Facility Offer and guarantee requiring lawyers to confirm they read and understood the terms had no idea their Banker failed to disclose the existence of the different terms set out in the unpublished constitution. A Facility Offer stating 'relevant terms of the ***code of banking practice*** apply to the agreement when signing this Facility Offer' were either misleading or untrue and the tax-payer cost of the Martin Committee in 1991, and the legislators' time implementing it's principles, were nullified by predatory and potentially dishonest Bankers from February 2004.

WHISTLEBLOWERS: PEOPLE 'IN-THE-KNOW'

This reports sets out how Jan McClelland was commissioned to review the modified 2004 code as required in clause 5. On 11 March 2008, the Committee, in their role as monitors, acted as whistleblowers. They noted inconsistencies between the Association's unpublished constitution and their code duties. Also in 2008, Viney was appointed by the Committee to review its activities as set out in clause 34. Despite reviewers having access to the Committee's submissions, it seems neither reviewer transparently investigated and provided an explanation for the monitoring committee's outburst. In December 2008, the Viney and McClelland reports were published. The Committee members who had set out concerns earlier resigned prior to completing their terms of office and new Committee members were appointed.

Throughout this period, subscribing bank CEO's and the banks continued to administer and fund the Australian Bankers' Association, and the ABA continued to publish PR media statements promoting code's high-standards. An audit of the bankers' media goes beyond the purpose of this report. There will be many instances post February 2004 when

the Bankers' used media statements to perpetuate myths such as the code is a contract; it protects individuals and small businesses; the Committee is independent; subscribing banks must comply with high-standards and so on. The constitution, drafted almost seven years ago, and known too few other than banks and the FOS, suggests Don Argus' statements in 1993 were reflective of a banking culture and, in hindsight, prophetic.

DO LEGISLATORS RE-INVENT 'MARTIN' PRINCIPLES

This report suggests there is a need for legislation principles to be reviewed so 'fit and proper' governance principles are applied to self-regulated voluntary codes to ensure they are properly administered an enforced. In banking, this affects 22.49 million Australians and 2.4 million small businesses. By doing so, the modified code (or contract) could not be weakened by a dual-contract that meant Committee members can not '*investigate and make a determination on any allegation by any person that a bank has breached the code'* in clause 34(b)(ii) of the code.

In 1991, Martin recommended banks appoint independent monitors to ensure complaints handling is a '*cheap, speedy, fair and accessible alternative to traditional Courts'.* The principles were partially disbanded by Bankers' in 2003 and totally undermined from 20 February 2004 with the constitution and dual-contract. It is not clear whether the banks' ever intended the Committee be independent or the code a contract. If they did, then the unpublished constitution suggests Bankers acted in bad-faith if they invited customers to sign unfair-contracts. If they did not, then bank administered and funded PR promoting the codes high-principles were untruthful and false.

OPTIONS GOING FORWARD

This report should allow the Council of Small Business, the State Fair-Trading bodies and certain stakeholder parties to consider options. If the Martin Committee's principles are retained, then the defects should be referred to a Senate Inquiry or the Treasury for an independent review to make good shortcomings imposed by the 20 February 2004 constitution.

The further review could determine whether bank parties and /or bankers:

1. Misled the public by publishing, adopting and promoting principles in the 2004 code that were potentially untruthful and misleading;
2. Withdrew the Committee's powers to investigate and report on banks duties to have effective internal dispute resolution procedures;
3. Appointed the Committee without less powers that the code provided to investigate 'any' complaint by 'any' person regarding code compliance;
4. Undermined the Committee's independence and transparency and fairness in carrying out its code duties and therefore misled bank customers;
5. Allowed the banks' Association to act as a 'cartel-like' body to vary code principles and withdraw warranty-like customer protection; and
6. Breached the 'fit and proper' duties prior to and following the Code reviewer being sent the Committee's 11 March 2008 submissions.

This report might assist by being a catalyst for legislators to revisit the Martin Committee's principles and consider the Bankers' motives, including whether they sought to obtain financial advantage or by causing customers' disadvantage by requiring them to use the Courts. The report sets out the need and importance of the code being an

effective contract between banks and customers because of its ability to resolve disputes and code complaints by providing all partier a level playing field.

The report also sets out the significant difference between statements the bank CEO's and the ABA made with regard to the contractual nature of the code. It concludes that '***if***' the code is a contract then the overriding powers of the Association's constitution would seem to be introduced dishonestly and for the purpose of obtaining a financial advantage. On the other hand, if the code '***is not a contract'***, statements by the bank CEO's and the ABA should be investigated as they may be untruthful and misleading.

Generally, this report demonstrates that '***one way or another***', individuals and small business customers of subscribing banks have been misled. Moreover, there seem to have been a considerable number of parties willing to promote themselves as champions of small businesses and the public, yet supported subscribing banks covering up suspected misconduct. The report therefore reports on events since 1991 and aims to encourage feedback by parties that have been associated with the banks, legislators, regulators and customer advocacy groups during this period.

Note: This report and foreword has only been provided to parties on the condition that it sets out views obtained from research identified in the complete text of the full report. The report seeks to invite debate so that the Martin Committee's principles in 1991 are either reintroduced effectively or disbanded.

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AUSTRALIAN BANKERS'

PROBLEMATIC CODE OF PRACTICE[1]

INTRODUCTION

Australian banks and their customers rely on each other. The banks are businesses that must make profits to survive. If the banks did not make money, their shareholders and deposit-holders would, at the least, lose confidence in the financial system or, at worst, suffer real financial loss. On the other hand, it is almost impossible to function in modern society without having a relationship with a bank. A cash economy has been lost to history and we now enjoy benefits of an efficient payments system.

In order for the banking system to evolve, it required the considerable number of stakeholders including the legislators, regulators, banks and their customers to establish principles which will enable them to introduce the necessary changes. Whilst the banks were required to compete globally, customer protection was considered essential by the legislators for the benefit of the public.

With these changes, the relationship between the banks and customers should have been equal, fair and transparent however it could be argued that the customers need banks more than the banks need the customers. In reality, both need each other however banks' have accumulated monopoly powers, tilting the playing field. The code of Banking Practice (the code) which has evolved over the past 20 years was intended to balance the unequal playing but has somehow become the exclusive tool of the banks.

[1] Report on the code of Banking Practice 1993 – 2010: research by A Field B Ec. MBA (AGSM)

The so-called self-regulation of the Australian banking system through the code is the subject of the following critical review. This first part of the review charts the historical development of the code and, in the process, examines the relevant documents that include the Campbell Report of 1981, Martin Report of 1991, the first code published in 1993, Wallis Report of 1997, Viney Report of 2001, the revised 3003 code and the modified 2004 code, the 2005 ANU FEMAG Report, McClelland's ABA Report and the CCMC's Viney Review in 2008.

In carrying out this report, it was necessary to refer to various issues papers and bankers' reports, consider the Financial Ombudsman's role and look behind the issues that faced the architects of the code when they designed it and the motives of the banks that adopted it. As well, this report looks at the duties of the code Compliance Monitoring Committee (the Committee) which navigated these unchartered waters and allowed a problematic code to exist for seven years without addressing its application.

By evaluating the code in light of history, and uncovering possible motives behind its flawed application, this report attempts to bring to light the extent to which Australian Bankers failed to respect well researched meaningful consumer protection and regulation that followed the Martin Committee, and subsequent government reviews, seeking to introduce customer protection essential for fair banking.

PURPOSE OF THIS REPORT

This report looks at the incremental changes which have occurred since the Campbell Committee and legislators sought to increase competition in the banking sector. This report identifies a lack of integrity by parties in the banking sector seeking to obtain

commercial opportunities through self-regulation and the introduction of the banking codes. It will demonstrate the inability of community groups and consumer advocates to protect consumers due to the lack of controls by regulators, the fragmented and under funded consumer bodies, and bankers who seem addicted to increasing power and personal financial rewards.

Part 1: Sets out the steps taken by the legislators to se the transition of regulated banking to improved competition through de-regulated banking.

Part 2: Explains how the banks wrestled control of consumer protection from legislators and regulators by taking advantage of deregulation and their increasing wealth.

Customer protection was treated as secondary by banks once they had convinced the legislators and regulators to allow them to use independent voluntary 'self-regulated' codes which on face-value incorporated meaningful dispute resolution mechanisms. This report documents changes intended to protect customers without less funds than banks to protect themselves using the law and Courts to deal with complaints. It sets out how the promises made by the Bankers were not delivered.

Issues - Flaws and Consequences

It might be said this occurred during the evolution of self-regulation when the Australian Bankers' Association (the ABA), the bankers' lobby group formed in 1947, substituted the Bankers judgment for that of the government's committees, the legislators and other stakeholders. This all seems to have been possible due to the ABA's lack of regard for

government's task force's draft code in 1993 when the Bankers acted to '*word the innovative code*' themselves.[2]

The revised 2003 code also reflected the ABA's preferences to restrict proposed powers of the bankers Committee to naming repeat offenders in it Annual Report.[3] This seemed to be in blatant disregard of the ASIC and consumer group recommendations which had sought to have a totally independent monitoring body with the powers to impose its own genuine sanctions.[4]

(1) Administrator's constitutional restrictions and dual-contracts[5]

As it stands, the revised 2003 and modified 2004 codes are monitored by the code Compliance Monitoring Committee (the Committee) which has the bankers compulsory unpublished constitution imposed on it by the code Compliance Monitoring Committee Association (the Association). This limits the powers, independence and authority of the Committee by 'identifying ways in which the Committee will carry out its role.'[6]

Neither the Association nor its constitution was envisioned by the code[7] with the dual-contracts 'differing' from each other and ineffective disclosure embodied in the code[8]

2. Consequences of the problematic code

[2] R Viney, *Issues Paper* (2001), 1
[3] The 2003 code, Cl. 34
[4] R Viney, *Final Report* (2001), 27 Accessed at <http://reviewbankcode.com/pdfs/FinalReport.pdf> on 08/04/2010.
[5] For the purpose of this report, dual contracts, agreements, arrangements have the same meaning
[6] code Compliance Monitoring Committee, *Submission to the review of the code of Banking Practice 2007-2008*, (11 March 2008), Annexure A
[7] Ibid, Annexure G, 1
[8] The 2003 code, Cl 2.1(b)(i)

The need for affordable remedies to enable customers to resolve disputes against bankers, outside of the Courts[9] remains unsatisfied and with the government regulators failing to enforce the code principles, customers' of subscribing banks have to again risk using the Courts to remedy differences. This is generally difficult due to the high chance that such remedies will be costly and time-consuming; exactly what the proponents of the code and submissions referred to the Martin Committee in 1991 set out to avoid.

The conflicts inherent in the appointment of the Committee bound by the Association's constitution means that the code continues to be unbalanced, favouring the banks with unfair and unjust potency. Customers cannot make the Committee effectively police any allegations of Banker misconduct. As such, the Martin Committee's ambitions that no-one-is-taken-for-a-ride remains an unrealised aspiration.

This report will outline identifiable issues inherent in the code and provide stakeholders, customers and banks with an overview of the serious predicament that needs to be remedied. It will also relevant to identify the possible legal ramifications that can be considered when inconsistencies are investigated and corrected.

A. *FLAWS IN THE CODE*

1. Ambiguous Language

The code has inconsistencies that detract from its efficacy. Clauses 34 and 35 rely on an Internal Dispute Resolution (IDR) mechanism being established by subscribing bank and this report with suggest this is fanciful. Nor only are the IDR principles flawed, this

[9] *A Pocket Full of Change Report* (1991), 395

report suggests subscribing banks believe they only have to utilise their IDR process to only investigate 'financial disputes'[10] and not breaches of the code.

The banks use the code's lack of a clear definition of a complaint to which can be used by Bankers to place a further obstacle in the path of the Committee despite banks stating they have a dispute resolution process *available for all complaints* (emphasis added).[11] This is confounded by the banks stating in the code:

- they will 'continuously work towards improving the standards of practice and service in the banking industry' (clause 2.1(a)[12]; and
- its dispute resolution process is available for all complaints other than those that are resolved to your satisfaction at the time they are drawn to our attention (clause 35.7).

These broad guarantees deviate further in clause 40. This clause defines 'dispute' whilst failing to define a 'complaint'. The definition of dispute is 'a complaint by you in relation to a *banking service* (emphasis added) that has not been immediately resolved when you bring the complaint to our attention'[13]. The definition of '*banking service*' is then limited to being a '*financial service*'[14].

Subscribing banks, when defining and severely limiting the use of dispute in the code, without disclosing the meaning that they can impose on the Committee to investigate '*any complaint*', is a reductive definition that deviates considerably from the position the banks present in clause 2.1(a) above. The restrictions imposed on the Committee by the

[10] Code of Banking Practice Cl. 40 'dispute' means a 'financial dispute'
[11] The 2003 code, Cl 35.7
[12] Ibid, Cl 2.1(a)
[13] Ibid, Cl 40
[14] Ibid

use of wriggle-words in the code allows subscribing banks further opportunity to introduce secondary concerns if the Bankers can breach clause 35.7 and not investigate all complaints. This means the Committee members can be placed in an unenviable position of not being able to act in good faith and investigate complaints which they committed to doing in clause 34(b)(ii).

This paradox provides subscribing banks with the where-with-all to rely on silencing the Committee as Bankers can breach most of the 250 clauses and sub clauses in the 80 provisions in the revised or modified codes. It might be argued by Committee members that they were unaware of limitations imposed on them by the Association's constitution when they accepted privileged positions offered by the code subscribing banks and the BFSO. If the banks' customers cannot rely on the Committee to carry out its duties, then the earlier and present members might be asked why they continued acting as the independent Committee knowing that virtually all code complaints cannot be settled by them and customers will have to rely on them being settled in the Courts.

2. Restricted Investigatory Powers

Clause 34(b)(ii) of the code empowers the Committee to:

> investigate and to make a determination on, **any** allegation from **any** person that [a subscribing bank] breached this code, but the CCMC will not resolve, or make any determination on, any other matter…[15]

[15] The 2003 code, Cl 34(b)(ii).

Under clause 34(f), subscribers are required to comply with all reasonable requests of the Committee in pursuance of its functions. Hence, the Committee would still appear to have a duty to address the dual-contract as these concerns were raised in submissions to McClelland would be well known by the current Committee members. Therefore the Committee would still have an opportunity to duty to deal with dubious principles of the dual-contract in place prior to the new members being appointed in 2009.

The Association's constitution however, in spite of still being able to investigate any complaint as set out n clause 34(b), significantly curtails the Committee's powers to investigate complaints when challenged by the subscribing banks. Paragraph 8.1 of the constitution however still requires the Committee members to pay no attention to any complaint relating to an alleged code breaches if it falls within the wide ranging exception set out in this paragraph.[16]

Subject to paragraph 8.1, the Committee is required to desist from investigating any complaint being considered by the BFSO/FOS until finalised and to accept the findings that the BFSO/FOS makes in respect to the code breaches.[17] Tis can be a further hurdle as the subscribing bank and BFSO/FOS relationship is such that they jointly require the Association's constitution to limit the powers of the committee suggesting they might not be as independently minded as consumer advocates might prefer.

The constitution does, however, vest discretion in the Committee to conduct inquiries of its own motion, so long as the sole purpose of any such inquiry is *monitoring* a

[16] R Viney, *code Compliance Monitoring Committee Review* (2008), 19-20
[17] CCMCA Constitution, Paragraph 8(b)(i)-(ii)

subscribing banks' compliance with the code.[18] Despite processing 4.6 billion bank transactions each year with 2.4 disputes per million[19] (which amounts to thousands of alleged breaches) only about 10 transactions are investigated by the Committee each year and it named one bank since 2004 'in connection with a code breach[20].

The limited number of alleged code breaches might have also interested the ACCC. In its 9 April 2008 submissions sent to the code review, it raised a concern that language used in the code did not fulfill its own requirement under clause 2.1(d) that information be provided in plain language:[21]

> …language used in the code should be simplified. Wherever possible, it should be written in a consumer friendly manner *so that the consumers have a clear understanding of their rights, and the banks' obligations, under the code* (emphasis added).

ACCC may not have considered the 2005 FEMAG report which first mentioned the Association's constitution nor 11 March 2008 Committee submissions to code reviewer, Jan McClelland setting out their concerns. It does, however, state the audience, namely non-legally trained customers, need to understand the wording in the document without having to seek expensive legal advice. It is also evident that neither the code reviewer nor banks removed the wriggle words first introduced in the revised 2003 code.

3. Restricted Power to Sanction

[18] R Viney, *code Compliance Monitoring Committee Review* (2008), 19-20
[19] 22 December 2003, ASIC Report Shows Banks' Dispute Resolution Process working well, http://www.bankers.asn.au/ASIC-Report-Shows-Banks-Dispute-Resolution-Processes-Working-Well/default.aspx, accessed on 6 November 10
[20] CCMC 31 March 2008 Annual Report; Westpac Bank named for not agreeing to remedy code breaches
[21] Submission to the Review of the code of Banking Practice 2007-2008', Recommendation 3

Sections 34(i)-(iv) of the code purports to set out the consequences of a breach where one of the subscribing banks have been guilty of serious or systemic non-compliance; ignored the Committee's request to remedy a breach or failed to do so within a reasonable time or breached an undertaking given to the Committee or has not taken steps to prevent the breach reoccurring.

Paragraph 10.7 of the constitution however prohibits the Committee from making any public statement except in its Annual Report or without prior approval of the Chairs' of the BFSO[22] and ABA.[23] Thus bound, the only sanction that the Committee has seen fit to impose upon member banks was the public naming once of one bank in its 2008 Annual Report (paragraph 11).[24]

As there was only one instance where the Committee found that it was necessary to name a guilty bank during the past five years suggests that the Association's constitution might severely limit the manner in which the Committee can use its power to name a bank following a finding of serious or systemic non-compliance with the code.[25]

4. Lack of independence and transparency

Clause 34(h) of the code also limits the independence of the Committee as it requires banks to empower the Committee to carry out its functions and set operating procedures 'first having regard to the operating procedures of the BFSO and then consulting with

[22] Now the Financial Ombudsman Service (FOS)
[23] R Viney, *code Compliance Monitoring Committee Review* (2008), 11
[24] CCMCA Constitution, Paragraph 11.2.
[25] code Compliance Monitoring Committee, *Submission to the Review of the code of Banking Practice* (2007-2008), Annexure G, 1

the BFSO and the ABA.'[26] Although it is difficult to determine what precisely is meant by the phrase 'first having regard to the operating procedures of the FOS,' the intention appears to be that the Committee not contradict; conflict with or impinge on the jurisdiction of the FOS, nor damage the banks.

The FOS submission sent to code reviewer Jan McClelland on 4 August 2008 may have been self-serving as it remained silent on the bad faith surrounding the Association's constitution and the appointment of the Committee whilst seeking clarification of the relationship between the FOS and Committee. The FOS suggested that:

> [A] single entry point to raise alleged breaches of the code would make the operation of the code more streamlined and easier for customers – that is, customers would be able to lodge their complaint with the FOS and have it referred to the appropriate organisation without having to navigate the complexities of which organisation is more appropriate having regard to the individual circumstances of their matter.[27]

On would be inclined to think that the structural flaws and appointment of Committee members bound by the Association's constitution would be more difficult to undo than differentiating the FOS dispute resolution function from the Committee's compliance monitoring duties. The FOS dispute resolution activities would not exclude them from finding that there have also been code compliance breaches. The FOS having to deal with the limited powers and authority of the Committee might pose a greater concern to the FOS Board members if they have to comply with their governance duties.

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[26] The 2004 code, Cl 34(h)

[27] Financial Ombudsman Service, *Submission to the Review of the code of Banking Practice* (4 August 2008), 3

5. Compromised Review Process

The extent to which the transparency and efficacy of the code being managed by a Committee with limited independence requires answers.[28] Under clause 5 of the code, the ABA is required to commission an independent and transparent review every three years, or sooner, if appropriate, in consultation with banks, consumer organisations, industry associates and relevant regulatory bodies.[29] The fact that the code is a voluntary instrument amplifies the relevance of review procedures, particularly their apparent lack of independence and rigor. ASIC holds that it need not approve a self-regulated voluntary industry codes.

Because the ABA is an industry body made up of representatives from the banking and financial institutions, an issue which the independent reviewers do not seem to have adequately addressed is the banks involvement in any role where there might exist any conflict of interest. The McClelland review seemed to have overlooked principles of independence and transparency as the code is intended to replace the Courts by having unresolved small business complaints investigated by an independent third party. This might lead stakeholders and small business advocates to assert that the independent code Reviewer, Jan McClelland, failed to disclose her Key Issues prior to handing her Final Report to the banks.

Likewise, stakeholders and small business advocates might also assert that McClelland failed to give equal weight to consumer opinions and favoured those provided by the

[28] RG 183.6/ PS183.6: See ASIC, 'Regulatory Guide 183: Approval of financial services sector codes of conduct', Chapter 7 Financial Services and Markets, 3. Accessed at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps183.pdf/$file/ps183.pdf on 08/04/2010.
[29] The 2003 code, Cl 5.

banking industry. Statements made to McClelland by the Committee in their 11 March 2008 submissions and then in reply in their 29 July 2008 submissions, raising issues regarding lack of consumer protection, seemed unresolved in the reviewers Final Report in December 2008. This report seeks to elevate them and have them re-considered.

B. *CONSEQUENCES OF FLAWS*

In discussing potential legal ramifications of dual-contracts and the code-constitution predicament, several concerns are raised without purporting to be an authoritative legal analysis. Instead, it invites consideration from the legislators, regulators, peak council bodies and consumer groups. A summary of considerations requiring investigation are set out below.

1. Statutory Liability

(a) *Misleading and Deceptive Conduct*

Section 52 of the *Trade Practices Act 1974* (Cth) provides that:[30]

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

Section 55A provides that: [31]

[30] *Trade Practices Act 1974* (Cth), s52 Misleading and Deceptive Conduct. Accessed at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps183.pdf/$file/ps183.pdf on 08/04/2010

[31] Ibid, s55A Certain misleading conduct in relation to services. Accessed at http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s55a.html on 08/04/2010

> A corporation shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics and the suitability for their purpose or the quantity of any services.

Given that the:

> (a) Association's constitution informs subscribing banks' its interpretation and implementation of the banking code in relation to such pertinent issues as the Internal Dispute Resolution (IDR) practices, and
>
> (b) code has the status of a schedule of implied terms and conditions within each individual contract entered into between deposit-taking institution and its client;

This report will consider whether, by offering on its terms and conditions, no reference to the Association's constitution, the 12 major deposit-taking institution, acting as one entity, conducted themselves as to constitute misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth).

(b) *Allegations of Cartel Conduct by the Association's Membership*

According to Part IV Division 1 of the *Trade Practices Act 1974* (Cth), provisions of a 'contract, arrangement or understanding' may be taken to be cartel provisions if they directly or indirectly prevent, restrict or limit the capacity, such as the code subscribing banks and the Association's members, to supply services.[32]

Two criteria must be met in order for an agreement or arrangement to constitute a cartel provision:

[32] *Trade Practices Act 1974* (Cth), ss44ZZRD(1),(3)

(1) intention to prevent, restrict or limit the capacity, likely capacity or actual supply of [code monitoring and dispute resolution] services must be present in the agreement, and

(2) subscribing banks and financial institutions must either be competitors or would be competitors but for an agreement to the contrary.

Specifically, this condition is satisfied if 'at least 2 parties to the contract, arrangement or understanding' are, or are likely to be[33] or would be competitors if they had not made an agreement [to have an unpublished constitution] to the contrary[34] and therefore would be in competition with each other in relation to the supply of the relevant services.[35]

As banks providing loans to 22 million customers meant individuals and businesses unwittingly bound themselves by the constitution which limited the services ancillary to the provision of the principal service of providing a warranty (i.e. code monitoring and dispute resolution), this report will raise a concern that Association members by their conduct limited or withdrew crucial services provided to customers and ask if such actions constitutes cartel conduct.

2. Common Law Liability

(a) *Good Faith in Contractual Dealings*

The code is reported by the banks and the banks' ABA as having the status of a schedule of contractual provisions for subscribing banks. Courts will imply those provisions into contracts that the banks enter into with clients and customers. Under common law,

[33] Ibid, s-s44ZZRD(4)(a)
[34] Ibid, (Cth), s-s44ZZRD(4)(b)
[35] Ibid, (Cth), ss44ZZRD(4)(c),(g),(h),(i)

contractual dealings are to be made in good faith.

According to McDougall J in *Tomlin v Ford Credit Australia* [2005] NSWSC 540, citing Sir Anthony Mason[36] at [116], duty of good faith in contract generally requires:

(i) An obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself);

(ii) Compliance with honest standards of conduct; and

(iii) Compliance with standards of conduct that are reasonable having regard to the interests of the parties.

Accepting this general view, this report suggests consideration must be had to whether the banks would be acting in bad faith if they proceeded to:

(a) enter into a contract with a client without disclosing the existence of the Association's constitution and the restrictive effect that Paragraph 8 has on their ability to act in consonance with the code, and therefore their contractual obligations,

(b) then refuse to pursue complaints through their IDR process, which they are obliged to do under the code as a contractually binding document, under the authority of that undisclosed constitution.

3. Regulatory Issues

ASIC was to take into account *Corporations Regulations* when approving IDR schemes under section 912A of the *Corporations Act 2001* (Cth). General obligations on financial

[36] See Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' in *Law Quarterly Review* (2000) 116 (April), 66

services licensees which provide financial services to retail clients include that the licensee is required to have a dispute resolution system in place when complying with subsection 912A(2) of the Act.

The IDR procedure must comply with standards and requirements made or approved by ASIC and in accordance with the relevant regulations made for the purposes of paragraph 912A(2)(a)(i). Regulation 7.6.02(1)(a) in Principal Regulations requires ASIC to take Australian Standard AS ISO 10002-2006 *Customer satisfaction - Guidelines for complaints handling in organisations* into account when considering whether to make or approve standards or requirements relating to internal dispute resolution.

Given the new standard was introduced in 2006 as an amendment to the Corporations Regulations[37] replacing the former AS 4269-1995 (*Complaints Handling)* it would seem that ASIC is under a statutory obligation to at least take into account these standards when giving its seal of approval to a system of IDR

4. Statutory obligation under *APRA Act*

The APS 520 Prudential Standard developed by APRA, made under subsection 11AF(1) of the *Banking Act 1959*, requires all regulated institutions to:[38]

(a) Have and implement a written Fit and Proper Policy that meets the requirements of this Prudential Standard;

(b) Assess fitness and propriety of responsible persons prior to appointment and

[37] Corporations Amendment Regulations 2009 (NO. 10) (SLI NO 386 OF 2009) Explanatory Memorandum Select Legislative Instrument 2009 No. 386. Accessed at http://www.austlii.edu.au/au/legis/cth/num_reg_es/car200910n386o2009471.html on 08/04/2010

[38] All authorised deposit-taking institutions (**ADIs**) and authorised non-operating holding companies (authorised NOHCs) under the Act. See APS 520 at http://www.apra.gov.au/ADI/upload/APS-520.pdf on 23/03/2010.

then re-assessed annually (or as close to annually as practicable);

(c) Take all prudent steps to ensure a person is not appointed to, or not continue to hold, a responsible person position for which they are not fit and proper

(d) Additional requirements must be met for certain auditors; and

(e) Certain information must be provided to APRA regarding responsible persons and the regulated institution's assessment of their fitness and propriety.

According to these standards, this report will consider whether the fact that officers and senior management of regulated institutions are able to hold positions as code regulators if the Association's constitution compromises their ability to be 'fit and proper', and if so, whether these standards comply with the relevant APS 520 APRA criteria.

5. Possible Crimes Act breaches

An independent audit of subscribing banks' IDR complaints might find that some Bankers have not acted honestly or same banks and the Committee's records might show that other parties have promoted code compliance when they have, by deception, acted dishonestly to cause financial disadvantage to their customers. If so, some remedial action might follow an independent audit of the records of the various parties and if there are discrepancies possibly they might extend to internal and external auditors.

C. *SUMMATION*

The banking and finance industry in Australia has progressed following deregulation and following the Martin Committee's report and publishing of the first code in 1996. The improved fortunes in the economy have seen the banking sectors fortunes improve

considerably and with that the community has seen the responsibilities of the regulators transferred from the public sector to the banks themselves. In hindsight, it seems this has been misguided as earlier government's favoured competition at the expense of reduced customer protection. The introduction and prominence of voluntary self-regulated codes opened the door to questionable banking practices and the Bankers' problematic 2004 code.

The body charged with authority for determining the application of the code was the Association of subscribing banks that acted in a '*cartel-like*' way to further the Bankers own best interests. This has been possible due to the less than independent Committee appointed or co-appoint with the help of the BFSO/FOS who were probably privy to the Association's 20 February 2004 constitution.[39] This provided opportunities for the banks to promote standards of practice which are at best problematic or at worst untruthful and intentionally false and misleading.

The Martin Committee stated that the developing of standards of best-practice should not be the sole prerogative of banks as they "*cannot be relied upon to secure, by themselves, improved standards we need; while banks must continue to have a major say… standards…should be reflected in some objective assessment of their adequacy*.[40] This report raises the possibility of there being a conflict of interest between the ABA Board, subscribing banks' Boards, the Association's members, the BFSO/FOS and Committee members. It suggests the conflict has arisen due to lack of transparency and effective scrutiny by independent reviewers funded by banks and their Association members, and

[39] Mallesons Stephen Jacques document headed '*Code Compliance Monitoring Committee Association* 20 February 2004
[40] Ibid

possibly the failure by regulators to use their powers. And while the culture existed, subscribing banks continued to use their PR machine which subscribing the bank CEO's administered and funded to encourage customers to borrow or lend their funds whilst adverting customers were 'bound by their high-standards' the code.[41]

This report suggests that nearly all of the high-principles in the modified code intended protect customers from mischievous bankers and set out in the 250 clauses and sub-clauses in the revised and modified codes were virtually meaningless. It suggests this was not what the Martin Committee or the legislators intended when they considered the introduction of voluntary self regulated code in 2003.

The legislators and regulators would have been briefed on the revised code when it was published by the Australian Bankers' Association on 1 August 2003. John McFarlene, CEO of ANZ was the ABA's Chair[42] and Gail Kelly CEO of St George Bank was Deputy Chair.[43] It is difficult to ascertain who masterminded the revised 2003 and modified 2004 code however it seems the subscribing banks remain overconfident as the codes remain in place and are substantially unchanged.

PART 1

ARCHITECTS OF THE CODE

[41] As attested by the authors in the Statutory Declaration of 3 July 2009.
[42] 17 June 2003, John McFarlene elected ABA's new chairman, http://www.bankers.asn.au/John-McFarlane-Elected-as-Australian-Bankers-Associations-New-Chairman/default.aspx , accessed on 6 November 2010.
[43] 20 February 2002, ABA Council elects new deputy chair – Gail Kelly CEO St George Bank, http://www.bankers.asn.au/Australian-Bankers-Association-Council-Elects-New-Deputy-Chair-–-Gail-Kelly,-Ceo-St-George-Bank/default.aspx, accessed 6 November 2010

Almost every Australian has a relationship with a bank. In today's cashless society, reliant on electronic transfers and debt it's practically impossible to get by without a bank account. Banks' customers, therefore, expect an easy relationship. They see banks' services as essential services.

Banks have been part of Australian society for nearly a century but the Commonwealth Government did not attempt to formally nationalise banks until 1947.[44] Since then, the government has taken the financial sector on a journey when attempting to establish a system that would work best for the banking industry and its customers, the 20 million Australians who have put their trust on the banks.

The first major change in terms of regulation and role of the financial sector in Australian society can be said to have taken place when the Australian Financial System Inquiry, also known as the Campbell Committee was established in 1979. The committee was composed of highly esteemed banking and government officials who were given the task of exploring the existing regulatory regimes and make recommendation about what steps to take forward.

Members of the Campbell Committee (September 1981):

- J. K. Campbell[45]
- A.W. Coates
- K.W. Halkerston

[44] Selected Events in the evolution of the Australian Financial System, www.bankers.asn.au/Default.aspx?ArticleID=619, accessed on 4 April 2001

[45] Sir James Campbell; CEO Hooker 1964, Chair 1974; Director IBM 1969-1980; Chairman Citi National 1971-80 and Dep. Chair Network Finance 1966-83. Edna Carew, *Language of Money 3*, (1996), Allen & Unwin Academic, http://www.anz.com/edna/dictionary.asp?action=content&content=campbell_report

- R.G. McCrossin
- J.S. Mallyon[46]
- F. Argy[47]

When this report came out, Malcolm Fraser[48] was the Prime Minister and John Howard[49] the Treasurer. The recommendations of the report led to government deregulation, the Australian dollar being floated, exchange controls removed and foreign banks allowed entry to the Australian market.

It was a seismic shift in Australian banking and the sector went through rapid expansion during the following decade. With expansion came excesses in certain areas, however, and the House of Representatives commissioned another report to assess whether deregulation had gone too far.

On 27 November 1991, the Standing Committee on Finance and Public Administration tabled its report on the inquiry into banking and deregulation entitled 'A Pocketful of Change'[50]. The recommendations of the report made a case for the adoption of a code of Banking Practice.

Members of the Martin Committee (1991):

[46] Reserve Bank Chief Manager
[47] Former Treasury First Assistant Secretary
[48] Malcolm Fraser was Australia's 22nd Prime Minister. He began his term as caretaker Prime Minister on 11 November 1975 after Governor-General Sir John Kerr dismissed Gough Whitlam's Labor government and remained in office till 11 March 1983. Australia's Prime Ministers Website, URL: http://primeministers.naa.gov.au/primeministers/fraser/index.aspx
[49] John Howard was Australia's 25th Prime Minister served from 11 March 1996 until 3 December 2007. John Howard was then Treasurer from 1977 until the Fraser government lost office in 1983. Australia's Prime Ministers Website URL: http://primeministers.naa.gov.au/primeministers/howard/
[50] Inquiry into banking and deregulation, House of Representatives www.aph.gov.au/house/committee/reports/1991, accessed on 29 December 2009

- Stephen Martin (Chairman)[51]
- J.N. Andrew
- R.A. Braithwaite
- R.I. Charlesworth
- B.W. Courtice
- A.J. Downer
- S.C. Dubois
- R.F. Edwards
- R.P. Elliot
- G. Gear
- R.S. Hall
- L.J. Scott
- A.M. Somlyay.[52]

Paul Keating was then Prime Minister.

At this impasse a government task force was set up to draft a code, with input from the banks, consumer groups and government agencies. The final code, however, was one whose carriage was undertaken by the ABA itself. There were glaring differences between the task force's ignored recommendations and the ABA's adopted code, with the balance of power once again shifting towards the banks.

In 1997, the Wallis Inquiry recommended to the government that rather than relying on the integrity of the bank parties, government should introduce co-regulation through a

[51] Stephen Martin; Chair, MHR, Parliamentary Secretary Foreign Affairs & Trade, Chairman House Standing Committee Finance & Public Administration. Shadow portfolios of Defence, Trade and Tourism Blue Grass Consulting: Stephen Martin - Biography. http://bluegrass.com.au/our-people/stephen-martin/
[52] Ibid, xiii

national regulatory body with comprehensive responsibilities to enforce consumer protection in the banking and finance sector.

Members of the Wallis Committee (1997):

- Stan Wallis (Chairman)[53]
- Bill Beerworth[54]
- Prof. Jeffrey Carmichael[55]
- Ian Harper[56]
- Linda Nicholls[57]

Following the Wallis Inquiry, the government introduced a series of statutes and Acts and established key industry regulators, the ASIC, APRA, and later, the ACCC. Each had responsibilities to enforce certain provisions of the bankers' self-regulated codes of practice and other legally enforceable regimes that were supposed to result in superior consumer protection for the nation's individuals and small business clients.

Between 1997 and 2003, the government, headed by the Liberal Prime Minister John Howard and Treasurer, Peter Costello, together with the Minister for Financial Services and Regulation, Joe Hockey, relied on the support of the following government and non-

[53] Mr Wallis was Managing Director of Amcor Ltd between 1977 and 1996 and is now Deputy Chairman of that company. He is President of the Business Council of Australia and holds a number of other company directorships.
[54] Mr Beerworth is a solicitor and merchant banker and is Principal Partner of the corporate and financial advisory firm, Beerworth & Partners Limited.
[55] Professor Carmichael was formerly Professor of Finance at Bond University, Chairman of the Australian Financial Institutions Commission and Chief Manager of the Markets Group of the Reserve Bank.
[56] Professor Harper directs the Ian Potter Centre for International Finance at the Melbourne Business School within the University of Melbourne. He has held positions with the Australian National University and Reserve Bank.
[57] Mrs Nicholls is a company director and adviser to Coopers & Lybrand. She has held senior positions in banking and funds management in Australia, New Zealand and the United States.

government bodies to create and enforce changes within the banking and finance sector. At the same time, the ABA and its member banks gained even further influence on the government and were actively involved in regulating the banking industry.

A. *GOVERNMENT PARTIES*

1. The Reserve Bank of Australia (RBA)

The primary purpose of the RBA is to conduct national monetary policy and ensure the maintenance of a strong financial system for the country.[58] It was formed in 1959 by virtue of the Reserve Bank Act 1959[59] and since 1996, the RBA Governor and Senior Officers have appeared twice yearly before the House of Representatives Standing Committee on Economics to report on conduct of monetary policy and matters falling within the responsibility of the Reserve Bank.'[60]

The RBA Board was comprised of the following members during 1995 to 2003:

1. Mr Frank Lowy (member since 1995; re-appointed 2000)[61]
2. Ms Jillian Broadbent (since 7 May 1998 and until 2003)[62]
3. Mr Donald McGauchie (appointed March 2001)[63]

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[58] Reserve Bank of Australia, Our Role <http://www.rba.gov.au/about-rba/our-role.html>, accessed on 2 March 2010
[59] Reserve Bank of Australia, A Brief History <http://www.rba.gov.au/about-rba/history/index.html>, accessed on 2 March 2010
[60] Reserve bank of Australia, Accountability <http://www.rba.gov.au/about-rba/accountability.html> at 2 March, 2010
[61] Media Release: "Re-appointment of Mr Frank P Lowy AC to the Board of the Reserve Bank of Australia", 22 June 2000, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[62] Media release: "Reserve Bank Board Appointment", 28 April 1998; Treasury portal press releases; www.ministers.treasury.gov.au, accessed on 27 February 2010
[63] Media Release: "Appointment of Mr Donald McGauchie to the Board of the Reserve Bank of Australia", 22 March 2001, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

4. Mr I J Macfarlene (Chairman in March 2001)
5. Dr S A Grenville
6. Mr E A Evans
7. Mr Hugh Morgan AO (Re-appointed for another 5 years on 29 July 2002)[64]
8. Mr R F E Warburton
9. Prof. Warwick McKibbin (Appointed July 2001)[65], and
10. Dr Ken Henry (Noted as being part of the 2001 board).[66]

2. The Australian Securities and Investments Commission (ASIC)

The Wallis Review's recommendations set out the need for a regulator that would oversee market integrity and consumer protection. As a result, ASIC was established.

Members of the ASIC Board since 1999:

1. Mr David Knott (Chairman from 18 November 2000[67]; Deputy Chairman 1 July 1999[68])
2. Ms Jillian Segal (Member since October 1997, Deputy Chairman from 18 November 2000[69] until 30 June 2002) [70]

[64] Media Release: "Re-appointment of Mr Hugh Morgan to the Board of the Reserve Bank of Australia", Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010
[65] Media Release: "Board of the Reserve Bank of Australia", 26 July 2001, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[66] Ibid
[67] Media Release: "New Chairman and Deputy Chair for the Australian Securities and Investments Commission", 9 November 2000, Media Release: "Australian Competition and Consumer Commission Appointments", 2 November 2000, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[68] Media Release: "New Deputy Chairman of the Australian Securities and investments commission", 1 July 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[69] Ibid
[70] Ms Segal is resigning from this position in order to take up a position as a member of the Dawson Committee; Media Release: "Departure of Ms Jillian Segal as ASIC Deputy Chair", 27 June 2002, Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

3. Mr Alan Cameron
4. Mr Peter Day (Deputy Chairman until January 1999)[71]
5. Prof. Berna Collier (5 November 2001 – 2004)[72]

Prior to 2001, the body was called Australian Corporations and Financial Services Commission[73] with its main function being to 'contribute to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers.'[74] Operations of ASIC commenced on 1 July 1998 following an overhaul of the nation's regulatory framework in order to permit market participants to adapt to challenges of the current and emerging corporate and financial environment.[75]

3. Australian Prudential Regulation Authority (APRA)

APRA was established and currently oversees the prudential regulation of authorised deposit-taking institutions, insurance companies, and superannuation funds. [76] It was created as a statutory authority on 1 July 1998.[77]

Board members (since May 2000):

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[71] Media Release: "ASIC Deputy Chairman to step down next year", 4 December 1998, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010. Mr Day stepped down to assume a role in the private sector

[72] Media Release: "Appointment of Member of the Australian Securities and Investments Commission", 13 September 2001, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010; Prof. Collier chaired the Government's Task Force on Industry Self-regulation and in 2001 was also appointed to the Advisory Board of Axiss Australia; in 2001 ASIC membership returned to three: with David Knott (Chair) and Jillan Segal (Deputy Chair)

[73] Media Release: "Financial System Reforms – Implementation", 17 March 1998; Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

[74] ASIC, What we do <http://www.asic.gov.au/asic/asic.nsf/byheadline/Our+role?openDocument> at 2nd March 2010

[75] Media Release: "Treasurer Herlads New Era for Financial System Regulation, 1 July 1998; Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

[76] APRA, About APRA Home: Who we are, <http://www.apra.gov.au/aboutApra/> at 2nd March 2010

[77] APRA, About APRA Home: Who we are, <http://www.apra.gov.au/aboutApra/> at 2nd March 2010

1. Dr Jeff Carmichael (Chair) (appointed 17 March 2008 [78] confirmed 29 June 1998[79])
2. Mr Graeme Thompson (CEO) (appointed 17 March 2008[80] confirmed 29 June 1998[81])
3. Mr Alan Cameron (representative of ASIC)[82]
4. Mr Ian Macfarlene (representative of the RBA)[83]
5. Dr John Laker (representative of the RBA)[84]
6. Mr Donald Mercer (appointed June 1998 for a 5-year term)[85]
7. Prof. David Knox (appointed June 1998)[86]
8. Ms Marian Micalizzi (appointed on 10 May 2000)[87]
9. Dr Robert Austin (appointed June 1998[88] until before May 2000)
10. Mr Rod Atfield (appointed August 2001 until 2006)[89]

4. The Australian Competition and Consumer Commission (ACCC)

The ACCC was established during the same time with the primary purpose of ensuring that individuals and businesses comply with Commonwealth's competition, fair trading and consumer protection laws.'[90]

ACCC Commissioners (from 1997 to 2002):

1. Prof. Allan Fels (Chairman July 1999 until 30 June 2003)[91]

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[78] Ibid
[79] Media release: "Appointments to the Australian Prudential Regulation Authority"; Treasury portal press releases; www.ministers.treasury.gov.au, accessed on 27 February 2010
[80] Ibid
[81] Ibid
[82] Ibid
[83] Ibid
[84] Ibid
[85] Ibid
[86] Ibid
[87] Five-year term; Media Release: "New Appointment to the Australian Prudential Regulation Authority", 10 May 2000, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[88] Ibid
[89] Media Release: "Appointment to the Australian Prudential Regulation Authority". 30 August 2001, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[90] ACCC, What we do <http://www.accc.gov.au/content/index.phtml/itemId/54137> at 2nd March 2010

2. Mr Allan Asher (Deputy Chairman July 1999)

3. Mr Sitesh Bhojani (from 10 November 1999)[92]

4. Dr Tom Parry (November 2000 until 6 June 2005)[93]

5. Mr Alan Tregilgas (November 2000 until 31 March 2004)[94]

6. Mr Ross Jones (From 4 June 1999 until June 2004)[95]

7. Mr John Martin (From 4 June 1999 until June 2004)[96]

8. Ms Teresa Handicott (From 4 June 1999 until June 2002)[97]

9. Ms Rhonda Smith (From 4 June 1999 until June 2002)[98]

10. Mr Don Watt (From 4 June 1999 until June 2002)[99]

11. Mr Warwick Wilkinson AM (From 4 June 1999 until June 2002)[100]

12. Prof. Doug Williamson (From 4 June 1999 until June 2002)

13. Mr Graham Scott (From 4 June 199 until 1 April 2001)[101]

14. Mr Andrew Reeves (From 4 June 1999 until 31 December 2001)[102]

15. Mr Paul Bexter (from 4 June 1999 until 30 June 1999)

16. Dr David Cousins (from 14 July 1999[103] until 14 June 2002[104])

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[91] Media Release: "Australian Competition and Consumer Commission Appointments", 2 November 2000, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[92] Full time four-year term; Media release: "ACCC Appointments", 16 November 1999, Treasury Ministers Portal Press Releases; www.ministers.treasury.gov.au, accessed on 27 February 2002
[93] Media Release: "Australian Competition and Consumer Commission Appointments", 2 November 2000, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[94] Ibid
[95] For a five-year term; Media Release: "Australian Competition and Consumer Commission Appointments", 4 June 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[96] Ibid
[97] For a three-year term; Media Release: "Australian Competition and Consumer Commission Appointments", 4 June 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[98] Ibid
[99] Ibid
[100] Ibid
[101] For limited terms; Media Release: "Australian Competition and Consumer Commission Appointments", 4 June 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[102] Ibid

17. Ms Yasmin King (From 27 October 1998 until 2001)[105]

18. Ms Jennifer McNeill (22 July 2002 – 2007)[106]

19. Mr Rod Shogren (May 1997 until 29 April 2002)[107]

20. Mr Graeme Samuel (Deputy Chair 10 October 2002[108] however majority vetoed it[109])

21. Mr Ed Willett (nominated 10 October 2002 and later confirmed)[110]

B. *NON-GOVERNMENT REVIEW PARTIES*

1. Financial Sector Advisory Council (FSAC)

The council is a non-statutory body established in March 1998 to provide advice to the Government on policies to facilitate the growth of a strong and competitive financial sector. [111] The Task Force members are highly skilled and experienced business

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[103] Three-year term appointment; Media Release: "Australian Competition and Consumer Commission Appointment", 30 June 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

[104] Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

[105] Media Release: "Australian competition and consumer commission appointment", 27 October 1998, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

[106] Her appointment was for a full-time 5-year term; Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

[107] Ibid

[108] Media Release: "ACCC Appointment Consultation", 10 October 2002, Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

[109] Media Release: "ACCC Appointments", 12 November 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

[110] Media Release: "ACCC Appointment Consultation", 10 October 2002, Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

[111] Government Online Directory, Financial Sector Advisory Council, 7th April 2009 <http://www.directory.gov.au/osearch.php?ou%3DFinancial%20Sector%20Advisory%20Council,ou%3DOther%20Portfolio%20Bodies\,%20Committees\,%20Boards%20and%20Councils,o%3DTreasury,o%3DPortfolios,o%3DCommonwealth%20of%20Australia,c%3DAU&changebase> at 3rd March 2010

professionals drawn from the financial sector.[112] The council continues to report to the Treasurer at present. [113]

FSAC Council Members (as of March 2000):

1. Maurice Newman (Chairman) – Deutsche Bank and ASX (appointed March 1998) (re-appointed 8 March 2000)[114]
2. Paul Batchelor – AMP Limited (appointed November 1999)[115]
3. Terry Budge – Bank of Western Australia (appointed March 1998)
4. Patricia Cross – Suncorp - Metway Limited (appointed March 1998)
5. Les Hosking – Australian Centre for Global Finance (appointed March 1998)
6. Ian MacFarlane – Governor of the RBA (appointed August 1999 until 2002)[116]
7. David Murray – Commonwealth Bank of Australia (appointed August 1999)
8. Richard Sheppard – Macquarie Bank Limited (appointed March 1998)
9. John Trowbridge – Trowbridge Consulting Pty Limited (appointed March 1998)
10. Charles Curran AO – QBE Insurance Group (appointed 22 August 2002)[117]
11. Chris Mackay – UBS Warburg (appointed 22 August 2002)

2. Commonwealth Consumer Affairs Advisory Council (CCAAC)

[112] Media Release: "Financial System Reforms – Implementation", 17 March 1998; Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[113] Australian Government: The Treasury, The Charter of the Financial Sector Advisory Council, 17th June 2004, <http://www.treasury.gov.au/contentitem.asp?NavId=017&ContentID=851> at 3rd March 2010.
[114] Media Release: "Re-appointment of Members to the Financial Advisory Council", 8 March 2000, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010; Re-appointed with Mr Newman were Mr Budge, Mrs Cross, Mr Hosking Mr Sheppard and Mr Trowbridge
[115] Media release: "Appointment to Financial Sector Advisory Council", 30 November 1999, Treasury Ministers Portal Press Releases; www.ministers.treasury.gov.au, accessed on 27 February 2002
[116] Media Release: "Appointments to the Financial Sector Advisory Council", 13 August 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[117] Media Release: "Appointments to Financial Sector Advisory Council", 22 August 2002, Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

The CCAAC was created to provide advice to the Minister for Financial Services and Regulation on consumer needs arising from market transactions and developments and at the same time identify emerging issues affecting consumers. The council continues to exist and currently reports to Senator The Hon Ian Campbell, Parliamentary Secretary to the Treasurer and Manager of Government Business in the Senate, who has portfolio responsibility for consumer affairs. [118]

In establishing the CCAC, Minister for Financial Services and Regulation, Joe Hockey confirmed that [he was] 'confident that… the Council will be a significant consumer voice. It is important for the government to have direct access to independent "grass roots" advice from people involved with consumer issues in an increasingly complex and global marketplace… it is about creating a framework so consumers are empowered and can make more informed choices…'[119]

Members of the CCACC: (20 May 1999)[120]

1. Colin Neave (Chair) – Australian Banking Industry Ombudsman
2. Gregory Bartels
3. Caroline De Mori
4. Janet Grieve
5. Fiona Guthrie
6. Emmanuel Hegarthy
7. Michael Kay

[118] Australian Government Treasury, The Commonwealth Consumer Affairs Advisory Council (CCAAC), <http://www.treasury.gov.au/documents/371/HTML/docshell.asp?URL=index.asp> at 2nd March, 2010
[119] Media Release: "Advisory Body set to boost consumer sovereignty", 20 May 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[120] Ibid

8. May Miler-Dawkins
9. Louise Sylvan – CEO Australian Consumers' Association
10. Adriana Taylor

The Council was created under the following terms of reference:[121]

- Investigate and report to the Minister on consumer issues referred to the body by the Minister
- Advise the Minister on consumer education matters referred to the body by the Minister
- Consider reports and papers referred to the body by the Minister and report on their likely consumer impact;
- Identify emerging issues impacting on consumers and draw those to the attention of the Minister.

3. Self-Regulation Tasks Force

The Minister for Financial Services and Regulation, Joe Hockey responded to the Wallis recommendations by creating a uniform prudential environment, which he believed would lead to greater certainty for financial customers. These changes are part of the Government's fundamental goal of increasing competition and improving efficiency, while preserving integrity, security and fairness of the financial system[122] Hockey strongly advocated for self-regulation in these words:

[121] Ibid
[122] Media Release: "Wallis reforms boos consumers choice", 11 March 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

> I have a great belief in allowing industry to regulate itself. In an increasingly global marketplace, consumers have more choices than ever before and will be exercising their sovereignty by rejecting suppliers that fail to ensure high standards of information disclosure, customer service and product quality… However, where industry is unable to maintain appropriate standards through self-regulatory means, and when there is sever market failure, I will look to prescribe industry codes to make lack of compliance illegal and subject to enforcement under the Trade Practices Act…[123]

In 1999, Joe Hockey created the Self-Regulation Task Force to 'provide feedback to Government, industry and consumers on what constitutes best practice in industry self-regulation'[124]. They aimed to determine ways to reduce regulatory burden on businesses, identify best practice in self-regulation and ultimately improve market outcomes for consumers.[125]

Task Force Members: (August 1999)

1. Berna Collier (Chair) – Clayton Utz [126]
2. Peter Daly – Insurance Enquiries and Complaints Ltd[127]
3. Louise Sylvan – Australian Consumers Association[128]
4. Mark Paterson – ACCI [129]
5. Johanna Plante – Australian Communications Industry Forum[130]

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[123] Media Release: "Hockey launches industry conduct codes", 28 May 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[124] Joe Hockey, Press Release: Hockey Announces Inquiry into Self-regulation, 12 August 1999 http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/1999/038.htm&pageID=003&min=jbh&Year=1999&DocType=0 at 2nd March 2010
[125] Media Release: "Hockey announces inquiry into self regulation", 12 August 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[126] Ibid
[127] Ibid
[128] Ibid
[129] Ibid

6. Ella Keenan – Business and Professional Women of Australia[131]
7. Rob Edwards – Australian Direct Marketing Association[132]
8. Marina Santini Darling – GIO Australia Holdings Ltd[133]
9. Gary Potts – Treasury[134]

The principles of self-regulation found through the Task Force's investigation, as well as the outcome that has led to the banking industry as it stands today, will be further discussed in the succeeding chapters of this report.

4. TPA Review Committee

In 2002, the Treasurer announced the review of the competition provisions of the Trade Practices Act. This committee's task was to determine whether the TPA Act provided sufficient recognition for the globalisation factors and the ability of Australian companies to compete globally.

Members of the Review Committee:

- Sir Daryl Dawson (Chairman)[135].
- Ms Jillian Segal, former Deputy Chair ASIC
- Mr Curt Rendall, representing the small business sector.[136]

C. *BANK PARTIES*

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[130] Ibid
[131] Ibid
[132] Ibid
[133] Ibid
[134] Ibid
[135] Sir Dawson was a former Justice of the High Court from 1982-1997
[136] Media Release: "Review of the Competition Provisions of the Trade Practices Act 1974, 9 May 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

1. Australian Bankers Association (ABA)

From 1997-2002, the ABA Chairman was Frank Cicutto[137]. It's CEO, Jeff Oughton[138] had replaced Tony Aveling on April 2000[139] and shortly after, on 12 May 2000, the officers of the ABA appointed Richard Viney to conduct a review of the first code. [140]

The ABA's Senior Board Members during this period:

1. Mr Frank Cicutto, CEO and Managing Director NAB (1999-2001)[141]
2. Mr David Murray, Managing Director CBA (Chairman elected on 23 May 2001)[142]
3. John McFarlene, Managing Director ANZ (Chairman elected 17 June 2003)[143]
4. Mr Ed O'Neal, Managing Director St George Bank (Deputy Chairman under Cicutto and re-elected under Murray)[144], and,
5. Ms Gail Kelly, CEO and Managing Director St George Bank was Deputy Chair from 20 February 2002[145]

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[137] Frank Cicutto, was appointed Managing Director and CEO of NAB in June 1999. He was first appointed to the Board as an executive director in 1998. He has over 32 years experience in banking and Finance in Australia and internationally. *National Australia Bank Limited Annual Financial Report 2000*

[138] Jeff Oughton was appointed as acting CEO on 17 May 2000, his background includes positions in the National Australia Bank and the Reserve Bank; Media Release: "Jeff Oughton-acting CEO for the Australian Bankers' Association", 17 May 2000, www.bankers.asn.au, accessed on 15 February 2010

[139] Media Release: "Tony Aveling to Retire" , 11 April 2000, ABA Press Releases, http://www.bankers.asn.au/Tony-Aveling-to-Retire/default.aspx

[140] Richard Viney, Issues Paper (2001) 1. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010

[141] Frank Cicutto retired, thus an new Chairperson needed to be elected

[142] Media Release: "David Murray elected as new ABA Chairman", 23 May 2001, www.bankers.asn.au accessed on 15 February 2010

[143] 17 June 2003, John McFarlene elected ABA's new chairman, http://www.bankers.asn.au/John-McFarlane-Elected-as-Australian-Bankers-Associations-New-Chairman/default.aspx , accessed on 6 November 2010.

[144] Ibid; O'Neal was re-elected for his second term as Deputy Chairman on the day of Murray's election, however he passed away before completing his term on 17 September 2001.

[145] Media Release: "Australian Bankers' Association Council elects new deputy chair-Gail Kelly, CEO St George Bank", 20 February 2002, www.bankers.asn.au accessed on 2 March 2010

ABA Chief Executive Officers from 1997-2002:

1. Mr Tony Aveling until 2000
2. Mr Jeff Oughton, acting CEO from April 2000 until January 2001
3. David Bell was appointed 16 January 2001 and commenced 29 January 2001.[146]

2. Banks members of the ABA at 2002:

1. Adelaide Bank
2. AMP Bank
3. Arab Bank Australia
4. ANZ
5. Bank of Cyprus Australia
6. Bank of Western Australia
7. Bank of Queensland
8. Bendigo Bank
9. BNP Paribas
10. Citibank Limited
11. Commonwealth Bank
12. Credit Suisse First Boston
13. HSBC Bank
14. Mizuho Corporate Bank Limited
15. Laiki Bank (Australia)
16. Macquarie Bank Limited
17. National Australia Bank

[146] Media Release: "ABA appoints new CEO", 16 January 2001, www.bankers.asn.au accessed on 19 January 2010

18. NM Rothschild and Sons (Aust) Limited
19. Primary Industry Bank of Australia
20. St George Bank
21. Suncorp-Metway Limited
22. United Overseas Bank Limited
23. Westpac Banking Corporation

D. *REVIEW 1993 CODE: ISSUES AND PROMISES*

The review of the code in 2000 by Richard Viney heard submissions from consumer groups and government bodies, who agreed that there was a lack of evident transparency in the monitoring process, where ASIC stood aloof as the banks got on with their business. It was generally agreed that there needed to be an external and independent body that would monitor the banks.

1. Issues raised against the 1993 code

(a) *Consumer groups*

- The Australian Consumers' Association asked for pre-contract disclosure to all consumers, improved disclosure on fees and charges, clear guidelines for account closure and default, accuracy in advertising and accessible standards for internal dispute resolution.

- The National Farmers' Federation asked that banks who adopt the code should not be excluded from certain sections of it. An end to unilateral imposition of fees and charges was also called for, along with more direct communication of

changes in rates and fees.

▪ The Joint Consumer Organisations requested compliance monitoring, complaints mechanisms, enforcement of sanctions against institutions that breach the code, public reporting of code compliance and the power to remove subscribers from the code.

▪ Consumer and Business Affairs Victoria called for greater transparency and accountability in compliance monitoring and sanctions for subscribers who breach the code.

(b) *Regulators*

▪ ASIC called for external monitoring, provisions on sanctions and publicity of breaches, regular code review and disclosure on fees and charges.

▪ The ACCC supported ASIC's views, and also made the point: "Although the policy underpinning the Trade Practices Act is the promotion of competition, it is not competition at any cost to society."

▪ The Standards Australia Committee noted that if an agency has a visible, accessible and responsive complaints handling system then consumers are less likely to turn to the ombudsman's office. As an "issue of fairness", it said, complaints procedures need to be available to the public "and the public should be given reasons for any decision not to uphold their complaint, and informed about appeal rights and further review".

2. Promises made by the Bank Parties

(a) *The Major Banks*

- In their submissions National Australia Bank and Westpac voiced concerns that the code in some places duplicated what had become legislation in the Privacy Act, Financial Services Reform Bill, Electronic Funds Transfer code Of Conduct and Uniform Consumer Credit code. A revised code, they felt, should not duplicate other regulation.

- The Commonwealth Bank agreed with the need for regular and transparent reviews of the code, involving a wide process of consultation with community, consumer and government bodies.

- National Australia Bank said the code must be independently monitored and reviewed every three years, using a transparent process with submissions from community.

(b) *The Australian Bankers' Association*

- The ABA suggested the definition of a "banking service" be "any financial service provided by a bank to a customer".

- They recommended the establishment of a code compliance monitoring committee, however recommended they only be given a "naming sanction for repeat offenders".

- In a letter to Richard Viney, CEO David Bell said: "Our positions on joint

debtors, subsidiary cards, dispute resolution and electronic communications are fully accepting of the interim recommendation in those respects."

Chapter I

DEREGULATION

The Campbell Committee made an inquiry into the Australian financial system and detailed its findings and recommendations in its Final Report of September 1981.[147] This report is significant for the strong argument the Committee made for various forms of banking regulation.[148] In the report, the Campbell Committee threshed out the advantages of a protective scheme of co-regulation that was 'self-regulation but with some limited government involvement to the extent necessary to ensure that the desired prudential objectives are achieved effectively and equitably.'[149]

A. *DEFINITIONS AND BACKGROUND*

The Campbell Committee explored different regulatory regimes with varying levels of government involvement. Government regulation on one extreme meant a high level of 'formal regulation and supervision' by government.[150] Deregulation on the other extreme meant the absence or a low level of government involvement with little or no formal regulation and supervision. Self-regulation meant leaving the industry alone to police its own ranks. In between, a hybrid of co-regulation took on features of both government regulation and self-regulation.

B. *PURPOSE OF DEREGULATION*

[147] Committee of Inquiry, *Australian Financial System: Final Report of the Committee of Inquiry*. (September 1981)
[148] Ibid, 1
[149] Ibid, 290
[150] Ibid, xxvii

In its report, the Campbell Committee proceeded on the premise that 'the most efficient way to organise economic activity is through a competitive market system which is subject to a minimum of regulation and government intervention.'[151] In the spirit of deregulation, the Campbell Committee went as far as making a case for the removal of the then existing prohibition on the entry of foreign banks into Australia.[152] It did so upon the firm belief that 'adequate and vigorous competition is an essential requirement for the efficient operation of financial markets.'[153]

C. *SELF-REGULATE, CO-REGULATE, PUBLIC CONFIDENCE*

The Campbell Committee received submissions that stressed the adverse impact of regulation for efficient financial intermediation.[154] The Rae Report of 1974 had outlined the need for regulators to have regard for efficiency as well as investor protection. The concern was that excessive attention to investor protection might impose costs on companies, discouraging recourse by them to the market. The restriction of the options available to investors might then impair the efficiency of the market.[155]

According to the Campbell Committee, in developing and revising investor protection arrangements, it was important for governments to recognise efficiency and cost considerations.[156] The Campbell Committee acknowledged the benefit of the greater flexibility that came with self-regulation, but it was conscious of the possible conflict between the interests of the self-regulating body and those of the community in general.

[151]Ibid, 1
[152]Ibid, 439
[153]Ibid, 436
[154]Ibid, para 18.22
[155]Ibid, 287
[156]Ibid

The Committee thought such a conflict could be avoided in part by broadening the membership of the self-regulating body to include representatives of affected groups.[157]

The Campbell Committee went on to identify the shortcomings of self-regulation and took into account the relevant findings by the Rae Committee in 1974 and the Wilson Committee of the United Kingdom. The shortcomings were:

- the lack of investigatory powers, appropriate sanctions or authority to enforce rules means that the success of self-regulation depends heavily on the voluntary acceptance of the power of the self-regulating authority;
- a possibility of self-serving, anti-competitive regulation or non-enforcement rules;
- activities and organisations tend to develop outside the jurisdictional power of the self-regulatory body; and
- increasing complexity of financial markets may be less amenable to informal, non-statutory methods of regulation, particularly by part-time committees.[158]

On account of the shortcomings of self-regulation, the Campbell Committee expressed its preference for co-regulation[159] and more direct government participation in the regulatory process. Among the signals of the shift were the enactment of the Securities Industry Acts and increased regulation of takeovers and other market practices, where the industry

[157]Ibid, 290
[158] Ibid, 365-366
[159]Ibid

became responsible for ensuring the enforcement of requirements set under legislation or by the industry itself.[160]

[160]Ibid, 366

Chapter II

A POCKET FULL OF CHANGE

Ten years after the Campbell inquiry, the industry landscape of the banking sector had changed considerably with the introduction of new banks in the deregulated environment. The major banks in 1991 were seeking growth by way of mergers and acquisitions in an effort to expand market share. Following the 1987 Stock Market Crash, there were concerns about the competitive banking sector caused by deregulations that followed Campbell.[161] This led the Parliament to commission a new report that would review the success of deregulation within the sector to address the community's discontent and lack of confidence in banks.[162] The Committee's intentions for the Report were,

> to go forward learning from the experiences of the 1980's and building on that experience to ensure that the 1990's and beyond reflect the very valuable knowledge that has been obtained… and ensures that the people of Australia have their particular interests in terms of a secure but strong financial system guaranteed[163]

A. *ASSESSMENT OF RECOMMENDATIONS*

[161] Mr Braithwaite, MP in Hansard, (27 November 1991), 3349 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;advyes;dbgroup;holdingTypid,orderBy custom rank; %2031%2F12%2F1993;querytype=;rec=5;resCount=Default, viewed on 29 January 2010

[162] Mr Martin, MP in in Hansard, 27 November 1991, 3349 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;advyes;dbgroup;holdingTypid,orderBy custom rank; page0;query%22code%20of%20banking%20practice%22%20Date%3A01%2F01%2F1983%20%3E%3E %2031%2F12%2F1993;querytype=;rec=5;resCount=Default viewed on 29 January 2010

[163] Mr Elliott, MP in Hansard, 27 November 1991, 3349 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;advyes;dbgroup;holdingTypid,orderBy custom rank; page0;query%22code%20of%20banking%20practice%22%20Date%3A01%2F01%2F1983%20%3E%3E %2031%2F12%2F1993;querytype=;rec=5;resCount=Default viewed on 29 January 2010

On 28 November 1991, the House of Representatives Standing Committee on Finance and Public Administration (Martin Committee) completed its 'A Pocket Full Of Change: Report on Banking And Deregulation'[164]. The committee's Chairman was Stephen Martin,[165] the Prime Minister was Paul Keating. The report recommended the adoption of a code of Banking Practice.

The recommendations from Martin Committee report reflected the intentions behind the adoption of the code of Banking Practice (the code). However, not all of the these found their way to the final codes adopted by the banks.[166]

1. Fairness the Over Arching Principle

The idea of fairness in banking for consumers struck a chord with the Martin Committee and formed the overarching principles to the recommendations. According to Martin, the introduction of a code of banking practice in Australia was 'a way of remedying many of the unfair practices prevalent in banking.'[167]

Specifically, transparency would be fostered as a 'code would provide a single source of information for a customer to refer to' and 'more significantly any code will include provisions designed to ensure that customers are adequately informed of the full details

[164] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991.
[165] Stephen Martin; Chair, MHR, Parliamentary Secretary Foreign Affairs & Trade, Chairman House Standing Committee Finance & Public Administration. Shadow portfolios of Defence, Trade and Tourism Blue Grass Consulting: Stephen Martin - Biography. http://bluegrass.com.au/our-people/stephen-martin/
[166] The extent to which the 1993 code departs from the Martin Committee's recommendations is the subject of the discussion in the next section relating to the code of Banking Practice of 1993.
[167] Ibid, 354

of the products they are about to use.[168] Also, 'negotiating a code between the banking industry, government and consumer organisations will provide an opportunity to ensure that all its provisions are fair.'[169]

On 27 November 1991, before the Parliament, Martin presented the report with minutes of the proceedings and evidence received by the Martin Committee.[170] Martin explained the importance of fairer banking providing 'the code as an alternative to a raft of legislation.'[171]

A code that would offer 'transparency'[172] and 'better disclosure of the terms and conditions underlying the banking relationship'[173] would foster a fairer relationship between the parties.

In a radio interview two days later, Martin talked about paying attention to the 'ordinary man and woman in the street that wants a basic banking service' and giving 'a report card on whether or not deregulation of Australia's financial services industry is in fact working and whether consumers were benefiting.' In relation to the banks, Martin stated, 'Not for a minute are we suggesting that they shouldn't be making profits, but I think what we are suggesting to them is that, yes, sure, on the way to doing that they've got to

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[168] House of Representatives Standing Committee on Finance and Public Administration, *A pocket full of change: banking and deregulation,* (November 1991), lvi.
[169] Ibid
[170] Hansard, (27 November 1991), 3349 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;advyes;dbgroup;holdingTypid,orderBy custom rank; page0;query%22code%20of%20banking%20practice%22%20Date%3A01%2F01 %2F1983%20%3E%3E%2031%2F12%2F1993;querytype=;rec=5;resCount=Default, viewed on 29 January 2010.
[171] Ibid
[172] Ibid
[173] Ibid

make sure that they look after the ordinary man and woman in the street that wants a basic banking service; and I think they're trying to provide that.'[174]

2. High cost of Litigation / Delaying Tactics - Abuse of Process

There were 'significant power imbalances' between a customer and a bank in these ways:

- 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 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;
- In terms of will and financial resources, there is often little incentive for banks to settle a dispute, even if the bank would be likely to lose any eventual case because banks know they can outlast most customers; 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 favourable precedent.[175]

The Martin Committee expressed concern for individuals and small businesses and gave particular attention to issues related to the 'adequacy of means of redress available to them in cases of dispute with their bank.'[176]

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[174] Stephen Martin, Radio Interview, (29 November 1991) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fradioprm%2F37N00%22 viewed on 29 January 2010.

[175] Ibid, 393-394, para 20.64

The Committee examined the principal remedy of court litigation and its inherent difficulties, such as the cost of litigation, powerful position of the banks in the litigation process, unnecessarily protracted proceedings, inability to continue legal action and failure to ensure adequate discovery or belated discovery.[177]

The Committee recommended that 'the Australian Law Reform Commission examine the powers of the courts to deal with abuse of their processes and consider whether there is a need for legislation in this area to assist the courts to deal with abuse of process'[178] and 'the Senate Committee on Legal and Constitutional Affairs, as part of its inquiry into the cost of justice, investigate the issue of the cost of justice in cases between banks and customers.'[179] Delays in court proceedings were a related concern. The trial and appeal process meant years of waiting. The superior resources that a bank could use to delay a case for years placed great financial strain on the consumer litigant.[180]

The Martin Committee quoted the Former Governor General and Justice of the High Court of Australia, Sir Ninian Stephen,[181] who said:

'[t]he Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to litigate in his own court [emphasis added]. '[182]

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[176] House of Representatives Standing Committee on Finance and Public Administration, *A pocket full of change: banking and deregulation*, (November 1991), 264, para 15.83.
[177] Ibid, 264, para 15.84
[178] Ibid, 266, Recommendation 49
[179] Ibid, Recommendation 50
[180] Ibid, 394, para 20.66
[181] Sir Ninian Stephen was the 20th Governor General (1982-1989) and a Justice of the High Court of Australia (1972-1982)
[182] Ibid, 394, para 20.65

The Martin Committee expressed the 'need for cheap, speedy, fair and accessible alternatives to the traditional court system if customers are to receive justice in their dealings with the banks.'[183]

3. The Codification of Martin Committee's Principles

(a) *Banking code as a Contract, in Plain Language:*

The Martin Committee was drawn to the idea of a code of banking practice enforceable as a contract on account of the retention by the courts of their authority to enforce implied contractual terms.[184] The Committee appreciated the importance of fairer terms for consumers out of fear that 'the contractual terms of the banking relationship raised issues of public policy not effectively dealt with by negotiation between substantially unequal parties.'[185] The Martin Committee cited Lord Scarman[186], who had stated in a related decision of the House of Lords that, 'The business of banking is the business not of the customer, but of the bank.'

In a detailed analysis of banking law and practice, it was recommended that the ALRC be requested to set minimum terms and conditions of the banker-customer relationship, with terms of reference specifying the need: To distribute rights, responsibilities and the risk of loss in the banking relationship with fairness and equity; to take into account the need for a workable and efficient payments system; to encourage product development; to

[183] Ibid, 395, para 20.67
[184] Ibid, 382-383, para 20.9
[185] Ibid
[186] Baron Leslie Scarman OBE; PC (1911–2004); English judge served as a Law Lord until he retired in 1986

encourage fair market competition; to ensure bank customers are aware of their rights and responsibilities; and to ensure that banking contracts are not one-sided.[187]

(b) *Disclosure Requirements*

The Martin Committee's recommendations embodied the principles of disclosure[188] and information as a right of individuals[189] in line with the *Freedom of Information Act 1982* (Cth).[190] The Committee observed how the banks went about disclosing information 'when it suits and denying access when it does not.'[191] When it took evidence in Dubbo, NSW, the Martin Committee saw how a bank had applied double standards as it selectively withheld and disclosed information at its convenience.[192]

The Martin Committee cited the principle of access to information in the *Freedom of Information Act 1982* (Cth) and invoked its object 'to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth'[193] including 'access to personal information as a right.'[194] The Martin Committee took the opportunity to share information on the United Kingdom (UK) Draft code of Banking Conduct that provided, 'through the UK Data Protection Act 1984, for personal information to be made available.'[195]

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[187] para 20.13 at 383 - 384
[188] Ibid, Recommendation 94
[189] Ibid, Recommendation 100
[190] Ibid, lxvi
[191] Ibid, 441, para 21.108
[192] Ibid
[193] Ibid, 441, para 21.110
[194] Ibid
[195] Ibid, 442, para 21.114

It was recommended that a code of banking practice, contractually enforceable by bank's customers and subject to ongoing monitoring by the Trade Practices Commission be developed. To this end, there was a need for a process of consultation between the banking industry, consumer organisations, Commonwealth regulatory agencies and relevant State Government authorities. The key bankers' representative were the ABA which was an advocate for the banking industry and was formed in an effort by the banks to oppose a government proposal to nationalise the banking system.

In 1985, the ABA drafted its constitution to reflect its role as an industry body focused on representation to government, policy issues, industry efficiency, industrial relations and public relations. The consultative process during the Martin review took effect under the auspices of the Trade Practices Commission in which monitoring should have regard to the degree of compliance with the code and to the ongoing appropriateness of the provisions of the code in the light of changing circumstances.[196]

4. The Dispute Resolution

To avoid costs involved in litigation, the report argued the need for the rationalisation of industry-based dispute resolution procedures in the area of consumer financial services.[197] At the same time, the Committee sought the speedy implementation by the banks of effective complaint-handling schemes and the publication of the existence of complaint departments to customers through brochures in branches and annual reports.[198]

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[196] Para 20.51, 76
[197] Ibid, 177, para 11.86
[198] Ibid, 377, para 19.121

A number of comprehensive procedures[199] for dispute resolution were recommended. As part of a more complete dispute resolution process, the Martin Committee observed the banks' movement towards the 'establishment of their own internal complaint-handling divisions, the commencement of the collection of detailed data arising from consumer complaints and the feeding of that data into their long-term planning.'[200]

The ineffectiveness of internal dispute resolution procedures however, became evident with Australian Banking Industry Ombudsman (ABIO) which showed most complainants came directly to them without previously being dealt with internally.[201] The ABIO believed that internal systems were inadequate and/or consumers lacked confidence in them or knowledge about them.[202]

a) *Internal: Learning from Electronic Funds Transfer code*

The Martin Committee suggested the following lessons can be drawn from the experience of developing the EFT code: codes should be developed by a consultative process involving industry, government and consumers; codes should be reviewed regularly, perhaps every two years; codes should be monitored by a particular agency charged with that responsibility; and the terms and conditions of codes should be enforceable as a matter of contract law.[203]

b) *External: The ABIO (the Ombudsman)*

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[199] Ibid, Recommendation 81
[200] Ibid, 396, para 20.80
[201] Ibid, 403-404, para 20.119
[202] Ibid
[203] 20.34, at 387

The Martin Committee acknowledged the special focus on dispute resolution. Despite the development of the ABIO, many submissions expressed the difficulties that consumers and small businesses experienced in seeking to contest a bank's action, decision or calculation.[204]

The Committee stated that 'it could not support the extension of the Banking Ombudsman to cover small business generally.' It further stated that the 'size and complexity of many small business operations would swamp the Ombudsman's Office at the expense of small consumers.' The Committee reported that many disputes arise because customers are unaware of their rights and obligations under banking contracts. The Committee agreed with the Ombudsman's recommendation that 'improving communications between banks and their customers will help to avoid potential disputes.'[205] This also furthered the argument for contracts to be written in 'plain language.'[206]

National Australia Bank, however, stated that the banking practice should be codified on a national basis. It further stated that it should be a self-regulatory code and the Ombudsman 'is probably the one that first comes to mind as a possibility for ensuring adherence to a voluntary code of practice'.[207]

(c) *Need for Independent Mediators*

The Martin committee recommended that an independent mediator (or mediators), acceptable to both the banks and foreign currency borrowers, be appointed to mediate in

[204] Ibid, 393, para 20.63
[205] (20.68) at 395
[206] (20.69) at 395
[207] 20.17, at 384

foreign currency loan cases that remain in dispute. The determinants of the mediator will not be binding on either party. The mediator should operate under the following conditions: Mediation would not be possible where cases have already proceeded through all stages of appeal so that the court processes are recognized. Mediation would also not be possible where out of court settlements have been reached. Mediation can be sought where cases are still in court without final decision, or pending, and any determinations of the mediator will be non-binding on both parties so that both have the appropriate option of pursuing court action.[208] It was also suggested that banks pay proportionally for their usage of the mediator.[209]

d) *Monitoring: Reserve Bank of Australia (the RBA), Trade Practices Commission (TPC) and the Australian Payments System Council (APSC)*

The Martin Committee's considered that the implementation of the code ought to be monitored by an appropriate Commonwealth regulatory authority.[210] It recognised 'the value in having one agency at the Commonwealth level with the primary responsibility in relation to consumer banking issues.'[211] Independence from the banks was an important feature that an agency at Commonwealth level would enjoy which was the same independence that the US Federal Reserve enjoyed.

The Martin Committee examined the US Federal Reserve's responsibilities in regulation and monitoring of consumer financial services in America,[212] but the RBA expressed its

[208] 60.
[209] Ibid 333, para 17.191
[210] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 390, para 20.50.
[211] Ibid, 393, para 20.60
[212] Ibid, 391, para 20.54

wish not to take on a similar role here,[213] explaining that circumstances prevailing in the US, such as the difficulty of achieving consistency across many US States and the large number of financial institutions, did not exist in Australia. It went on to express concern about the possible impact of additional duties on its overall efficiency.[214]

The TPC[215] was the Martin Committee's choice for the monitoring body.[216] Although the TPC did not have channels of communication with the banks to the same degree as the RBA, it was experienced in code development and monitoring, it had contact with the consumer movement and it possessed relevant powers and responsibilities under the *Trade Practices Act 1974*.[217]

The Martin Committee thus recommended that the '[TPC] be given formal responsibility for overseeing consumer banking issues at the Commonwealth level including the monitoring of the recommended code of banking practice.'[218]

The TPC was not, however, asked to monitor compliance with the 1993 code. That job went to the APSC[219], a non-statutory government agency chaired by the RBA.[220] The authority of the APSC under the 1993 code was limited to obtaining information from the RBA based on reports that the banks provided and with this information, the APSC would submit to the Treasurer its own reports on compliance with the code.[221]

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[213] Ibid, 392, para 20.55
[214] Ibid
[215] Add info about the first TPC (members), what the TPC's role is
[216] 390, 20.50
[217] Ibid, 393, para 20.61
[218] Ibid, Recommendation 77
[219] Add info about the APSC
[220] code of Banking Practice (1993), Preamble
[221] Ibid

The 1993 code likewise made it a duty of banks to submit to the APSC reports on the operation of the code and the number, category and manner of handling disputes.[222] Beyond its ability to submit reports to the Treasurer, the APSC could do no more to ensure compliance with the provisions of the 1993 code. There seemed little indication that the 1993 code complied with the pre-condition of the Attorney-General's Department that it be 'very vigorously administered.'[223]

4. Global Banking code Reviews: US, UK, NZ, Israel

The 1991 Martin Committee Report stated that a voluntary code of conduct for banking institutions was required to protect customers in disputes with banks[224]. It was cited that in disputes with banks, 'the vast majority of consumers' were at a disadvantage due to the resources available to major financial institutions[225].

The Committee members investigated foreign banking practices so that they could understand the overseas regulations in place to protect customers in disputes with banks. Members of the Martin Committee travelled to Europe and to the US and Canada to analyse the operations of the respective regulators and codes of banking practice governing financial institutions[226].

The Martin Report also paid attention to the banking systems and customer protection in New Zealand. The Committee found that banking and financial associations in Britain[227]

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[222] Ibid
[223] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 385, para 20.21.
[224] Ibid, 388, para 20.40
[225] Ibid, 394, para 20.65
[226] Ibid, 509-544
[227] Ibid, 387, para 20.36

and New Zealand[228] were in the process of compiling codes of banking practice for their members. The UK code of banking practice was introduced in December 1991[229] while the NZ code came into effect in January 1992.[230]

When the Committee members travelled to the US they found the banking operations were governed by Title 12 of the legal code.[231] These laws and regulations inscribe the existence of truth-in-lending practices and alternative dispute resolution processes that are fair, independent and low-cost[232].

Through its analysis of Israel, the Committee members established that banking operations were regulated through the 1941 Banking Ordinance and the 1981 Banking (Service to Customer) Law 5471[233]. Israeli laws regulating banks included clauses stating that the customer must not 'be misled'[234]. The laws also allowed the Supervision Department to enforce fines and sanctions on misconducting banks which may have been publicly announced through 'a newspaper or in any other way'[235].

In England, the Committee jointly appointed by the Government and the Bank of England to review banking services law and practice (the 'Jack Committee') made two recommendations on banking law and practice. The first was the enactment of a Banking

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[228] Ibid, 388, para 20.37
[229] British Bankers' Association, *Good Banking: code of Practice*, December 1991.
[230] New Zealand Ministry of Consumer Affairs, *code of Banking Practice Discussion Paper*, 1995, http://www.consumeraffairs.govt.nz/policylawresearch/discussionpapers/dp-banking-cop/banking-cop-01.html [Accessed 03 February 2010]
[231] Ibid, 388, para 20.39
[232] Refer to Title 12 – Banks and Banking of the US Legal code, specifically 12 U.S.C. § 1785; 12 U.S.C § 1786; 12 U.S.C § 1787
[233] Ibid, 388, para 20.38
[234] Bank of Israel, *Banking (Service to Customer) Law, 5741-1981*, 1981, p. 150-2, http://www.bankisrael.gov.il/deptdata/pikuah/bank_hakika/eng/150.pdf [Accessed 29 January 2010]
[235] Bank of Israel, *Banking Ordinance, 1941*, 1941, p. 103-29, http://www.bankisrael.gov.il/deptdata/pikuah/bank_hakika/eng/103.pdf [Accessed 29 January 2010]

Services Act to implement 18 proposed changes or clarifications to banking law. The second was that the industry be given a limited period to develop a 'code of best banking practice' to be used by the proposed Ombudsman in determining disputes.

The Jack Committee proposed that the Government issue a formal code with statutory backing if the industry code was not satisfactory in its term, or not fully implemented or observed. It made 26 specific recommendations about improved standards of banking practice that should be dealt with in the code and appended to their report a draft code. However, following the subsequent UK White Paper, these recommendations were reduced to a proposal for a code of banking practice developed by the industry. The draft code developed as a result has been severely criticised.[236]

Similarly, many in New Zealand consider that the draft code prepared by the New Zealand Bankers Association is not adequate. National Australia Bank representatives commented that the New Zealand code did not go far enough but might provide a starting point.[237]

An alternate approach to achieving some of the objects of codes of conduct - clear and fair contract terms - was developed in Israel and was being adopted elsewhere in Europe. This approach was based on legislation, which allows unfair contract terms to be dealt with in the abstract rather than in specific disputes between the banks and customers. All European Community member countries now have such legislation in force or under consideration.

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[236] para 20.36 at 387
[237] para 20.37 at 388

The basic feature of such legislation is a two-tiered mechanism whereby provision is made for consumer interests to be represented by a public or private body in negotiations with suppliers or their organisations were set up to achieve fair and standard contractual terms. In some countries public resources are committed to providing a secretariat function in the negotiations. At the second level is a court or court-like agency with power to order a supplier to cease using particular contract terms. The existence of the second level is considered essential for the effective conduct of negotiations at the first level.[238]

In the United States, the concept of 'truth-in-lending' underpins consumer credit legislation. The intent of the legislation is to achieve a fairer marketplace through full disclosure, so that lending transactions are carried out on a basis of 'truth.' The principle is now being extended in the US to cover borrowing.[239]

5. Overarching Regulation

The Martin Committee noted that the recent decision to extend coverage of sections 52A of the *Trade Practices Act 1974* concerned with unconscionable conduct had been provided to small businesses. This would redress some of the disparity that exists between small business and banks in disputes.[240]

The Committee also sought to address the ambiguity and lack of transparency of traditional banking law and the need for an effective mechanism to replace the court's

[238] para 20.38 at 388
[239] para 20.39 at 388
[240] para 15.85 at 265

role in ensuring standards of fairness in newer products and areas of uncertainty.[241] In relation to the codification of common law, the Martin Committee appreciated how 'banking law continues to play an effective role in mediating the relationship between banker and customer.'[242]

B. *BANKS' IMPLEMENT MARTIN'S RECOMMENDATIONS*

The ABA considered it may be timely to codify important aspects of banking law and practice. If the law was to be codified in the sense of introducing legislation, the ABA expresses the view that Commonwealth legislation administered by a Commonwealth agency would be most appropriate.[243]

The ABA was among those who favoured the codification of the relevant common law while the Banking Ombudsman, Attorney-General's Department, Chairman of the Trade Practices Commission, National Australia Bank, Westpac and Metway Bank were among those who favoured the development of a code of banking practice.[244]

The Attorney-General's Department gave the pre-condition that an effective code of banking practice be 'very vigorously administered.'[245] When the major banks were questioned about the concept of a code of banking practice with industry disclosure principles they were not opposed, but they preferred that it be self-regulatory.[246]

'Self-regulation not appropriate'

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[241] Ibid
[242] Ibid, 383, para 20.12
[243] Para 20.15 at 384
[244] Ibid, 384-385
[245] Ibid, 385, para 20.21
[246] Ibid, 426, para 21.30

The Martin Committee did not believe the banks should be left alone to form their own code. In the words of the Committee, 'Market forces are not of themselves sufficient to ensure that bank services are delivered on fair and equitable terms. It is not appropriate for banks to have exclusive responsibility for setting standards of banking practice.'[247] The Martin Committee went on to cite the Jack Committee, which reviewed the banking services law and practice in England:

> The developing of standards of best banking practice… the sole prerogative of banks… is no longer entirely appropriate: competition… cannot be relied upon to secure, by itself, the improved standards for which we see a need. While banks must continue to have a major say… those standards… should be reflected in some objective assessment of their adequacy.[248]

A code is sketched out

On 26 June 1992, the government endorsed the development of the code of banking practice that the Martin Committee recommended.[249] The government's reasons for its endorsement were the recognition that 'customers believe they are at a disadvantage in dealing with banks because of their relative financial weakness and the size and power of banks'[250] and the recognition that 'There needs to be an acceptable balance of interests, and an appropriate code would help to achieve this.'[251]

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[247] Ibid, 389, para 20.42
[248] Ibid
[249] House of Representatives Standing Committee on Banking, Finance and Public Administration, Review of Certain Recommendations of the Banking Inquiry Report, October 1992, para 5.6.
[250] Ibid, para 5.5
[251] Ibid, para 5.5

CCMCA Consultation initiated

A government task force proceeded to draft the code in consultation with the banks, consumer groups and other relevant organisations over a period of six months.[252] The Treasury and the Trade Practices Commission jointly chaired the task force. Members of the task force included leaders of industry including officials of the RBA, Federal Bureau of Consumer Affairs[253] and the Attorney-General's Department.[254]

The Treasurer was Hon. John Dawkins,[255] the Federal Minister of Consumer Affairs was Jeanette McHugh[256] and Michael Lavarch[257], current Chairman of Financial Ombudsman Service, was Federal Attorney-General.

Highly regarded Allan Fels[258] was Chairman of the Trade Practices Commission and the Governor of the Reserve Bank was Bernard William Fraser[259]

The Martin Report of 1991 was therefore the first serious attempt by a contemporary government to comprehensively review the banking sector and develop standards of

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[252] Ibid, para 5.7
[253] Ibid
[254] See Estimates Committee F, 5 November 1993, Attorney-General's Department, Program 2 – Business and consumer affairs, Subprogram 2.3 – Trade practices and consumer affairs.
[255] John Dawkins BEc; Treasurer, Keating Government December 1991-1993 consulted with World Bank and OECD. "Directors Report: John Dawkins", *Integrated Holdings Limited*, Annual Report 2000 p2 accessed 9 February 2010
[256] Jeannette McHugh MHR 1983-1996; Minister Consumer Affairs 1992- 1996 Evatt Foundation Biography URL: http://evatt.labor.net.au/about_who/mchugh.html. Accessed 9 Feb. 10
[257] Prof. Michael Lavarch; Attorney-General in 1993-1996; Director, Financial Ombudsman Service Executive Dean of Law QUT 2004. Biography, Queensland University of Technology URL: http://www.law.qut.edu.au/staff/mlavarch.jsp accessed 9 February 2010.
[258] Allan Fells LLB PhD; Chairman ACCC 1995-2003; Chair TPC 1991-1995; Prices Surveillance 1989-1992. ANZSOG Biography Allan Fells URL: http://www.anzsog.edu.au/Faculty/?FacultyId=3549 accessed 9 February 2010
[259] Bernard Fraser; Secretary to Treasury 1984-1989; Governor, Reserve Bank Australia 1989-1996. *Treasury Annual Report 2000-2001,* (part 3.5)

practice and customers' protection, fairness and bankers' principles that were also being evaluated by governments and banks in the wider global community.

Incorporation of a code

Following the Martin Report's achievement of producing the most significant changes to the banking industry since its deregulation, the House Standing Committee on Banking, Finance and Public Administration, assessed the progress of banks in implementing the report's recommendations. Their report, "Checking the Changes", was tabled in October 1992 in which it was found that most of the banks' implementation of some recommendations were unsatisfactory.[260]

Among the findings of this 1992 report was the need for banks to develop measures for more effective ways of dealing with disputes involving small business customers than the current reliance on expensive and cumbersome court processes.[261]

While looking into the dispute resolution processes, the Committee accidentally discoved a plan by the board of the dispute resolution scheme to limit the scope of the scheme, putting into question the independence of the scheme. Whilst the committee recognised the fact that the board of the scheme was fully funded by the banks they made the final decision on the terms of reference and funding of the Ombudsman. The Committee

[260] October 1992. House of Representative Standing Committee Banking, Finance & Public Administration "Checking the Changes: Review of Certain Recommendations of the Banking Inquiry Report", Foreword
[261] Ibid, 22

reiterated the significance of the scheme to give banks' customers confidence that there is a mechanism in place if a complaint arises.[262]

Moreover, the Committee continued to support a self-regulatory approach in the dispute resolution process within the banking sector, it warned the banks that if there was a chance that the scheme was being curtailed, or if 'individual banks considered the scheme was one they could opt out of freely without regard to the consequences for their customers", then options other than self-regulation may need to be considered.[263]

The review also noted the Government's response to the Martin Committee's report, which stated:

> "Consumer groups and individual customers frequently complain about shortcomings of banks… [customers] believe they are at a disadvantage because of their relative financial weakness and the size and power of banks. There needs to be an acceptable balance of interests, and an appropriate code would help to achieve this…"[264]

At the same time, the committee received a submission from the Australian Consumers Association (ACA) entitled 'A Thimble Full of Change.' This submission set out how the retail banks ignored the Banking Inquiry Report. The ACA submission criticised the banks for their 'cavalier' attitude when complying with the recommendations of the Martin Report.[265]

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[262] Ibid, 49
[263] Ibid
[264] Ibid, 70 – Government's response to Committee's report dated 26 June 1991
[265] Ibid, 115, The members of the committee who conducted this 1992 review were: Mr R P Elliott, MP (Chairman); Hon, I B C Wilson, MP (Deputy Chairman); Mr J N Andrew, MP; Mr R A Braithwaite, MP; Dr R I Charlesworth, MP; Mr B W Courtice, MP; Mr A J Downer, MP; Mr S C Dubois, MP; Mr R F Edwards; Mr G Gear, MP; Mr R S Hall; MP, Mr S P martin, MP; and Mr L J Scott, MP[265]

This 1992 review by the House Committee saw the proposed code of Banking Practice as being crucial to re-establishing the trust and confidence of consumers, especially after public perception of banks fell to a historic low because of the events that took place in the 1980's. [266] Thus, it was necessary for the banking industry to produce a code that would address the needs of their customers particularly on how the code can protect their rights.

[266] Ibid, 118

Chapter III

IMPROVING RELATIONSHIPS

The first code was introduced in 1993 in response to the House of Representatives Standing Committee on Banking, Finance and Public Administration, October 1992. The report, titled 'A Pocket Full of Change' was, in fact, the detailed and well researched Martin Report in 1993. *It had been an aspiration of the Parliament since 1990 for banks to have a set of high-standards and for them to be monitored 'independently' by the Committee whose duty it is to monitor compliance with the code and to investigate 'any alleged breach of the code'*[267] *by any person* (emphasis added).

The draft report, prepared by the government's taskforce, had come to the attention of the ABA but had initially attracted a negative response. In an interview with Channel 9 on 20 June 1993, Don Argus, Chief Executive of NAB and Head of the Association, had called the draft of the code prepared by the government task force a 'complex document'[268] and estimated the cost of implementation to be approximately $300 million, adding that '*if civil penalties were attached then whoever is doing business is going to have to cover themselves for the potential of very large claims on civil penalties [should the bankers be found to have acted improperly]*'[269] (emphasis added).

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[267] McCracken and Everett, Part 3, C9, 266 [9.010]
[268] Channel 9, Adam Shand, 'Interview Don Argus', Business Sunday, 20-6-93 Transcript Media Monitors ACT Pty Ltd, page 4 <http://parlinfo.aph.gov.au/parlInfo/download/media/tvprog/VY1I6/upload_binary/vy1i61.pdf;fileType=application%2Fpdf#search=%22code%20of%20banking%20practice%22> on 29 January 2010.
[269] Ibid, 5

Mr Argus, however, also expressed some disappointment with the *lack of a better understanding of the principles of commercial and prudential law already in place*[270] (emphasis added). He suggested that the existing law was not comprehensive:

> *if the Australian public believes that we want re-regulation of the banking industry, then there's a formal process to go through, and that's to legislate through parliament* [271] (emphasis added).

In approaching the subject of the 1993 code, this chapter will therefore initially document the jurisdiction and failures of relevant commercial law in providing protection to banking customers at the time the code was created, before considering how its introduction was designed to supplement and support that law, and where it too failed.

A. *PROBLEM: NON-COMPREHENSIVE DUTIES OF BANKERS*

1. *Legal Relationship between Banker and Customer*

Banks and financial institutions enter into relationships with their customers in the myriad of products they offer and the services that they perform. At the heart of these relationships lies a promise. Assuming proper formation and constitution,[272] this relationship will be governed by general principles of contract law, which assumes that all parties are autonomous agents, have equal bargaining power, and therefore retain the capacity to freely bind themselves to legal obligations toward the other.

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[270] Ibid.
[271] Ibid.
[272] Put simply, that there has been an "offer" by one party, an "acceptance" by the other, and that these actions are sufficiently certain to become legally binding. The intention to form legal relations must be present on the part of both parties, 'consideration' must have been exchanged, and vitiating factors such as misrepresentation and unconscionable conduct must be absent. Finally, in many industries statute or industry practice requires the contract to be in a specific form (ie written).

For example, in the case of a deposit, the property (the deposit) would pass from the depositor to the bank and become the property of the bank subject to contractual qualifications as to how the bank may use it, and clear rights as to when the customer may expect to demand back from the bank the initial sum. Where banks act as creditors by providing loans, they are governed by these same contractual principles. Before amendments to the *Banking Act 1959* (Cth) were introduced in 1998,[273] the concept of a bank was largely limited to being a deposit-taking institution where deposit-taking was its primary role. Since then, the concept has been enlarged to accommodate financial institutions other than banks.

2. *Banker's Contractual Duty to a Customer*

A contractual relationship exists between a bank and its customer when the customer agrees to open an account, take a loan or purchase a financial product. A duty of care arises between a bank and its customer where a contract expressly states that the bank will exercise 'reasonable care' in performing its contractual obligations. This duty of care may also arise if it is implied into the contract by the courts, frequently in relation to the performance of professional obligations.[274]

Assuming a contract exists between a bank and its customer, the actual terms of the contract may not be entirely clear. Firstly, while the express terms and conditions of a contract will generally be paramount, they will be subject to relevant statutory obligations. For example, the implied contractual terms contained in the provisions

[273] See Pt II Div 1 ss 7-11
[274] See the discussion in Seddon and Ellinghaus, *Cheshire & Fifoot's Law of Contract* (9th Aus ted, Sydney: LexisNexis Butterworths, 2008) at [10.53].

prohibiting misleading and deceptive conduct and unconscionable conduct in both the *Trade Practices Act 1974* (Cth)[275] and the *Australian Securities and Investments Commissions Act 2001* (Cth)[276] have increasingly been litigated in recent years. In addition, many terms and conditions have been implied into such contracts by courts,[277] with reference to the common law and general legal principle, and on the basis of business efficacy[278] or necessity.[279] The courts will approach such cases with differing presumptions depending on the nature of the transaction.

Such legal obligations (both express and implied) arising within a contractual relationship will not be valid at the time prior to its formation, and will cease to bind the parties where the contract is validly terminated, or when the customer becomes bankrupt or is liquidated.[280] This means that the customer's ability to pursue the banks in court for breach of such provisions is severely limited by the point at which the contract was formed and terminated, and by the terms of the contract itself, which are often numerous and difficult to understand for non-legal practitioners. However, there may be other legal obligations that co-exist or exist regardless of contractual duties.

3. Banker's 'Duty of Care'

A duty of care may arise in tort either contiguously with or irrespective of an existing contractual relationship, such as when the bank adheres to the contractual terms but its

[275] ('TPA'). Pts IVA, V
[276] ('ASIC Act'). Pt 2, Div 2.
[277] Such terms include, for example, the obligation of the bank to replay the initial deposit amount upon request, and to give reasonable notice before ceasing operations with the customer: see *N Joachimson v Swiss Bank Corp* [1921] 3 KB 110, 127 (Atkin J).
[278] See *Joachimson*, 121, 129 relying on *The Moorcock* (1889) 14 PD 64.
[279] See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 104, applying *Liverpool City Council v Irwin* [1977] AC 239
[280] See Ellinger, Lomnicka and Hooley, Modern Banking Law (Oxford: Clarendon Press, 2005), Ch 5.

actions are negligent and cause harm to the client. Banks and financial institutions are therefore likely to come under a duty to exercise 'reasonable care' prior to the formation of a contract.[281] Since the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[282] this has included negligent misstatement of, for example, the financial prospective of a financial product offered by the bank, and may give rise to an action in damages for pure economic loss.

Ultimately, it is up to the courts to make the decision as to whether as a matter of policy, the financier owes a duty of care to the customer. Where the financier is specifically requested to advise, a duty to do so with due care and skill will likely arise,[283] but the less vulnerable the client,[284] and the more tenuous the relationship with financier, the more difficult it will be to establish a duty.[285] A pre-emptive 'disclaimer' of such a duty, particularly if accepted by the recipient, is also regarded by the courts as entirely possible in many circumstances.[286]

If a duty of care is established, the responsibilities incumbent upon the bank in order to fulfil its duty of care will depend upon the circumstances of the case and will be adjusted according to the seriousness of the risk involved. For a complainant without legal assistance, it is usually difficult for him or her to determine what duties are owed to him or her by the bank. Compounding this difficulty for complainants is the fact that, for them to establish a legal claim for breach of duty of care against banks, they must go through

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[281] This is in addition to any fiduciary and statutory duties that are imposed.
[282] [1964] AC 465
[283] See for example, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 475-6.
[284] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515
[285] *Essanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241, 252 (Brennan J), 256-7 (Dawson J)
[286] *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, 570 (Barwick CJ).

an arduous process of obtaining evidentiary documentation from the institutions, which may or may not cooperate, and paying court fees in a drawn out litigation which banks, with their vast resources, can easily handle.

4. Banker's Fiduciary Duty

A fiduciary relationship on the other hand is distinct from a tortuous duty of care, in that one person must in a position of power and authority vis a vis the other. Whether the relationship of financier/client and banker/customer may be recognized as such will depend on the circumstances of the case, particularly where there is "a relation of confidence … inequality of bargaining power … the scope for one party unilaterally to exercise a discretion or power which may affect the rights or interests of another … and a dependency or vulnerability on the part of one party that causes that party to rely on another …".[287]

For example, a fiduciary duty will be more likely to exist the more immediate the relationship (ie the bank was not conducting business with the customer through a string of intermediaries), and the customer did not have independent advice.[288] Where the role of advisor is assumed, there will exist fiduciary duties of care; however, it is likely to be restricted to those issues that the banker was employed to advise on.[289]

5. Statutory Duty Not to Mislead

[287] *Breen v Williams* (1996) 186 CLR 71, 107 (Gaudron and McHugh JJ). See also *Duke Group Ltd (in liq) v Pilmer* (1999) 31 ACSR 213, 353-9
[288] *Commonwealth Bank of Australia Ltd v Smith* (1991) 102 ALR 453, 476.
[289] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 385 (Brennan J)

Financial service providers are subject to a statutory obligation not to engage in conduct that is misleading or deceptive or is likely to be misleading of deceptive. These provisions were contained in the *Trade Practices Act 1974* (Cth) at the time that the 1993 code was created, but were later transferred to the *Australian Securities and Investment Commission Act* (Cth).[290] These obligations are much broader than the obligations that common law (see above) imposes upon bankers and financiers. Interestingly, and unusually, the general law has little role to play in interpreting these statutory protections. Rather they set out a:

> 'norm of conduct' (*Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348) which should not be interpreted according to established principles of liability under the general law and which, since it may be offended by acts both honest and reasonable (*Yorke v Lucas* (1985) 158 CLR 661 at 666), is 'morally neutral'.

These statutory duties will be particularly pressing where no contract has yet been created between the banker and its customer. The statutory remedies available for breach of these provisions[291] also give a wider scope for damages to the consumer than under case law.

B. *RESPONSE: THE CODE OF BANKING PRACTICE*

The code of Banking Practice that was published in 1993 sought to create greater commercial certainty and better business practice by fostering 'good relations between the Banks and their Customers' and 'formalising standards of disclosure and conduct'[292] rather than encouraging a litigious culture by simply creating more legislation. The code

[290] s 12DA
[291] s 12GM.
[292] code of Banking Practice (1993), Preamble

prescribed standards of good practice and service, and imposed obligations for the disclosure of information relevant and useful to customers covered by the code,[293] including individual and small business customers of signatory banks.[294]

The code is also a legally binding document, as it becomes an implied contractual provision in the relationship between the bank and its customer.[295] The implied contractual obligations, should they be breached, give the customer a potential right to claim damages for breach of contract, and often to terminate the contract. However, it should be noted that the code was initially designed as a response to an unworkable legal regime; the code as a contractual provision was not intended to have become the principal tool available to banking customers seeking to assert their rights.

Dependence on this aspect of the code belies a fundamental flaw in its design and implementation. As this chapter demonstrates, it is the code's initial incongruity with the recommendations of the Martin Report, and hence its ineffectivess as a regulatory regime, that has kept it and its subsequent incarnation the 2003 Banking code of Practice unsuitable for the protection of institutional banking clients.

1. Principles of Institutional Integrity

The 1993 code was based on the following principles[296]:

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[293] Ibid, Cl 2.1
[294] At present, 14 banks in Australia are signatories. They include the four major retail banks. See <http://www.codecompliance.org/codes.html>
[295] The code becomes a legally binding contractual provision between the bank and all of its customers upon the banks public adoption of it. See code of Banking Cl 35.1. For a list of signatory banks, see <http://www.codecompliance.org/codes.html>.
[296] Ibid, Principles

(i) Having regard to the paramount requirement of Banks to act in accordance with prudential standards necessary to preserve the stability and integrity of the Australian banking system;

(ii) Consistently with the current law and so as to preserve certainty of contract between a Bank and its Customer; and

(iii) So as to allow for flexibility in products and services and in competitive pricing.

In line with the above principles the 1993 code was intended to[297]:

(i) describe standards of good practice and service;

(ii) promote disclosure of information relevant and useful to Customers;

(iii) require Banks to have procedures for resolution of disputes between Banks and Customers; and

(iv) if the above are achieved, promote informed and effective relationships between Banks and Customers;

Having set out its principles and objectives, the code was divided into three parts[298]:

(i) Part A - Disclosures. This part describes the information which a Bank will provide to a Customer in respect of the Banking Services[299] which the Bank offers to the Customer.

(ii) Part B - Principles of Conduct. This part describes certain principles of conduct which a Bank will follow in dealing with its Customers.

(iii) Part C - Resolution of Disputes. This part requires Banks to have dispute handling procedures.

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[297] Ibid, Objectives
[298] Ibid, Cl 6
[299] As is the case in common law and relevant statute, 'banking service' was defined as: a deposit, loan or other banking facility provided by a Bank to a Customer but does not include a service in relation to a bill of exchange, a variation of a term or condition of a facility or debt that arises as a result of a withdrawal of more than the amount by which an Account is credited without the approval of the Bank. See the Banking code of Practice: Definitions and Application.

Upon public adoption of the code, the institution and its representatives would bind themselves to the obligations imposed in their contractual relationship with their customers.[300] This clause is still in existence today. The code imposed the following terms and conditions in regards disclosure:

> 2.1 A Bank shall provide to a Customer in writing any Terms and Conditions applying to an ongoing Banking Service provided by the Bank to the Customer. Those Terms and Conditions shall be:
>
> (i) distinguishable from marketing or promotional material;
>
> (ii) in English and any other language the Bank considers appropriate;
>
> (iii) consistent with this code; and
>
> (iv) clearly expressed;

and the code requires that all banks abide by the following principles of conduct:

> 7.1 Have readily available any Terms and Conditions of each Banking Service it currently offers to Customers or prospective Customers.
>
> 7.2 Shall disclose the existence of any application fee or charge and whether the fee or charge is refundable if the application is rejected or not pursued.
>
> 7.3 Where a fee or charge is levied by a Bank for the provision of a bank cheque, a travellers cheque, an inter-bank transfer or the like service the Bank shall disclose the fee or charge to a Customer upon request when the service is provided or at any other time.

2. Unstable Foundations to 'revised 2003 code'

[300] Ibid, Cl 1.3

The 1993 code was an 11-page document that did not reflect the Martin Committee's sophisticated 572-page report; not only did the substance of the code fall short of the Martin Committee's recommendations, but the process of the drafting and adoption deviated from what the Committee had found to be fitting.

(a) *Consultation Process*

The Martin Committee deemed it highly inappropriate for banks to have 'exclusive responsibility for setting standards of banking practice.'[301] While a government task force drafted the code in consultation with banks, consumer groups and government agencies,[302] the final draft was 'one whose carriage had been undertaken by ABA itself.'[303] The repercussions of this failure advantaged the banking and financial institutions, rather than protecting the customers that it was intended to operate for.

(b) *Complaints and Dispute Resolution*

Mindful of evidence of variations of the relevant standards among banks and their branches,[304] the Martin Committee recommended the observance of minimum standards for internal dispute-resolution procedures, such as: keeping records of the dispute; a clear point of entry into the use of the mechanism; clear steps that are readily accessible; defined lines of responsibility; speedy and timeliness; the giving of reasons for the decision, and; relevant documentation provided throughout.[305]

[301] Ibid, Martin Report, para 20.42
[302] Ibid, para 5.7
[303] Ibid, R Viney, Issues Paper (2001), 1.
[304]Ibid, 404, para 20.120
[305]Ibid, 405, para 20.123

The Report also recommended an increase in the monetary threshold of the ABIO Scheme.[306] While this Scheme provided a free dispute resolution service that operated on the basis of 'fairness and good banking practice in all the circumstances'[307] rather than exclusively legal criteria, the ABIO limited its own jurisdiction to hear disputes[308] by imposing a low financial benchmark that severely restricted its capacity to resolve disputes between banking and financial institutions and their clients.

The attention that the code gave to dispute resolution however was considerably less than that which the Martin Committee recommended. The code of 1993 reflected neither the Committee's intention to rationalise industry-based resolution schemes, nor its intention to establish comprehensive procedures of dispute resolution. What the 1993 code stipulated was an internal process for resolving disputes,[309] together with an external and impartial process for resolving disputes,[310] as well as the duty of banks to submit information on the number, category and manner of handling of its disputes to the Reserve Bank.[311]

The 1993 code contained no standards for internal dispute resolution other than information regarding the procedures, a promise to respond promptly and information on the internal process of dispute resolution,[312] the reasons for the outcome of the internal

[306]Ibid, Recommendation 79
[307]Ibid 396, para 20.79
[308] For example, they would only process disputes regarding property and financial transactions below $250,000 and will not only process disputes below $280,000.
[309]code of Banking Practice (1993), clause 20.1
[310] Ibid, cl 20.4
[311]Ibid, Preamble
[312] Ibid, cl 20.2

process and possible further action that could be taken by the customer if it failed to resolve the issue:[313]

> 20.2 A Bank shall have available in branches general descriptive information on:
>
> (i) the procedures for handling such a dispute;
>
> (ii) the time within which the dispute will normally be dealt with by the Bank; and
>
> (iii) the fact that the dispute will be dealt with by an officer of the Bank with appropriate powers to resolve the dispute.
>
> 20.3 Where a request for resolution of the dispute is made in writing or the Customer requests a response from the Bank in writing, the Bank shall promptly inform the Customer in writing of the outcome and, if the dispute is not resolved in a manner acceptable to the Customer, of:
>
> (i) the reasons for the outcome; and
>
> (ii) further action the Customer can take, such as the process for resolution of disputes referred to in section 20.4.

Moreover, the 1993 code took a position *against* any increase in the monetary threshold of the ABIO Scheme, and gave preferential treatment to an external and impartial process with a jurisdiction similar to that of the ABIO.[314]

> 20.4 A Bank shall have available for its Customers free of charge an external and impartial process (not being an arbitration), having jurisdiction similar to that which applies to the existing Australian Banking Industry Ombudsman Scheme, for resolution of a dispute that comes within that jurisdiction and is not resolved in a manner acceptable to the Customer by the internal process referred to in section 20.1.

[313] Ibid, cl 20.3
[314] Ibid, cl 20.4

> 20.5 The external and impartial process shall apply the law and this code and also may take into account what is fair to both Customer and the Bank.

Customers who did not desire to expend resources litigating contractual disputes were restricted to appealing to the goodwill or good-practice of the institution against which they had reason for complaint. This was because the code provided that customers of subscribing banks must initially resolve disputes through the bank's own Internal Dispute Resolution (IDR) process.[315] Through this process, banks were able to choose which complaints they can refuse or resolve. At the same time, external and impartial processes provided for by the code upon failure of the IDR mechanism[316] was severely restricted.[317] The duty to monitor compliance with the code at this stage was given to the Australian Payments System Council (APSC).[318]

(c) *Public Disclosure*

Finally, though the 1993 code also embodied the principle of disclosure of terms and conditions.[319] It did not recognise any right to information beyond that. With a view to protecting public access to and awareness of the bank's and financial institutions conduct towards their customers, the Martin Committee recommended ongoing dialogue between the Reserve Bank, the Trade Practices Commission and consumer representatives.[320] But the 1993 code was silent on the matter of an ongoing dialogue and contained a provision

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[315] Ibid, code of Banking Practice (1993), Cl 20.1: A Bank shall have internal process for handling a dispute between the Bank and a Customer and this process will be readily accessible by Customers without charge upon them by the Bank. A dispute arises where a Bank's response to a complaint by a Customer about a Banking Service provided to that Customer is not accepted by that Customer
[316] Ibid, Cl 20.4
[317] Now the Financial Ombudsman Service (FOS)
[318] code of Banking Practice (1993), Preamble
[319] code of Banking Practice (1993), Cll 2.1,2.2
[320] Ibid, Recommendation,102.

only on the review of the code 'at least every three years in accordance with the Objectives and the Principles set out in this Preamble and having regard to the views of interested parties.'[321] This reflected the widely divergent views that consumer representatives and the banks had expressed in regards banking and finance, and the final authoritative role that the ABA had played in its final draft.

The consumer representatives argued that banks, as public institutions, were bound by a social contract through their licenses to operate to perform certain services 'on fair and equitable terms.'[322] The ABA however regarded this approach as inevitably culminating in a 'return to regulation',[323] and asserted that social justice aims should be satisfied through subsidies provided by the government to the vulnerable members of society, groups[324] rather than through the regulation of the banking and finance sector.

C. *THE RESULT: WEAK REGULATORY MODEL*

The provisions of the 1993 code departed significantly from recommendations that the Martin Committee made. Among Martin Committee's recommendations that should have found their way into the 1993 code but did not were:

i. The development of a code of banking practice as a result of a process of consultation;
ii. Consideration for small business;
iii. Monitoring by an appropriate Commonwealth regulatory authority;

[321] code of Banking Practice (1993), Preamble
[322] House of Representatives Standing Committee on Finance and Public Administration, 'A pocket full of change: banking and deregulation', November 1991, 446, para 22.19.
[323] Ibid, para 22.20
[324] Ibid

iv. Adequate dispute resolution and complaint handling;

v. Disclosure and the right to information; and

vi. Ongoing dialogue and review.

Despite these divergences, the 1993 code became fully operative in November 1996[325] following its adoption the then ABA member banks.[326] The House of Representative's Standing Committee on Banking, Finance and Public Administration initiated a review of the Reserve Bank of Australia's 1992-93 Annual Report on August 1994[327] and, in conducting this review, the Committee recognized that the 1993 code of Banking practice was a major step in improving the relationship between banks and customers. However, it also acknowledged that it was too narrow in application.[328]

The Committee recommended the extension of the code on the grounds that, since deregulation of banking sector throughout the 1990s, the range of financial products offered by the banks increased considerably.

Despite the ABA's argument that the legal definition of 'Banking Service' included the financial products identified by the Committee,[329] and therefore that consumers would have the protection of legislative tools,[330] the Committee's comment that 'the code should not be static but rather reflect changes in the banking environment and take into

[325] R Viney, *Final Report* (2001), 17
[326] R Viney, *Issues Paper* (2001), 1
[327] August 1994 Review of the Reserve Bank of Australia's 1992/93 Annual Report <http://www.aph.gov.au/house/committee/reports/1994/1994_PP158.pdf> on 1 February 2010
[328] Ibid, 23
[329] Ibid, 25
[330] For example, the *Uniform Consumer Credit code 1996* (Cth) came into effect at the same time as the code, and this impacted on the code standards and protection by XXX.

account the development of new banking products'[331] was ultimately acknowledged as accurate by the government.

[331] August 1994 Review of the Reserve Bank of Australia's 1992/93 Annual Report, 25.

Chapter IV

BANKS SEIZE CONTROL

Soon after the establishment of the 1993 Banking code and its adoption in 1996, it became clear that the introduction of an enforcement mechanism would be necessary. Even after the extensive recommendations made by the Martin Inquiry, the banking industry suffered from lack of credibility and trust as the media continued to report incidents of banks bending the rules and breaking the law.[332]

As discussed in the previous chapter, the code that was introduced in 1993 was flawed structurally in that it did not provide adequate incentives for banks to implement it as a binding set of practices. The accountability and transparency of the complaint resolution process in the context of the deregulated environment was questionable[333] and it was essentially left to the courts to enforce as a contractual provision, an option the Martin Committee sought to avoid as it was one that most banking clients could not afford.

The recommendations of both the Financial System Inquiry (the 'Wallis Report'), and the House Standing Committee on Industry, Science and Technology's report 'Finding Balance: Towards Fair Trading in Australia' (the 'Towards Fair Trading Report'), were intended to compel the government to promote institutional integrity in the banking sector by introducing a system of co-regulation through the creation of regulatory bodies to enforce the codes of

[332] For example, Four Corners broadcast an investigative report in which the banking sector's self-regulation following on from the Martin Report was branded 'the biggest bastardy': See 'Banks Behaving Badly' (10th March 1997), Bob Allen, Accountant
[333] Ibid

practice, as well as legally binding regimes, and to provide greater consumer protection measures for small business clients of banking and financial institutions.

The Wallis Report's recommendations suggested that strong national prudential and regulatory bodies were needed with comprehensive responsibilities empowering them to enforce consumer protection in the finance sector. The 'Towards Fair Trading' report recognised that the unfair conduct of big business towards small business was a major concern for the efficient functioning of the market. Unfortunately, key concerns of these inquiries were never genuinely addressed and the banking sector was left with a system of self-regulation in which small business clients are forced to turn to the courts when banks fail to adhere to their own rules.

A. *INQUIRIES AND RECOMMENDATIONS*

1. The Wallis Committee Report

The Wallis Report was designed to review the effectiveness of the financial sector reforms that had taken place during the 1990s. Published in April 1997, it contained 115 recommendations on a wide variety of financial system issues. It concluded that *market* regulation of banking and finance should be directed at defined 'sectors' rather than particular institutions,[334] so that a limited number of *government* regulatory institutions were needed to monitor the market regulators themselves.[335]

(a) *The Corporate and Financial Services Commission (CFSC)*

[334] Tyree, A. "Banking Law in Australia". Chapter 1 page 4

[335] For example, control is exercised over a market regulator through the requirement that they hold a license to do so. License holders may regulate a specific financial market, while ASIC supervises the entire process and system.

A major recommendation by the Wallis Committee was the establishment of a national regulatory body, later to become ASIC, that it called the 'Corporate and Financial Services Commission' (CFSC).[336] This institution would provide the Commonwealth regulation of 'corporations, financial market integrity and consumer protection' combining the market integrity, corporations and consumer protection roles of the Australian Securities Commission (ASC), the Insurance and Superannuation Commission (ISC) and the Australian Payments System Council.[337]

The Wallis Committee recommended that this institution should have sole responsibility for administering consumer protection regulation within the finance sector, with relevant provisions from the *Trade Practices Act 1974* (Cth) forming part of its establishing statute[338] and a strong focus on the prevention of fraud.[339]

Simultaneously, the Wallis Committee advised that the CFSC should have:

- appropriate regulatory and investigative powers, including powers to obtain documents and question persons involved in the relevant conduct, and to accept legally enforceable undertakings;
- provision for protection from liability for those who provide investigative assistance;
- power to impose administrative sanctions, such as banning or disqualification orders;
- power to initiate civil actions, to seek punitive court orders such as financial penalties and a range of remedial court orders; and

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[336] This body later became the ASIC.
[337] *Financial System Inquiry Final Report*, March 1997, Recommendation 1
[338] Ibid, Recommendation 3
[339] Id Recommendation 2

- power to initiate, and to refer matters to the Director of Public Prosecutions for criminal prosecution.[340]

(b) *The Australian Prudential Regulation Commission (APRC)*

Another major recommendation by the Wallis Committee was the establishment of the Australian Prudential Regulation Commission (APRC)[341] 'to carry out prudential regulation in the financial system.'[342] The Wallis Committee proposed that the APRC should have the power under legislation to establish and enforce prudential regulations on any licensed or approved financial entity.[343] The Committee recommended that the decisions of the APRC on prudential grounds should not be subject to administrative or other review.[344]

(c) *The Reserve Bank of Australia*

The RBA was in existence at this time. However, the Wallis Committee recommended that responsibility for prudential supervision of the financial system be removed and invested in the contemplated Australian Prudential Supervisory Commission. It further recommended that a Payments Systems Board be established to ensure that payments system policy is in line with public policy aims.[345]

2. Finding Balance: Towards Fair Trading

[340] Ibid, Recommendation 27
[341] This body later become the Australian Prudential Regulation Authority (APRA)
[342] *Financial System Inquiry Final Report* March 1997, Recommendation 31
[343] Ibid, Recommendation 33
[344] Ibid
[345] Now at s10B of the *Reserve Bank Act 1959* (Cth)

Following the Wallis Committee's publication in April 1997, the House Standing Committee on Industry, Science and Technology[346] published its report titled 'Finding Balance: Towards Fair Trading in Australia' in May of the same year. The Committee recognised that unfair conduct by big businesses towards small business was a major concern, that these concerns are justified and that they should be addressed urgently. The report's recommendations were therefore aimed at providing unfairly treated small business with adequate redress.[347]

In the report, several serious business conduct issues specifically related to small business finance focused entirely on the conduct of banking and finance institutions.[348] Amongst these serious conduct issues, a lack of disclosure of loan terms and conditions, and banks obstructive behaviour with regard to dispute resolution stood out.[349] For example, complaints received from small businesses in relation to their dealings with powerful firms shared the following common features:

a. Inadequate disclosure of relevant and important commercial information which the weaker party should be aware of before entering the transaction; and

b. Inadequate and unclear disclosure of important terms of the contract particularly those which are weighed against the weaker party, especially when the terms which can operate against the interests of the weaker party are not brought to the attention of that party or their full import is not spelt out to that party.

While such conduct could potentially be illegal under both legislation and common law, as

[346] Committee part of 38th Parliament, Chair Hon Bruce Reid MP, other members were David Beddall MP, Fran Bailey MP, Bob Baldwin MP, Russel Broadbent MP, Richard Evans MP, John Forrest MP, Teresa Gambaro MP, Harry Jenkins MP, Ricky Johnston MP, Allan Morris MP, Peter Nugent MP, Gavan O'Connor MP and Paul Zammit MP
[347] Hom Bruce Reid MP, Foreword to the Report, May 1997
[348] Ibid, page 138
[349] Finding Balance: Towards Fair Trading in Australia, May 1997, page 137

either unconscionable or misleading and deceptive, it was often difficult to enforce these best standards through such legislative provisions. This is partly because the law is restrictive in its interpretation and application of principles.

3. Banks take advantage of weak party's ability to protect interests

In terms of unconscionable conduct, the mere presence of an inequality is not conclusive of illegal conduct, rather inequality must be such that the weaker party 'suffers from an inability to protect its interests if the stronger party is sufficiently aware of the inability and takes advantage of the weaker party'.[350]

While a court must be satisfied merely on the balance of probabilities (rather than the much higher criminal standard of beyond reasonable doubt), it requires proving a hypothetical alternative future: i.e. that damage would not have occurred had the stronger party not acted in the way that they did. On the other hand, deceptive and misleading conduct would require the victim to prove to the court on the balance of probabilities that the offending party intended or was aware of the falsity and/or misleading nature of the representation that they were making to the other party. Both offences are therefore very difficult to prove in terms of evidentiary availability and litigation may prove extremely costly.

Moreover, the individual, rather than the public, meets the costs whilst the entire public will benefit from the enforcement of such fair trading provisions.

B. *GOVERNMENT RESPONSE*

Treasurer Peter Costello, in a statement made on 2 September 1997 observed that 'the Wallis

[350] Ibid, 159

Inquiry found Australia's financial sector performance to be close to the world average rather than among the world's best.'[351] In response, the government chose to introduce a package of legislation establishing several regulatory bodies in an attempt to enforce new industry codes and monitor compliance with legislative obligations:[352]

> The package of [B]ills before us gives effect to major changes to the structures of the regulatory bodies themselves by establishing two mega-regulators, the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, lovingly known as APRA and ASIC. The [G]overnment, therefore, is changing the regulation of financial services markets – for example, collective investments, superannuation, company law, Corporations Law, payments systems, financial sector shareholdings and banking – at the same time as it is changing the regulatory bodies themselves.

In doing this, the key recommendations of the Wallis Committee and the Fair Trading Report were not reflected in the regulatory scheme that was established. Rather, they set in motion the creation of regulatory authorities with little to no real powers over the conduct of big business in the banking sector. By seeking to keep separate the regulation of consumer protection and that of prudential supervision, the Wallis Report's comprehensive recommendations could not be contemplated. Rather, the ASIC, APRA and the RBA were envisaged together to uphold a scheme of co-regulation of the financial sector, where ASIC and APRA would monitor and enforced compliance with the code as well as various consumer protection and prudential law. Due to fundamental flaws with their establishing Acts, and a lack of resources and political

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[351] Hon. Peter Costello, M.P., "Reform of the Australian Financial System", Treasurers Press Release No. 102 (2 Sept 1997): http://fsi.treasury.gov.au/content/PublicInformation/PressReleases/PR020997.asp

[352] Labour MP Kelvin Thomas, Commonwealth Hansard, *Parliamentary Debates*, House of Representatives, 8 April 1998, 2854 - collection of Bills incl Australian Prudential Regulation Authority Bill 1998, the Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998 and the Superannuation Supervisory Levy Imposition Bill 1998.

will, they have been left, however, with no real enforcement powers within their own jurisdiction.

1. Financial Sector Reform Act 1998 (Cth)

The *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), in part, carried out the recommendations of the Wallis Committee when it created the government regulator APRA and expanded the responsibilities of anther government regulator, the Australian Securities Commission - renaming it the Australian Securities and Investment Commission.

ASIC was designed to oversee the enforcement of the system of market regulators,[353] including the monitoring of compliance with the code of Banking Practice, which had been removed from the jurisdiction of the Australian Payments System Council (APSC):[354]

> The Commission has the function of monitoring and promoting market integrity and consumer protection in relation to the payments system by: Promoting the adoption of approved industry standards and codes of practice; the protection of consumer interests, community awareness of payments system issues; sound customer-banker relationships, including through: monitoring the operation of industry standards and codes of practice; and compliance with such standards and codes.

With this provision likewise forming part of the *Australian Securities and Investments Commission Act 2001* (Cth), ASIC continues to be the monitoring body duty bound to ensure compliance with the code.

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[353] *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), Section 1
[354] *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), Section 10

2. APRA ACT 1998 and Amendment Act 2003

(a) *General Powers*

APRA's responsibilities relate to the prudential supervisions of life insurance businesses. The APRA Act sets out the framework for APRA's operation, as well as establishing its powers and functions. The Act established APRA's three main purposes to be: (i) to regulate bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards; (ii) to administer the financial claims schemes provided for in the *Banking Act 1959* (Cth) and the *Insurance Act 1973* (Cth), and; (iii) to develop the administrative practices and procedures to be applied in performing the regulatory role and administration.[355]

In the Second Reading Speech on the Australian Prudential Regulation Authority Bill 1998,[356] Treasurer Peter Costello announced that the intention of the legislation was to 'put in place a structure designed to improve the efficiency and competitiveness of the Australian financial system while preserving its integrity, security and fairness.'[357] The government sought to replace the various agencies charged with the prudential supervision of the financial system within a single regulatory authority. Within APRA's jurisdiction would be:

- Banks and other deposit-taking institutions;
- Life and general insurance companies, and;
- Superannuation funds and retirement income accounts.

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[355] *Australian Prudential Regulation Authority Act 1998* (Cth), s 8(1)
[356] ('APRA Bill')
[357] The Hon. Peter Costello, M.P., "Second Reading Speech: on the Australian Prudential Regulation Authority Bill 1998", 1.

As such, APRA was intended to be an independent regulator like the Reserve Bank, but subject to a policy determination power of the Treasurer in the event of an irreconcilable disagreement with the Government of the day.[358] It was emphasised in the Parliament that, by having a single regulator 'at arm's length', in the same way as the Reserve Bank operates autonomously of the government's decision-making in relation to its jurisdiction, consumers would be provided with stability and independent supervision.[359] It is clear, however, that the final APRA Act did not protect the level of independence envisaged.

(b) *Institutional Weaknesses*

(i) Lack of an Independent Board

In the Bill, it was suggested that APRA should be accountable through an independent board that would operate under a charter to ensure the prudential regulation is balanced with considerations of efficiency, contestability and industry competition.[360] The Bill envisaged three main functions for the board to:

(i) determine APRA policies (including goals, priorities, strategies and administrative policies);

(ii) ensure APRA performs its functions properly, efficiently and effectively, and

(iii) ensure APRA's operations are conducted having regard to its purposes.[361] The Board was to comprise nine members: a Chair, the CEO, two members each of

[358] Ibid, 6
[359] Commonwealth, *Second Reading Speech*, House of Representatives, 26 March 1998, 1650 (Peter Costello) See also Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 1998, 2771 (Stephen Martin).
[360]Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 1998, 5156 (Chris Miles)
[361] Australian Prudential Regulatory Authority Bill 1998 (Cth) ('APRA Bill') s 17

> whom is either the Governor or Deputy Governor of the Reserve Bank or an officer of the Reserve Bank Service, one member who is also an ASIC member or an ASIC staff member, and four other members.[362]

While this Board briefly functioned, after the establishment of APRA in 1998, the HIH collapse and the subsequent Royal Commission prompted a revision of its structure through an amendment Act in 2003.[363]

The current APRA Act provides for a significantly smaller and potentially less independent team that is more open to manipulation by a confluence of private and public interests. The APRA members consist of between three and five people, appointed by the Governor-General by written instrument. At least three of the APRA members must be full-time, members and each of the other APRA members (if any) may be appointed as a full-time or part-time member.[364]

The appointment of the APRA Chair and Deputy Chair, from amongst the members, arrives directly from the Governor-General, whom, by constitutional convention, acts upon the recommendation by the Prime Minister of the day. In essence therefore, restriction on the number of members narrows the potential for representation from a variety of key stakeholder groups, and the hierarchy within APRA may be heavily influenced by the government of the day. While the limit of a five-year tenure carried over from the APRA Bill may be regarded as positive, it reinforces the opportunity for the government of the day to gain influence, as it has the potential to roughly correlate to electoral terms.

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[362] Ibid, s19
[363] *Australian Prudential Regulation Authority Amendment Act 2003* (Cth)
[364] *Australian Prudential Regulation Authority Act 1998* (Cth),('APRA Act') s 16.

To guarantee the independence of the Board from the private sector, the APRA Bill provided that a person cannot be appointed as a Board member if that person is a director, officer or employee of a body regulated by APRA.[365] The Act retains this provision in relation to APRA members.[366] As in the Bill, the appointment of a member is immediately terminated if the member becomes a director, officer or employee of a body regulated by APRA.

In the Act however, directors, officers or employees of bodies operating in the financial sector other than those regulated by APRA may be appointed if the Minister considers that their performance will not be compromised.[367] While members are required to disclose any interests that could conflict with the proper performance of the functions of their office,[368] it will not prevent the member from being involved in the processing of that issue once they have obtained the consent of the other APRA members.[369]

(ii) Subordinate to Government Interests

In the APRA Act the relationship between APRA and the Minister for Financial Services gives the government far greater leverage over its internal policy than was contemplated by the Bill. In the Act, the Minister is empowered to give APRA a written direction regarding policies it should pursue or priorities it should follow.[370] While the Chair is given the opportunity to discuss with the Minister the need for the proposed direction, this is a far more interventionist approach than the initially envisaged indirect government consultation mechanism put forward in the APRA Bill. It also puts in place a less stringent reporting process: the Minister must

[365] Ibid, s 20
[366] Ibid, s17(2)
[367] Ibid, s 17(3)
[368] Ibid, s 48A
[369] Ibid, s 48B(1)
[370] Ibid, Section 12.

publish the relevant direction in the *Gazette* within 21 days after the direction is given and be laid before Parliament within 15 sitting days of the House after the publication. Failure to do so however does not affect the direction's validity[371] and it may therefore be binding on the institution under administrative law without the public having been given an opportunity to scrutinize its content through their elected representatives.

3. ASIC ACTS 1998 AND 2001

(a) *General Powers*

ASIC's responsibilities relate to market integrity and consumer protection. It was established upon recommendation of the Wallis Committee under the guiding principles of competition and consistent regulatory treatment within the industry.[372] It has, as its intended function, 'monitoring and promoting market integrity and consumer protection in relation to the Australian financial system'[373] and the Australian payments system,[374] as well as the operation and compliance of industry standards and codes of practice.

In the area of banking and finance, it is therefore intended to supplement APRA's prudential role by considering the impact on consumers when prudential systems in these institutions are absent or neglected. ASIC is empowered with a broad range of investigative powers to undertake as its role essentially 'whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions'[375] including the power to compulsorily obtain

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[371] Ibid, Section 12(5)
[372] Ian R. Harper, *The Wallis Report: An Overview*, (1997) *The Australian Economic Review* 30(3), 295.
[373] Australian Securities and Investments Commission Act 2001 (Cth), Section 12A(2)
[374] Ibid, Section 12A(3)
[375] Ibid, Section 11(4).

books and records, examine people, and require people to give reasonable assistance to it in connection with an investigation or prosecution.[376]

The ASIC was established by the *Australian Securities and Investments Commission Act 1989* (Cth) with its functions and powers articulated in the *ASIC Act 2001* (Cth). Many of its functions and powers are referred by the *Corporations Act 2001* (Cth) and *Corporations Regulations 2001* (Cth).

(b) *Institutional Weaknesses*

It seems ASIC has not taken up its role with any apparent zeal. Despite being statutorily bound to enforce codes of practice in the banking and finance sector, it has consistently characterised the operation of the code as non-enforceable. Initially, at a conference in November 2001, ASIC Deputy Chair Ms Jillian Segal[377] discussed how ASIC sees itself as a regulator at a time of industry self-regulation:

> Following the Wallis report in 1997, we have seen many changes to the Australian regulatory landscape. These not only include the establishment of ASIC and APRA, but the many changes to the Corporations Law (now known as the Corporations Act). In some cases, particularly in the area of fundraising, the shift has been away from prescription to relying on disclosure. In other areas, such as the Managed Investments regime, an emphasis has been placed on

[376] N.A. "Unleashing the Watchdogs" *Brief* (August 1999), 10

[377] Jillian Segal BA LL.B UNSW, LL.M Harvard. July 2002 to February 2003, Commissioner and later Deputy Chair ASIC; 2002 until 2004 Chair, BFSO; presently Director, Australian Securities Exchange and NAB. URL: http://www.cew.org.au/index.cfm?apg=membership&bpg=profilemember&aid=75 Viewed 11 February 2010

> compliance systems. In one sense, these changes represent shifts to greater self-regulation within a framework oversighted by the regulator.[378]

ASIC then announced that it had stopped monitoring industry compliance as a result of the later code of Banking Practice 2003[379] and its establishment of an independent monitoring committee.[380] In its Regulatory Guide 183, ASIC differentiated between mandatory industry codes and voluntary ones. An internal policy developed that it need not approve voluntary industry codes like the code of Banking Practice.[381]

> It is not mandatory for any industry in the financial services sector to develop a code. Where a code exists, that code does not have to be approved by ASIC. However, where approval by ASIC is sought and obtained, it will be a signal to consumers that this is a code they can have confidence in. An approved code will respond to identified and emerging consumer issues and will deliver substantial benefits to consumers.

In a later report,[382] ASIC clarified its role as being limited to working with the industry to develop or update codes, approving independent external dispute-resolution schemes and regularly liaising on a formal and informal basis with stakeholders who represent consumers'

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[378] Jillian Segal, 'Institutional self-regulation: role of the regulator?' (Paper presented to the National Institute Governance Seminar, Canberra, 8 November 2001) 1. <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/NIGConf_081101.pdf/$file/NIGConf_081101.pdf> on 29 January 2010.

[379] See Part VI. 2003 code and its 2004 Amendments

[380] Ibid

[381] *ASIC Regulatory Guide 183 Approval of financial services sector codes of conduct 2005* (Cth) RG 183.6.

[382] 'Helping consumers and investors, an ASIC better regulation initiative', December 2006 http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Helping_Consumers_Investors_Dec06.pdf/$file/Helping_Consumers_Investors_Dec06.pdf viewed on 29 January 2010

interests through a Consumer Advisory Panel[383] that met quarterly. David Knott was the Chair of ASIC during the initial period[384] and Jeffrey Lucy subsequently.[385]

4. Amendments to *the Trade Practice Act* 1974

In August 2000, a Treasury Taskforce on Industry Self-Regulation reported on 'recent developments in Australia … whereby industry self-regulatory schemes have been incorporated into regulatory frameworks.'[386] The Taskforce was commissioned by the then Minister for Financial Services and Regulation, Mr Joe Hockey, in order to provide information to government, industry and consumers regarding best practice in industry self-regulation.

The objectives of the taskforce were to reduce the regulatory burden on business, identify best practice and improve market outcomes for consumers.[387] The paper stated that 'the Commonwealth is presently in the process of developing and implementing regulatory regimes in the financial services sector … [allowing] for development of industry codes and complaint

[383] ASIC Consumer Advisory panel (CAP) established 1998 to advise on consumer protection and to comment on ASIC policies and services. Currently CAP Chair is Jenni Mack. Organisations that comprise CAP 2009 include Australian Council on Aging, Financial Counselling and Credit Reform Association, CHOICE, Legal Aid Commission NSW, National Information Centre Retirement Investments, Consumer Action Law Centre (VIC) and Australian Shareholders' Association. URL: http://www.fido.gov.au/fido /fido.nsf/byheadline/ASIC's+Consumer+Advisory+Panel?openDocument Viewed 11 February 2010

[384] David Knott appointed Deputy Chair ASIC 5 July 1999; Chair 18 November 2000, retired late 2003. <URL: http://www.camac.gov.au/asic/asic.nsf/byheadline/ASIC+previous+chairmen?openDocument>

[385] Jeffrey Lucy AM appointed Deputy Chair ASIC, on 24 February 2003, replacing Jillian Segal and Chairman 13 May 2004. Mr Lucy is Chartered accountant and Fellow of Institute of Chartered Accountants Press release: Previous ASIC Chairman <http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+previous + chairmen?openDocument#lucy> on 11th February 2010.

[386] Taskforce Industry Self – regulation: Treasury, Appendix C – Regulatory Framework for industry codes in Australia, August 2000.

[387] Treasury Portfolio Ministers, Media Release: "Hockey Announces Inquiry into self regulation", 12 August 1999

handling schemes'[388] and that the government recognised that there would be situations where 'industry self-regulatory schemes may need to be underpinned in legislation...'[389]

(a) *Issue: Bankers Dispute Resolution 101: 'See you in Court – take it or leave it'*

One of the major issues raised was the unfair conduct by banks when handling disputes, in which banks exploited their ability to engage the best and most expensive legal advisers to prolong cases as small business is commonly unable to match a major banks financial resources. According to the Report, the general perception existed that the prevalent attitude of banking and financial institutions towards dispute resolution was: "We'll see you in Court - take it or leave it".

The prevalence of such an attitude caused the Australians for Banking Justice Association to call for the establishment of an independent body to hear, judge and determine claims of commercial customers.[390] Despite these concerns, substantiated by examples of real experiences, the ABA insisted in their submission that existing legislative protections were adequate and opposed reform, including the common law equitable doctrines of economic duress and undue influence, and the *TPA 1974* (Cth)[391] provisions relating to unconscionable conduct, and misleading and deceptive conduct.[392]

(b) *Response: Introduction of 'Fair Trading' Amendments to TPA 1974 (Cth)*

With the Wallis Committee and the Towards Fair Trading Report published in the same period, Parliament was able to take stock of the recommendations provided. Thus, fair trading

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[388] Ibid
[389] Ibid,1
[390] Towards Fair Trading Report,149
[391] ss 51AA and 52 *Trade Practices Act 1974* (Cth)
[392] Towards Fair Trading Report,152

amendments were made to the *Trade Practices Act 1974* in 1998 to provide a 'general power to make industry code of conduct enforceable and to give the Australian Competition and Consumer Commission the duty to ensure that industry participants comply with code provisions and take action against breaches of prescribed codes. Member from McEwen, Fran Bailey, recognised the issues raised by the Towards Fair Trading Report, and committed government to ensuring small business owners are able to confront such problems without the inherent tension and inequalities documented.[393]

The relevant Federal Government Minister has the authority under the *Trade Practices Act 1974* to consider initiating a proposal for prescription of any industry code of conduct if:

- The code would remedy an identified market failure or promote a social policy objective;
- The code would be the most effective means for remedying that market failure or promoting that policy objective;
- The benefits of the code to the community as a whole outweigh any costs;
- There are significant and irremediable deficiencies in any existing self-regulatory regime;
- A systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes; and

[393] Fran Bailey MP, Hansard, Second Reading Trade Practices Amendment Bill 1997, 3 December 1997

- A range of self-regulatory options and light-handed quasi-regulatory options has been examined and demonstrated to be ineffective.[394]

(c) *Remaining Flaws*

Firstly, the principal body that is responsible for ensuring the effective operation of the various codes is the ASIC.[395] It can approve codes, sets standards for Internal Dispute Resolution (IDR), sets standards for and approve External Dispute Resolution (EDR) processes and bodies, which must be utilised in the event of an IDR failure, investigate complaints that have not been resolved within the EDR schemes, and, if a breach of these schemes is found, distribute penalties under the Corporations Act.

ASIC Unwilling to use powers

Unfortunately, ASIC's willingness to exercise its powers has at times been questionable, and the lack of transparency in their decision-making means that consumers are provided with minimal guidance on how to utilise such provisions to their benefit. For example, the ASIC Act (Cth) prohibits unconscionable conduct as a measure of consumer protection in relation to financial services.[396] With regard to these provisions, Federal Member for New England Tony Windsor asked the Minister answerable for ASIC:[397]

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[394] Taskforce on Industry Self-Regulation: The Treasury, *Appendix C – Regulatory Framework for Industry codes in Australia*, August 2000,
[395] Ibid, 8
[396] ss 12AC-13HD.
[397] Antony (Tony) Windsor BEc UNE , Independent Member New England, elected NSW Legislative Assembly Tamworth 25 May 1991, resigned 2001, Federal House Representatives Standing: Agriculture, Fisheries and Forestry 20 March 2002 to 17 October 2007. http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(Id:handbook/allmps/009lp);rec=0; Viewed on 11 February 2010

(1) What action is the Australian Securities and Investments Commission taking to enforce the ASIC Act in respect of the revelations to the Parliamentary Committee on Corporations and Financial Services that a solicitor for the Commonwealth Bank of Australia made false representations to a Parliamentary Hearing and a customer about the disputed balance of, and debits to, the customer's bank account?

(2) Will he explain the Government's and ASIC's policy on ASIC intervention in cases such as that described in part (1) and can he say whether ASIC leaves it to customers to take private legal action even when ASIC is aware that a bank has engaged in false and misleading conduct.

(3) Can he explain the obligations that banks have to act in accordance with their industry code and, if a dispute arises, whether banks must offer dispute resolution to their customers under the code of Banking Practice before taking legal action.

(4) Has ASIC received evidence that banks have not been providing dispute resolution to customers before taking legal action against customers despite their obligation under the code of Banking Practice to do so?

(5) Why has ASIC not taken action against any bank for failing to adhere to the code of Banking Practice for not providing dispute resolution to customers as banks are obliged to do under the code?[398]

The response was as follows:

> ASIC is unable to find any reference in the *Hansard* of the Parliamentary Committee on Corporations and Financial Services to the purported revelations … a relevant answer is unable to be provided.[399]

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[398] Treasurer Peter Costello, Parliamentary Debates, Question 2675, 28 March 2006.

The Towards Fair Trading Report stated that 'the Commonwealth, States and Territories have legislative provisions capable of underpinning industry codes of practice'.[400] This essentially assumes that, where self-regulation has failed, there are available to the public effective legal mechanisms that will discourage banking and financial institutions from breaking the law, and thereby provide an incentive for them to pursue a non-litigious resolution with their customers. Given the considerable resources at the disposal of these institutions, this is an unreasonable assumption.

It is not surprising in this context that where a system of co-regulation becomes one of self-regulation through default of government regulators, consumers will be disadvantaged no matter how many additional legislative protections they are afforded.

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[399] Ibid
[400] Ibid,11

Chapter V

UNBLEMISHED RECOMMENDATIONS

On 12 May 2000, the ABA appointed Richard Viney[401] to conduct a review of the 1993 code.[402] The Chairman of the ABA at this time was Frank Cicutto[403].

In undertaking the review, Viney was specifically asked to take account of changes in the banking services market and the needs and behaviors of bank customers as a whole.[404] The ABA, in all likelihood with best intentions, evidently believed that the banks' adoption of the Revised code of Banking Practice would lead to responsible self-regulation that would benefit Australian bank customers.

Newly-appointed Bankers' Association CEO, David Bell was confident that the "second generation code will be an effective demonstration to the Governments [policies] that self regulation works, and is a real alternative to the heavy hand of legislation."[405]

Submissions were accepted from government agencies, consumer groups and banks. An Issues Paper with interim recommendations was then published and once submissions on the

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[401] R Viney is reported as being an independent financial reviewer in the ABA Press release entitled: "Bank Customers to Reap Benefits of Self-Regulation" 8 October 2001: URL http://74.125.155.132/search?q=cache:iq6n5wH6rZgJ:www.bankers.asn.au/Bank-Customers-to-Reap-Benefits-of-Self-Regulation/default.aspx+Richard+Viney+report&cd=11&hl=en&ct=clnk&client=safari

[402] R Viney , Issues Paper (2001) 1. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.

[403] Frank Cicutto, appointed Managing Director and CEO of NAB in June 1999. He was first appointed to the ABA Board as an executive director in 1998. He has over 32 years experience in banking and Finance in Australia and internationally. *National Australia Bank Limited Annual Financial Report 2000*

[404] Media Release: "Review the code of Banking Practice-ABA Welcomes Issues Paper", 5 March 2001, www.bankers.asn.au accessed on 2 March 2010

[405] Media Release: "Bank Customers to reap benefits of self regulation: Banking code Review Complete", 8 October 2001, www.bankers.asn.au accessed on 2 March 2010

Issues Paper had been received and a Final Report with final recommendations was published.[406] Although there were differing views about what should be the appropriate monitoring body, the powers that body would possess and the sanctions it could impose, the final recommendations of the report ended up being those taken from the ABA. The key final recommendations, which will be detailed below, were: inclusion of small business; principle of fairness; monitoring of sanctions; dispute resolution; and periodic review and a forum for regular exchange. [407]

A. *INCLUSION OF SMALL BUSINESS CUSTOMERS*

The 1993 code applied only to individuals[408] however in light of the extension of the coverage of the ABIO to also cover small businesses in July 1998, the review process considered the possible similar extension of the coverage of the code. ASIC favoured the extension of the code to include small businesses out of recognition of the small business customers' disadvantaged bargaining position in dealing with the large financial organisations.[409] The Joint Consumer Submission (JCS) and the NSW Government also likewise favoured the extension of the coverage.[410]

The ABA did not object to the extension of the coverage.[411] code reviewer Viney finally recommended the code cover small businesses defined as having fewer than 100 full-time

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[406] R Viney, Final Report (2001), 17-18. http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.
[407] Media Release: "Banking Industry already meets most of ALP Banking Policy", 17 October 2001, www.bankers.asn.au accessed on 15 February 2010
[408] 1993 code, clause 1.1
[409] R Viney, Issues Paper (2001), 20-21. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.
[410] Ibid, 21-22.
[411] R Viney Final Report (2001), 27 http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.

people or their equivalent if the business is or includes the manufacture of goods) or, in any other case, fewer than 20 full-time people or their equivalent.[412]

B. *PRINCIPLE OF FAIRNESS*

The 1993 code did not contain a provision on fairness. Actually, the ABA initially resisted the idea of including a provision on fairness on grounds that it 'is a subjective concept that will vary from circumstance to circumstance.'[413]

Later, however, the ABA no longer objected to the provision on fairness[414] and Viney, in the end, finally recommended that the provision 'We will act fairly and reasonably towards you [our banks' customer] in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us' be included in the code.[415]

C. *PRINCIPLES OF MONITORING AND SANCTIONS*

Monitoring and sanctions were the most controversial issues in the review process. Monitoring under the 1993 code through ASIC (formerly through the Australian Payments System Council) involved an annual self-assessment by the banks followed by an ASIC report on the results of the self-assessment process.[416] The Joint Consumer Submission (JCS), the Australian Consumers' Association (ACA), ASIC and the NSW Government objected to the lack of transparency and independence of the monitoring process under the

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[412] Ibid, 4
[413] R Viney, Issues Paper (2001) 16. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.
[414] R Viney, Final Report (2001) 25 http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.
[415] Ibid, 3
[416] R Viney, Issues Paper (2001), 25-27. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.

1993 code.[417] For their part, the ABA acknowledged the necessity for change while 'avoiding inefficiency and disproportionate cost.'[418]

ASIC noted the importance of external monitoring to complement the self-assessment process.[419] The JCS argued the inadequacy of self-assessment and suggested a system of validation of the results of self-assessment through compliance monitoring by an independent external body.[420] The ACA suggested that compliance monitoring be adequately resourced.[421]

The NSW Government submission stated:

> 'It is important that the monitoring and reporting on the Banking code of Practice is carried out by an organisation with experience in consumer banking issues, and which is seen to be independent of the banks. The Australian Securities and Investment Commission is one such agency. Compliance with the code should be able to be independently double checked, and not rely entirely on a bank's self-assessment.'[422]

It was suggested that some parties were dissatisfied with the lack of a provision in the code for the imposition of sanctions for breaches. ASIC, for one, cited other industry codes such as the General Insurance code of Practice, that established a regime for investigating alleged of breaches and for imposing sanctions. This regime complemented the internal and external dispute-resolution procedures for resolving individual disputes. ASIC stated:

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[417] Ibid
[418] Ibid
[419] Ibid
[420] Ibid
[421] Ibid
[422] Ibid

> This review should consider establishing an independent regime for investigating alleged contraventions and imposing appropriate sanctions. The code should detail:
>
> - who can make complaints about non-compliance (this should include consumers, consumer advocates, regulators and other government agencies, and dispute resolution schemes);
> - the process for making complaints;
> - the decision-maker(s);
> - the decision-making process; and
> - the available sanctions (a range of effective sanctions should be available, so that a flexible approach can be taken).[423]

The ACA cited the Taskforce on Industry Self-Regulation Report of December 2000 and argued for a range of sanctions, underpinned by regulatory mechanisms it regarded as essential for code credibility. The ACA stated:

> The lack of sanctions in the Banking code presents a fundamental weakness and raises doubts about the credibility of the code for both industry participants and consumers. For example, there are no sanctions for breaches such as refusing to tell a customer about dispute mechanisms, not providing information on request or not following customers' instructions in relation to account cancellation. A range of sanctions, underpinned by regulatory mechanisms, is essential for code credibility.[424]

The JCS likewise argued for sanctions, citing comparable codes such as the AAMI Customer Charter, which had a penalty provision. The JCS stated:

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[423] Ibid
[424] Ibid

> For a complaints process to be effective it must be used by consumers. However, unless they can establish a loss which opens the way for compensation, consumers will generally not have any, or a sufficient, incentive to report breaches of the code to the code administration body.
>
> One way of addressing this issue – and in doing so of providing industry with a cheap compliance-monitoring mechanism – would be to include in the code, among other possible sanctions, a penalty provision under which the Subscriber would agree to pay a small sum to any Customer whose complaint that a code provision had been breached was established. This sum would be paid irrespective of whether the Customer suffered any loss or damage in consequence of the breach. The AAMI Customer Charter provides a possible model for a penalty provision of the kind proposed.[425]

code reviewer Viney agreed that without an independent regime for investigating complaints of code contraventions, with a capacity to impose appropriate sanctions, the banks' commitment to the code appeared to be perfunctory.[426]

D. *CODE MONITORS ESTABLISHED*

Toward the end of the review process the consumer organisations and ASIC expressed their preference for an 'independent, well-resourced code-monitoring agency with a capacity to impose a range of effective sanctions for code breaches.'[427] code reviewer Viney similarly wanted 'effective monitoring and sanctions.'[428]

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[425] Ibid
[426] Ibid
[427] R Viney Final Report (2001) 27 http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.
[428] Ibid, 28

In its Final Response submission, the ABA recommendations led to the establishment of a code Compliance Monitoring Committee (CCMC) as the monitoring body, with only a 'naming sanction for repeat offenders.'[429]

The criteria the ABA wanted for the CCMC were:

1) A committee, the code Compliance Monitoring Committee, would be set up within the Australian Banking Industry Ombudsman scheme. Agreement of the ABIO to do this would be necessary.

2) The function, powers and composition of the CCMC would be spelt out in the code. These could change if the code were changed.

3) The CCMC would operate quite separately from the Ombudsman's dispute resolution function so as not to adversely affect that function.

4) The CCMC would be a committee of three:

- One person having had relevant experience at a senior level in retail banking, appointed by the code-subscribing banks;
- One person having relevant experience and knowledge as the representative of the general body of bank customers, appointed by the ABIO, and;
- One person having had experience in industry, commerce, public administration or government service, appointed jointly by the ABIO and the code-subscribing banks.

5) The CCMC would employ a small secretariat to service the CCMC.

6) All decisions about banks' compliance with the code would be the responsibility of the CCMC.

[429] Ibid, 28-29

7) To ensure the CCMC operated diligently, within power, efficiently and effectively, the CCMC would be required to commission an independent annual audit of its activities and for that audit report to be lodged with ASIC for publication. Agreement of ASIC to perform this role would be required.

8) Banks would continue to prepare their own annual compliance reports and to lodge them with the CCMC.

9) The CCMC's functions and powers would be to:

- monitor code compliance by comparing banks' annual reporting of compliance with the CCMC's own experience gained through 'shadow shopping' and the incidence of complaints from customers about banks' non-compliance;
- receive complaints about breaches of the code and refer them to the banks concerned for response and remedial action where necessary;
- report annually on the level of compliance; and
- report in its annual report un-remedied, serious and systemic breaches by a bank with discretionary power to name the non-complying bank.[430]

In his Final Report, reviewer Viney ended up with a general recommendation for a 'monitoring mechanism and sanctions having the criteria detailed in the proposal set out in the ABA's Final Response.'[431]

E. *DISPUTE RESOLUTION PROCEDURES*

[430] Ibid, 27-29.
[431] Ibid, Final Recommendation 7, 30

The 1993 code dealt with both internal dispute resolution (IDR) and external dispute resolution, also called alternative dispute resolution (ADR).[432] ASIC, the JCS and the ACA were however highly critical.[433] ASIC stated:

> These provisions were developed at a time when IDR and ADR were relatively new concepts in Australia. However, since that time, the role of industry dispute resolution and the characteristics of effective dispute resolution have advanced considerably. In the light of this experience, *we take the view that the current provisions of the code are inadequate and require significant improvement if they are to meet consumers' needs* [434] (emphasis added).

ASIC cited a survey that surfaced concerns about:

- poorly trained call centre and branch staff;
- lack of communication and consistency between different banking sections;
- lack of consistency in the information provided by the institution staff of the banks;
- lack of response to enquiries and complaints or undue delay in response;
- refusal to compensate or to adjust accounts for losses suffered as a result of institutional error, including reluctance to refund overdraw fees where the overdraw resulted from institutional error, and
- lack of referral to external dispute resolution in cases where a complaint or dispute was not resolved.[435]

The JCS and ASIC pointed to deficiencies in the definition of a dispute, the lack of time-frames for the resolution of disputes at the IDR stage and the uneven level of compliance

[432] 1993 code, clause 20
[433] R Viney, Issues Paper (2001), 105-107. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.
[434] Ibid
[435] Ibid

with the obligation to make information on bank IDR processes available.[436] Viney found wide variances in levels of compliance with the obligation to disclose information on bank IDR processes.[437]

On the matter of ADR schemes, ASIC made favourable comments on the ABIO scheme and noted how, despite the absence of an express requirement to apply the criteria of fairness and good industry practice, the ABIO[438] terms of reference had these criteria.[439]

ASIC further suggested that the internal dispute resolution processes be consistent with Australian Standard AS 4269-95[440] and that the code lay down specific time periods for the completion of investigations and more detailed requirements for keeping complainants informed should disputes not be resolved within standard deadlines.[441]

F. *PERIODIC REVIEW; FORUM FOR EXCHANGE*

The 1993 code provided for a review every three years 'having regard to the views of interested parties,'[442] without any detail as to the mechanics of the review, external representation or consultation. A number of consumer submissions criticised the failure of the review process to provide for consumer and other stakeholder representation in the review body itself.[443] The Consumer Credit Legal Services (CCLS)[444] submission raised the

[436] Ibid
[437] Ibid
[438] Australian Banking Industry Ombudsman (ABIO) – duties and description to be added
[439] Ibid
[440] AS 4269-95
[441] R Viney, Final Report (2001), 65-66. http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.
[442] 1993 code preamble
[443] R Viney, Issues Paper (2001), 30-31. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.
[444] The Credit Consumer Legal Services is made up of (role and description)

lack of an established forum for the discussion of banking issues by consumer representatives with the industry in this manner:

> Unlike some other industries, such as insurance at a national level and the energy industry in Victoria, there is a lack of any forum where consumer representatives can raise issues with the banking industry. None of the relevant regulators, the industry association or ABIO offer such a forum. There is a need for a forum in which the code and current systemic banking problems can be regularly discussed between representatives of consumers, the industry and the ABIO.[445]

Viney welcomed the CCLS proposal for the establishment of a formalised forum ensuring regular discussions.[446] The ABA Final Response supported the concept of the independent reviews every three years in consultation with a range of stakeholders and reported the progress on the establishment by the ABA of a consultative forum.[447]

G. *SELF-REGULATION; CONSUMER PROTECTION*

At about the same time that Viney was appointed to conduct his review of the code, the government, through the office of the Minister for Financial Service and Regulation, was also conducting its own review to determine the effects of moving towards self-regulation particularly in the banking sector. The Minister, Joe Hockey, in a speech to the Society of Consumer Affairs Professionals in Business (SOCAP), confirmed the government's intentions and stated,

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[445] Ibid
[446] Ibid
[447] Ibid, 32

> 'The Government went to the last election with a commitment to encourage industry to develop effective approaches to self-regulation. Self-regulation must [be to] benefit Australia' consumers. It is said to work well when it comes to good corporate governance or the regulation of markets where integrity is directly measured in shareholder value…'[448]

Minister Hockey went on to discuss the Government's philosophy relating to consumers and reinforced its policies stating "Protection is the cornerstone of our philosophy"[449]. The Minister specified the four key elements of the government's thrust towards consumer sovereignty being[450]:

1. Protection – consumers must feel sure the Government has in place a legal system able to protect them
2. Choice – availability of a wide range of products and services
3. Sufficient Information – ability to choose between products in an informed way, which will depend on the provision of information that is relevant, transparent and easy to understand
4. Effective Redress – quickly remedy transactions that are unfair or when standards are not met, and sometimes it might be appropriate for the ACCC to use the enforcement powers of the TPA.

Hockey's belief in the effectiveness of the self-regulation model, wherein it was, in his and the government's view, able to "deliver cheap and reliable ways to solve disputes and, above

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[448] Speech to the Society of Consumer Affairs Professionals in Business (SOCAP), "Sovereignty and Empowerment: The New Frontier for Australian Consumers", 6 May 1999, Adelaide South Australia, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[449] Ibid
[450] Ibid

all, it is better for consumers..."[451] resulted in the formation of the Task Force on Industry Self-Regulation. The Task Force was given responsibility of finding the best practice in self-regulation [that would] ultimately improve market outcomes for consumers.[452]

After undertaking the review, the principles that underpinned the view that self-regulation works best were identified:[453]

1. There has to be consultation between industry, consumers and government,
2. There is broader coverage within an industry,
3. There is effective procedure for resolving disputes with proper sanctions for, businesses that breached the scheme, and
4. The scheme needs to be regularly reviewed by an independent body.

It might be said that the outcome of the reviews by Viney and the Task Force on Self-Regulation, together with influence of some key players within government, paved the way for government to ultimately support a shift into self-regulation.

This would seem contrary to views presented in both the Martin Committee and Wallis Inquiries however increasing support within the government seemingly made it easy for all the major banks, acting with one voice, to develop a modern code that could later be argued made them accountable to no party other than to themselves.

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[451] Media Release: "Hockey calls for quick response to bank issues paper", 5 March 2001, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[452] Media Release: "Hockey announces inquiry into self regulation", 12 August 1999, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010
[453] Joe Hockey speech at the Launch of the Self-Regulation Taskforce Report, 13 December 2000, Sydney NSW, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 27 February 2010

PART 2

PROMISES DELIEVED

The events that took place when the first code was introduced in 1993 led the government and banks to assess the effectiveness of having self-regulation in the banking industry. It was asserted that banks needed to strengthen the principles of banking while providing a mechanism for monitoring and dispute resolution.

The bankers seemed to have convinced the government and public that they would introduce a transparent and effective self-regulatory structure with systems that would be fair to their consumers. From this premise, the revised 2003 and modified 2004 codes were born.

BANKS ADOPT REVISED 2003 CODE

Following the publication of the ABA and bank CEO's revised code on 1 August 2003, the following bank boards were the first to adopt it:

1. Adelaide Bank – 12 August 2003
2. ANZ Bank – 12 August 2003
3. Bank of South Australia – 12 August 2003
4. Commonwealth Bank – 12 August 2003
5. St George Bank – 12 August 2003
6. National Australia Bank – 29 August 2003
7. Bank of Queensland – 7 October 2003

8. ING bank (Australia) – 3 November 2003
9. Bank West – 19 January 2004
10. Citibank – 5 April 2004
11. HSBC Bank – 10 May 2004[454]

When the revised code was published and adopted, ABA noted that John McFarlane (CEO, ANZ Bank) had replaced David Murray as its Chair[455] on 17 June 2003 and that Gail Kelly[456] (CEO, St George Bank) was Deputy Chair[457]. During this period David Bell was a non-banks member of the ABA and its Chief Executive Officer.

The 2003 code provided for the Committee's function to monitor subscribing banks' compliance with the practices set out in the code and investigated breaches. The code stated the Committee would 'monitor subscribing banks' compliance' and 'investigate and to make a determination on ***any*** (emphasis added) allegation from any person that a code subscribing bank breached the code…'[458] This was however not possible due to the use of wriggle-words which limited the subscribing banks' duties and the Committee's powers.

The ABA and bank CEO's were also silent on the drafting of the wriggle words in the revised code and it is likely the banks' constitution was also underway. It was clear, a few months later that the Banker's Code Compliance Monitoring Committee's Association

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[454] <www.bankers.asn.au> on 1 December 2008
[455] <http://www.bankers.asn.au/John-McFarlane-Elected-as-Australian-Bankers-Associations-New-Chairman/default.aspx> on 20 January 2010
[456] <http://www.bankers.asn.au/Australian-Bankers-Association-Council-Elects-New-Deputy-Chair—-Gail-Kelly,-Ceo-St-George-Bank/default.aspx> on 20 January 2010
[457] <http://www.bankers.asn.au/Citibank-MD-Les-Matheson-Elected-as-Australian-Bankers-Associations-New-Deputy-Chairman/default.aspx> on 20 January 2010
[458] *code of Banking Practice 2003* cl 34(b)

(the Association), a new body of the code subscribing bankers,[459] was intending to further vary the high-principles and practices in the code.

REVISED CODE DECLARATIONS

It was clear that the ABA and bank CEO's wanted it to be widely known by the public that after the revised code was published on 1 August 2003, the high standards in the code meant that:

> A bank must be sure it is ready to comply with its obligations under the revised code before it adopts it because *the code is an enforceable contract* (emphasis added) between the bank and the customer."[460]
>
> The code is a voluntary code in the sense that a bank has a choice whether to adopt it. *Once a bank has adopted the code, it binds the bank contractually to the customer. So if a bank breaches the code, it has breached its contract to the customer* [461] (emphasis added).
>
> The revised code builds significantly on the earlier edition (1993) and among the new provisions: small business is included for the first time.[462]
>
> This code meets and beats similar codes in other countries such as the UK, Canada, New Zealand and Hong Kong. The ABA's code… stands out both in scope and the specific customer benefits it provides."[463]
>
> *Banks will submit to independent monitoring* (emphasis added) of compliance and if a bank has systemically or seriously breached the code it is liable to be publicly named."[464]

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[459] The CCMC provided evidence relied on for this review that the 'CCMCA' Constitution was already published by 20 February 2004
[460] 1 August 2003, Revised Code of Banking Practice, http://www.bankers.asn.au/REVISED-CODE-OF-BANKING-PRACTICE452/default.aspx, accessed on 6 November 2010
[461] Ibid
[462] Ibid
[463] Ibid

> *Each bank will lodge an annual report with the Committee on its compliance with the code* (emphasis added) in much the same way as banks have done under the original 1993 code in reporting annually on compliance to ASIC.[465]
>
> David Bell, CEO of the ABA and Jillian Segal, Chair of the BFSO in a joint decision of the two organisations announced the appointment of Mr Tony Blunn, AO, as Chairman of the independent Code Compliance Monitoring Committee for monitoring banks' compliance with the code. [466]
>
> The Committee will have a very important role, especially when it comes to taking action against a bank… *the code is contractually binding, so a regulator might even consider action of its own* [467] (emphasis added).
>
> The Committee will be able to receive complaints from anyone who thinks that a bank has breached the code. The Committee will have the power to investigate that complaint and decide whether a breach has occurred.[468]
>
> *Mr Blunn emphasised the independence of the committee which he believed had an important role in the broader structure of the governance arrangements of the banking sector* [469] (emphasis added)

The messages being published by the ABA and bank CEO's intended the legislators and public to believe that the code is an enforceable contract; the banks would submit to being independently monitored. The Committee, being independent, might take an action against rogue banks or bankers and that each bank will lodge an annual code compliance report with the Committee. All worthy principles - assuming the Committee was in fact

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[464] Ibid
[465] 17 November 2003, Code of Banking Practice – Appointment of Chairman of CCMC, http://www.bankers.asn.au/Code-of-Banking-Practice---Appointment-of-Chairman-of-Code-Compliance-Monitoring-Committee/default.aspx, accessed on 6 November 2010.
[466] Ibid
[467] Ibid
[468] Ibid
[469] Ibid

independent and the code was an enforceable contract - which later appears not to be the case.

MODIFIED 2004 CODE

On 14 May 2004, the ABA and the bank CEO's, amended the 2003 code and published their modified 2004 code. At that time, the bank CEO's congratulated themselves on having a world-class, voluntary, self-regulated code of banking practice. According to the ABA, the code sets high-standards of conduct for banks in their dealings with their individual and small business customers. The ABA emphasised the role of the Committee was provided for in the code:

> *The code makes provisions for an independent Code Compliance Monitoring Committee* (emphasis added) to investigate and monitor complaints about code breaches. All the ABA members who subscribe to the code have agreed that the Committee may be empowered to conduct its own enquiries into a bank's compliance with the code. Any person may make a complaint to the Committee about a breach of the code…[470]

The banks that adopted the modified 2004 code had already agreed to be monitored by the independent Committee. Their customers were assured by the banks CEO's and the ABA that 'the Committee has been set up as an independent body with consumer, small business and banking industry representatives.'[471]

The bank CEO's guaranteed the public that the modified 2004 code grants and confirms existing rights to customers including: disclosure of fees and charges as well as changes

[470] 'code of Banking Practice Finetuned for Guarantors', 14 May 2004
[471] Ibid

to terms, fees and charges; privacy and confidentiality; and *complaints handling* (emphasis added), among others.[472] In fact, the bank parties were at pains to promote a new modified contract bound by ethics, good faith, high-principles and honesty but with no mention of the wriggle-words the bankers apparently could rely on the skirt their IDR duties and limit the powers of their independent Committee to name them. Becoming increasingly confident, they also failed to mention their Association's unpublished 20 February 2004 constitution.

The ABA emphasised the fact that one of the most important commitments that banks undertook in adopting the modified code is to *act fairly and reasonably towards customers in a consistent and ethical manner* (emphasis added).'[473] Again, the ABA and the subscribing bank CEO's, the architects of the modified 2004 code, doubled their declarations to the further improved high-principles of the code and the Bankers' good intentions.

ARCHITECTS OF THE MODIFIED CODE

ASIC records note that ten months after publishing the modified code the ABA was incorporated. On 20 June 2005, its Board comprised the CEO's of subscribing banks and therefore the ABA Board members already had a duty under the *APRA Act* to have the appropriate skills, experience and knowledge and to act with honesty and integrity, and to be fit and proper and have appropriate governance standards.

[472] 'Frequently Asked Questions on the modified code of Banking Practice 2004', 18 October 2004
[473] Ibid

The ABA's Board comprising the subscribing bank's CEO's on 20 June 2005 were:[474]

- Mr Stuart Davis – HSBC (appointed 20 June 2005)
- Mr Robert Hunt – Bendigo Bank (appointed 20 June 2005)
- Mr John Stewart – National Australia Bank (appointed 20 June 2005)
- Mr Leslie Matheson – Citibank Australia (appointed 20 June 2005)
- David Morgan – Westpac (appointed June 2005)
- Mr Daniel McArthur – Bank West (appointed 20 June 2005)
- Ms Gail Kelly – St George Bank (appointed 20 June 2005)
- Mr David Murray – CBA (appointed 20 June 2005)[475]
- Mr John McFarlene – ANZ[476] (appointed 20 June 2005)
- Mr Barry Fitzpatrick – Adelaide Bank (appointed 20 June 2005)[477]
- Mr David Liddy –Bank of Queensland (appointed 20 June 2005)[478]
- Mr John Mulcahy – Suncorp Metway Limited (appointed 20 June 2005)[479]
- Mr Ralph Norris – Commonwealth Bank (appointed 22 September 2005)

Apart from the above officers, since 20 February 2004, the following parties had at one time or another been members of the ABA and their respective code subscribing banks[480]:

- Chris Skilton (appointed 1 April 2009 – 31 August 2009)
- Evart Drok (appointed 30 November 2008 – 1 June 2009)
- Simon Walsh (appointed 15 April 2008 – 19 December 2008)
- Paul Fegan (appointed 26 November 2007 – 1 December 2008)

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[474] ASIC Historical Company Extract: Australian Bankers' Association Incorporated, on 1 September 2009
[475] CBA, Annual Report 2004
[476] Australia and New Zealand Banking Group, 2004 Annual Report
[477] Adelaide Bank Limited, Annual Report 2005
[478] Bank of Queensland Limited, Annual Report 2004
[479] Suncorp Metway Limited Group, Annual Report 30 June 2004
[480] ASIC Historical Company Extract: Australian Bankers' Association Incorporated, on 4 February 2010

- Jamie McPhee (appointed 16 July 2007 - 30 November 2007)
- David Murray (appointed 20 June 2005 – 22 September 2005)

Shortly after the modified code was published, the ABA was incorporated. Its committee now became the Board and it included the subscribing banks' CEO's who released a series of self-serving declarations emphasising the industry's commitment to their customers. The ABA reported that: 'banks in Australia value the communities within which they operate and are committed to giving something back to those communities.'[481]

According to the ABA, this is evidenced by the fact that many banks acknowledge their corporate responsibility and have adopted programs and practices that demonstrate their commitment to social and environmental performance, as well as [their] financial performance.'[482] The ABA added that their support of policies being brought forward by the Financial Services Reform Act shows the banks commitment to *promoting consumer protection* [emphasis added] by implementing a harmonised and wide-ranging licensing, disclosure and conduct regulatory framework for financial products, markets and financial services providers.'[483]

MODIFIED CODE DECLARATIONS

When the ABA and bank CEO's published the modified 2004 code and 12 subscribing banks adopted it, customers were told by the Banker's the code was a contract.[484] It was a

[481] Heather Wellard, 'Corporate Responsibility Should be Voluntary Not Mandated', 14 October 2005
[482] 'Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Responsibility', 11 October 2005
[483] Heather Wellard, 'Financial Services Reform Proposed Refinements to Benefit Customers', 2 May 2005
[484] 1 August 2003, Revised Code of Banking Practice, http://www.bankers.asn.au/REVISED-CODE-OF-BANKING-PRACTICE452/default.aspx, accessed on 6 November 2010

courageous declaration because the same Bankers had prior-knowledge of the Code Compliance Monitoring Committee Association's constitution because it had already been drawn up the Association's members on 20 February 2004. This introduced a series of extraordinary events that followed and would have been confusing and misleading for the subscribing banks' customers had they been aware that the banks had mischievously produced a detailed set of unpublished principles that were imposed on the Committee members which allowed the banks to use the code to their advantage by not having, inter alia, to deal with all complaints (see below).

Was it really a contract?

If it was, then the bank CEO's and the ABA who apparently drafted the constitution might have sought to skirt laws that were intended to prevent banks or the Bankers, acting contrary or dishonestly, to be investigated and named by the Committee. Therefore, changed terms of the contract had the effect of changing the high-principles in the code when the public were opening new bank accounts or signing Facility Offers after the 20 February 2004 constitution was introduced.

This was dealt with in this report's introduction however many customers would have relied on the high-principles published in the code (now severely compromised) and the reported independent powers of the Committee to ***any*** (emphasis added) complaint by any person[485].

Is it possible that the modified 2004 code was not a contract?

[485] Code Cl 34(b)(ii)

If this was the case, why did John McFarlene, ABA Chair and Les Matheson, Deputy Chair [486](two senior bank people), and the bank CEO's continue to promote the code is being a contract? Following the introduction of the 20 February constitution, and the modified code being published, the ABA and bank CEO's declared:

a) The code is a contact:

> The code is contractually binding on subscribing banks."[487] When your bank adopts the code, it becomes a binding agreement between you and your bank... [and] will come into effect when your bank adopts it.[488] [It] establishes the banking industry's key commitments and obligations to its individual and small business customers on standards of practice.[489]
>
> On adopting the code, your bank will continuously work towards improving its standards of practice and service… provide general information about rights and obligations under the banker/ customer relationship; provide information in plain language; act fairly and reasonably towards you in a consistent and ethical manner – your conduct, the bank's conduct and the banking services contract will be taken into account.[490]

b) The code protects guarantors:

> In May 2004, some changes were made to the code's guarantee provisions and the code was re-published incorporating these and some related changes. [When] your bank

[486] 17 June 2003, John McFarlene elected ABA's new chairman, http://www.bankers.asn.au/John-McFarlane-Elected-as-Australian-Bankers-Associations-New-Chairman/default.aspx , accessed on 6 November 2010

[487] 14 May 2004, Code of Banking Practice Finetuned for Guarantors, http://www.bankers.asn.au/Code-of-Banking-Practice-Finetuned-for-Guarantors/default.aspx, accessed on 6 November 2010.

[488] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010

[489] Ibid

[490] 18 October 2004, Frequently Asked Questions on the modified Code of Banking Practice 2004, http://www.bankers.asn.au/default.aspx?ArticleID=448, accessed on 6 November 2010.

announces that it has adopted the code… if you think your bank has breached the code… a first step is to raise the issue with your bank.

The code also provides for *high standards of disclosure for prospective guarantors before they agree to guarantee someone else's debt to the bank* (emphasis added)… banks will provide important and relevant information for prospective guarantors before they commit to guaranteeing someone else's debt.[491] The modifications will fine tune the code to ensure that prospective guarantors receive appropriate and relevant disclosure. [492]

Before taking a guarantee from you, your bank must provide a prominent notice to you to seek independent legal and financial advice on the effect of the guarantee [493] (emphasis added). This legal advice, however, would be provided without customers' lawyers being provided access to the bankers' unpublished 20 February 2004 constitution.

c) The Committee will investigate any code breach:

Your bank has an internal complaint handling service to assist you… [The Committee] has been set up to investigate possible breaches of the code. Anyone can refer a possible breach of the code to this committee. *It investigates complaints that banks are not meeting their obligations under the code* (emphasis added). The final decision on a breach of the code is made by the committee in a written determination to the complainant and the bank. [494]

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[491] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010
[492] 14 May 2004, Code of Banking Practice Finetuned for Guarantors, http://www.bankers.asn.au/Code-of-Banking-Practice-Finetuned-for-Guarantors/default.aspx, accessed on 6 November 2010.
[493] 18 October 2004, Frequently Asked Questions on the modified Code of Banking Practice 2004, http://www.bankers.asn.au/default.aspx?ArticleID=448, accessed on 6 November 2010.
[494] Ibid

> The ABA established the … *Committee which will monitor compliance and have the power to publicly name a bank which has been found guilty of a serious or systemic breach of the code* [495] (emphasis added). The code gives customers rights that the bank must observe. These rights cover ... complaints handling [496] [and]… makes provision for an independent Committee to investigate and monitor complaints about code breaches… any person may make a complaint to the [committee] about a breach of the code.[497]
>
> Each bank will lodge an Annual Report with the Committee on its compliance with the code.[498]

d) Bankers' practice corporate responsibility:

> *Banks are going on record with major public commitments to improve reporting and consultation about their social obligations* (emphasis added) … banks are producing Social Accountability Charters, not as a peripheral event but as a core practice. These set out what stakeholders can expect across marketplace practices, employee practices, occupational health and safety, environmental practices and so on… Overall, the banking industry is doing a lot for empowering people with the appropriate financial skills, knowledge and information that will ensure they are better placed to make informed decisions about their money and avoid being misled on financial matters. [499]

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[495] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010

[496] Ibid

[497] 14 May 2004, Code of Banking Practice Finetuned for Guarantors, http://www.bankers.asn.au/Code-of-Banking-Practice-Finetuned-for-Guarantors/default.aspx, accessed on 6 November 2010.

[498] 18 October 2004, Frequently Asked Questions on the modified Code of Banking Practice 2004, http://www.bankers.asn.au/default.aspx?ArticleID=448, accessed on 6 November 2010.

[499] June 2004 revised 2006, ABA Fact Sheets: Corporate Responsibility – Contributing to the community, http://www.bankers.asn.au/default.aspx?ArticleID=594, accessed on 6 November 2010.

> At the heart of a customer's relationship with a bank is trust. It is difficult to gain and maintain trust if people are confused… [about] the terms on which the relationship is based. Empowering people with the appropriate financial skills, knowledge and information will ensure they are better placed to make informed decisions about their money. It is important so that customers are not misled on financial matters…the code commits banks to ensure their staff are trained to competently and efficiently discharge their authorised functions to help the customer choose banking products and services. [500]

> The banking industry in Australia is widely recognised for its leadership in the area of corporate responsibility. The ABA said accomplishing goals related to corporate responsibility is best achieved through voluntary adoption of business practices that reflect flexible and strategic decision-making by the Board of Directors.[501]

e) The desire for fair dealing requires transparency:

> Transparency, the desire for fair dealing, responsible treatment of stakeholders, and positive links into the community get reflected in banks' everyday activities and corporate responsibility practices.[502] *Your bank will give terms and conditions to you*

[500] 11 June 2004, Taskforce discussion paper on Financial Literacy is valuable contribution to formation of national strategy, http://www.bankers.asn.au/Taskforce-Discussion-Paper-on-Financial-Literacy/default.aspx, accessed on 6 November 2010.
[501] 14 October 2005, Corporate Responsibility should be voluntary not mandated, http://www.bankers.asn.au/Corporate-Responsibility-should-be-Voluntary-not-Mandated/default.aspx, accessed on 6 November 2010
[502] June 2004 revised 2006, ABA Fact Sheets: Corporate Responsibility – Contributing to the community, http://www.bankers.asn.au/default.aspx?ArticleID=594, accessed on 6 November 2010.

> *either before or as soon as practicable after, you take up an ongoing banking service* [503] (emphasis added).
>
> The revised code is a world-class self-regulatory code. It sets very high standards of conduct for banks in their dealings with… customers. The modifications will fine tune the code to ensure that prospective guarantors receive appropriate and relevant disclosure… the code is designed to foster good relationships between banks and their customers including guarantors and this is based on good standards of conduct.[504]
>
> The ABA says Federal Government's proposed refinements to the financial services reform provisions of the Corporations Act 2001… will provide better outcomes for customers. The proposals will mean that disclosure of information for consumers will be better aligned to consumer needs.[505]

Following the publication of the modified code, subscribing banks' Boards decided to not publish their Association's constitution when they voluntarily, knowingly committed to adopt high-principles in the self-regulated code. The Boards would also have understood the APRA provisions under *the Banking Act 1959* (Cth) that they are required to have a 'sound governance framework and conduct their banks affairs with a high degree of integrity'[506] as set out in the duties of ADI directors.

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[503] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010

[504] 14 May 2004, Code of Banking Practice Finetuned for Guarantors, http://www.bankers.asn.au/Code-of-Banking-Practice-Finetuned-for-Guarantors/default.aspx, accessed on 6 November 2010.

[505] 2 May 2005, Financial Services Reform proposed refinements to benefits customers, http://www.bankers.asn.au/Financial-services-reform-proposed-refinements-to-benefit-customers/default.aspx, accessed 6 November 2010.

[506] *Prudential Standard APS 510 Governance*, *section11AF of the Banking Act 1959*

The bank parties and their senior managers[507] also knew that they had responsibilities under the Banking Act and that APRA requires them to be fit and proper and to 'possess competence, character, diligence, honesty, integrity and judgement'[508] in the performance of their duties. The bank parties also knew that the fit and proper principles also relate to their independent auditors, as set out under the Act[509].

In these circumstances, the bank parties mindful of their duties, in the light of the ABA and bank CEO's public statements and inefficacy of the code following the introduction of the Association's constitution, still chose to impose, adopt and fund the promotion of the modified 2004 code.

The bank parties, including the directors and senior mangers, having affirmed their commitment to the code and its guiding principles, proceeded to expand the network to a second generation of bank employees to promote the high standards in the modified code. The bank CEO's also made a commitment to ensure that their staff were trained so that they could 'competently and efficiently discharge their functions under the code[510], first having 'adequate knowledge of the provision of the code'.[511]

The high principles and values in the code were set out in 80 clauses and 250 sub-clauses, covering 6 sections: "INTRODUCTION; KEY PRINCIPLES AND OBLIGATIONS;

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[507] *Prudential Standard specifies senior management responsibilities ss5(1) of the Banking Act 1959*
[508] *Prudential Standard APS 520 Fit and Proper, section11AF(1)(a)(b) of the Banking Act 1959*
[509] *Prudential Standard APS 530 Fit and Proper Auditors section 17(2)9B) of the Banking Act 1959*
[510] code of Banking Practice 2004 cl 7(a)
[511] Ibid cl 7(b)

DISCLOSURES: THE PRINCIPLES OF CONDUCT: DISPUTE RESOLUTION AND MONITORING AND APPLICATIONS AND DEFINITIONS."[512].

The banks' statements promoting their high-principles and wide-ranging standards in the 2004 code was published by the ABA. During this period, the affairs of the ABA were administered by the bank CEO's and funded by the subscribing banks despite all parties being aware of unanswered questions relating to changed principles in the code. This was now totally inconsistent with the aspirations and high-principles proposed by the Martin Committee following the introduction of the Association's constitution which came into effect on 20 February 2004.

SUBSCRIBING BANKS' DECLARATIONS

1. 31 May 2004 - National Australia Bank[513]

The NAB was transformed in 2004 with events that year being the catalyst for renewal of its Board[514]. Since 2004, a total of eight new directors have been appointed and the bank published is commitment to meeting high standards of corporate governance.

Its Corporate Social Responsibility Report[515] stated that the Board has responsibility for the corporate governance. The Board believes governance is a matter of high importance and will ensure the bank operates with a culture of *greater openness and honesty and with greater transparency* (emphasis added) and will provide high quality, relevant and

[512] This is a summary only set out in the contents page of the 2004 code of Banking Practice
[513] 'Banks that have adopted the code of Banking Practice: Dates of Adoption' www.bankers.asn.au/Default.aspx?ArticleID=460, on 12 February 2010; www.bankers.asn.au on 1 December 2008 Note; this list last updated 18 September 2006
[514] In 2004, 6 directors including CEO Frank Cicutto and Chairman Charles Allen resigned. The new CEO was John Stewart and its new independent Chairman was Michael Chaney.
[515] National Australia Bank's Corporate Social Responsibility Report 2005

credible information that contains a complete picture of the banks performance that can be trusted.

During the past year, the bank reported having 746 complaints referred to the BFSO. In its Social Responsibility Report, no mention was made as to how many complainants alleged code breaches, or how many complaints in total were received from its individual and small business customers. The Board members did not comment on how effectively the Committee found their IDR procedures were being managed, nor did they comment on the bank having prior knowledge of the Association's constitution when the Board adopted the modified code.

During 2003/ 2004 NAB Directors[516]:

- Charles Allen (Chairman; retired February 2004)
- Graham Kraehe (succeeded Allen as Chair; retired September 2005)
- Michael Chaney (Appointed December 2004; Chairman on September 2005)
- Frank Cicutto (Managing Director and CEO; resigned February 2004)
- John Stewart (succeeded Frank Cicutto as CEO and Managing Director)
- Ahmed Fahour (appointed CEO and Executive Director October 2004)
- Michael Ullmer (appointed Executive Director September 2004)
- Geoffrey Tomlinson (appointed March 2000)
- John Gordon Thorn (appointed October 2003)
- Catherine Walter (resigned May 2004)

[516] National Australia Bank Limited, Annual Financial Report 2004

- Kenneth Moss (resigned August 2004)
- Edward Tweddell (resigned August 2004)
- Brian Clark (resigned August 2004)
- Michael Williamson (appointed May 2004)
- Daniel Gilbert (appointed September 2004)
- Paul John Rizzo (appointed September 2004)
- Jillian Segal (appointed September 2004)
- Robert Elstone (appointed September 2004)

2. 1 June 2004 Westpac Bank[517]

Westpac 2004 Annual Report[518] states that its approach to corporate governance is to have a set of values that underpin everyday activities which *ensure transparency, fair dealing and protect stakeholder interests* (emphasis added). The Board believes that good corporate governance needs to be values driven and that it's Board, their executives, its management and employees have to be aligned to core values of teamwork, integrity and performance.

The bank operates with a policy of requiring honesty and integrity and respect for the law and requires that its practices and behaviours ensure transparency, fair dealing and protection of stakeholders' best interests. The bank however overlooked commenting on its members having prior knowledge of the Association's constitution when it adopted the modified 2004 code.

[517] Above n 22, 'Dates of Adoption'
[518] Westpac's 2004 Concise Annual Report

WBC 2004 Directors:[519]

- Leon Davis (Chairman since 2000)
- Gordon Cairns
- David Crawford
- Hon. Sir Llewellyn Edwards AC
- Ted Evans AC
- Carolyn Hewson
- Helen Lynch AM
- Peter Wilson

3. 1 June 2004 St George Bank[520]

St George Bank has a code of ethics which sets out expectations of the Directors and staff in their dealings with customers. The bank requires *high-standards of integrity and honesty in all dealings, the avoidance of conflicts of interest and observance of the law* (emphasis added).

On 1 July 2004, the government's new corporate governance reforms, known as CLERP9, commenced and whilst these laws haven't yet applied to the bank, the Board decided to early adopt some of these rules. The Directors are responsible for implementing the bank's governance policies and overseeing the management of bank controls, systems and procedures to ensure there is compliance with all regulatory and prudential requirements.

[519] Westpac Banking Corporation, Annual Financial Report 2004
[520] Above n 22, 'Dates of Adoption'

The board reviews matters of corporate governance and monitors senior management's implementation of its strategies, including reporting known or suspected incidences of improper conduct (however no comment was made on it having prior knowledge of the Association's constitution when it adopted the 2004 code). Its code of ethics encourages bank staff to report in good faith any suspected unlawful/unethical behaviour in others.[521]

St George 2004 Directors[522]

- Frank Conroy (Chairman)
- Gail Kelly (CEO and Managing Director)
- John Thame (non-executive Director)
- Leonard Bleasel (non-executive Director)
- Linda Nicholls (non-executive Director)
- John Curtis (non-executive Director)
- Paul Isherwood (non-executive Director)
- Graham Reaney (non-executive Director)
- Richard England (non-executive Director)

4. 1 June 2004 - Bank of South Australia[523]

Bank of South Australia is wholly owned by St George Bank Limited [524] and would most probably implement the same principles and values.

[521] St George Bank's 2004 Annual Report and Corporate Governance Statement
[522] St George Bank, 'Formula for Success' Annual Report 2004
[523] Above n 22, 'Dates of Adoption'
[524] St George, Annual Report 2004, 19

5. 15 June 2004 - ING Bank (Australia)[525]

The Board of ING has responsibility for identifying and ensuring compliance with all regulatory and ethical expectations and obligations (emphasis added).

ING 2004 Directors:[526]

- P R Sherriff (Appointed Chairman in May 2004)
- B C Bartkiewcz (Resigned from being Chairman in May 2004)
- A R Berg
- G N Brunsdon
- E H Robles
- H K Verkoren
- D H Harryvan
- A Derksen

6. 30 June 2004 - Suncorp Metway Limited

Suncorp's 2004 Annual Report states the bank's values are: *Trust* - keeping promises; *Honesty* - talking straight, being genuine and ethical; *Courage* - taking accountability for results; *Fairness* – treating people justly and equitably; *Respect* – treating individuals with dignity; and *Caring* – listening carefully to others[527].

[525] Above n 22, 'Dates of Adoption'
[526] ING Bank (Australia) Limited, Financial Report for the Year Ended 31 December 2004
[527] Suncorp Metway Limited Group, Annual Report 30 June 2004

Suncorp identified the important attributes that it's Board and the bank must have. These are *accountability*, *independence*, *diligence*, *prudence*, *transparency and most of all integrity* (emphasis added).[528]

SML 2004 Directors:[529]

- John Story
- William Bartlett
- Ian Blackburne
- Rodney Cormie
- Cherrell Hirst
- James Kennedy
- Martin Kriewaldt
- Chris Skilton (Non-executive director, CFO)

7. 5 July 2004 HSBC Bank Australia[530]

Information about HSBC Bank Directors in Australia, their principles and values are not readily available to the public at this stage.

8. 22 July 2004 Commonwealth Bank[531]

In its 2004 Annual Report, the Commonwealth Bank stated that it demands the highest standards of honesty from people in the bank. The CBA value statement is "*trust*, *honesty*

[528] Ibid 5
[529] Ibid
[530] Above n 22, 'Dates of Adoption'
[531] Ibid

and integrity" (emphasis added) which reflects the bank's high-standards. The Bank adopted a code of ethics known as the Statement of Professional Practice which sets out standards of behaviour required of all bank employees and directors. These standards require the CBA people to avoid situations which may give rise to conflicts of interest and ensure they are absolutely honest in all professional activities.

The bank states that its standards are regularly communicated to staff reinforcing the need for the highest standards of honesty and loyalty, and its governance principles. The bank is strongly committed to maintaining an ethical workplace, complying with all legal and ethical responsibilities and reporting instances of fraud, corrupt conduct and mal-administration or substantial waste.

Commonwealth Bank 2004 Directors:[532]

- John Ralph AC (Chairman)
- Dr John Schubert
- Ross Adler AO
- Reg Clairs AO
- Tony Daniels OAM
- Colin Galbriath AM
- Carolyn Kay
- Warwick Kent AO
- Fergus Ryan

[532] Commonwealth Bank, Concise Report 2004, 12-15

- Frank Swan
- Barbara Ward

9. 16 August 2004 - ANZ Bank[533]

ANZ's 2004 Annual Report[534] states good corporate governance meets the bank's ethical and stewardship responsibilities and provides the bank with a strong commercial advantage. The Chairman notes in his report that importantly, the bank has taken on a broader role in the community and he reinforces the board's message that quality disclosure is fundamental to achieving the bank's vision; to become Australia's leading and most respected major bank.

The report notes the directors and employees overriding responsibility is to *act honestly, fairly, diligently and progressively, and in accordance with the law* (emphasis added). Its key codes and policies which apply to the directors and employees, who are expected to pursue the highest standards of ethical conduct, reinforce the bank's commitment to having an overriding responsibility to always act honestly, fairly, diligently and progressively.

The directors and employees are expected to adhere to the high standards set out in the bank's own code. These require banks parties to disclose any relevant interests, act in the best interests of the group and always act honestly and ethically in all dealings. The Bank aims to achieve a culture that encourages open and honest communication and all levels of accountability, to meet its ethical responsibilities

[533] Above n 22, 'Dates of Adoption'
[534] Australia and New Zealand Banking Group, Annual Report 2004 http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzQzNDAyfENoaWxkSUQ9MzMwMDE4fFR5cGU9MQ==&t=1

ANZ 2004 Directors:

- C B Goode (Chairman)
- Dr G J Clark
- J C Dahlsen
- Dr R S Deane
- J K Ellis
- D M Gonski AO
- M A Jackson AC
- Dr B W Scott AO

10. 14 October 2004 - Citibank[535]

Currently this report's author has not been able to access any records that could give information on who were members of Citibank's Board of Directors when it adopted the code in 2004.

11. 6 December 2004 - Bank of Queensland[536]

Bank of Queensland has its own code of conduct that sets out the principles which all its Directors, employees, owner-managers and contractors are expected to uphold. *The bank actively promotes ethical and responsible decision-making within the Bank* (Emphasis

[535] Above n 22, 'Dates of Adoption'
[536] Ibid

added).[537] The bank requires its employees to undergo training in various areas of bank policies including the code of banking practice.[538]

BOQ 2004 Directors:[539]

- Neil Roberts (Chairman)
- Antony Love
- Bruce Phillips
- Neil Summerson
- Bill Kelty
- John Reynolds
- Peter Fox

12. 1 April 2005 - Bank West[540]

Details about Bank West Directors and values are not readily available tot the public.

13. 4 April 2005 - Adelaide Bank[541]

Adelaide Bank has a code which sets standards each bank executive, manager and employee is required to meet. The code is intended to enforce principles in the code of banking practice and obliges employees to contribute to the well being of the community and *demonstrate social responsibility and honesty in dealings with others* (emphasis added).

[537] Bank of Queensland, Annual Report 2004, 29
[538] Ibid 18
[539] Bank of Queensland Limited, Annual Report 2004
[540] Above n 22, 'Dates of Adoption'
[541] Ibid

Adelaide Bank 2004 Directors:[542]

- R J McKay AM
- Dr A Lloyd
- R A Cook
- P A Crook AO
- K D Abrahamson
- K G Osborn
- S Crane

14. 1 July 2005 - Bendigo Bank[543]

Bendigo has a policy that states *if an executive acts fraudulently, dishonestly or in breach legal duties, any unvested bank options or performance rights will lapse* (emphasis added). The bank believes that customer service and community relevance remain its longest standing competitive advantages thus it needs to continue to invest in the people and technology needed to maintain standards.

BAB 2004 Directors[544]**:**

- R N Johanson
- N J Axelby
- J L Dawson
- D J Erskine

[542] Adelaide Bank Limited, Annual Report 2005
[543] Above n 22, 'Dates of Adoption'
[544] Bendigo Bank Limited, Full Financial Report Period ending 30 June 2006

- R A Guy OAM
- T J O'Dwyer
- D L Radford
- K E Roache
- A D Robinson

15. 22 September 2008 - Rabobank Australia[545]

At this time, there are no details available about the Rabobank 2004 Directors.

PROMISES, PROMISES

As mentioned, the banking industry, through the ABA, promised to implement reforms that would benefit their customers. At the same time, the Federal Government stepped up its efforts to introduce regulations and reforms to achieve the same end.

In response, the ABA publicly stated that '[t]he ABA and its officers are pleased the Federal Government was looking for ways to reduce red tape for banks and customers while maintaining important consumer protections.'[546] The ABA CEO repeated bank support: '[W]e note and support the government's view that there needs to be greater consultation by the regulators within the industry. The ABA supports...

[545] Above n 22, 'Dates of Adoption'
[546] Heather Wellard. 'ABA Welcomes Roundtable Consultations on Financial Services Reform Red Tape Reductions', 14 August 2006

recommendation[s] that regulators should develop a wider range of performance indicators for annual reporting.'[547]

A milestone in achieving the government's aims would be to apply the Martin principles so the constitution did not impose barriers to effective monitoring and complaints resolution procedures in the modified code. The ABA and bank CEO's muddied the contractual nature of the code by continually reinforcing the point that the code was a contract. The ABA's message was that: 'the code is a strong charter because *its provisions have contractual effect* (emphasis added), independent compliance monitoring is an important feature of a code if it is to be credible and seen as a value by bank customers.'[548]

ASSOCIATES OF SUBSCRIBING BANKS

The Committee, the Ombudsmen and independent Code Reviewers

During the past seven years there have been several parties associated with the banks in their capacity as experts and contributors. These parties included the Committee members, the BFSO who appointed or co-appointed Committee members and independent industry experts who carried out important reviews of the modified code. These experts and advisors were generally either directly or indirectly funded by subscribing banks when assisting the banks to carry out statutory and contractual responsibilities.

[547] Heather Wellard, 'Australian Bankers' Association Welcomes the Federal Government's Rethinking about Regulation', 13 April 2006
[548] Heather Wellard, 'Review of the code of Banking Practice', 21 December 2007.

1. The code Compliance Monitoring Committee (the Committee)

The Committee's revelations appear later in this report however the monitors' submissions sent to McClelland in 2008 should not under any circumstances have been dismissed lightly. In fact, they may be the turning point that brought to light problems that banks have been covering-up since the modified 2004 code was published.

... the Committee's independence is implicit

From 1 April 2004 when the Committee was established, information published by them stated without a doubt that they passionately believed their organisation represented an important addition to the banking landscape. In their 31 March 2005 Annual Report, the Committee noted:

> Whilst the code does not explicitly use the word 'independent' in describing the role of the Committee, *its independence is implicit*. *The Committee must act independently in discharging its role because it is essential if the code is to be taken seriously* (emphasis added) and therefore be effective in achieving its purpose.[549]

The establishment of the Committee was therefore consistent with the industry's promise to provide a better service to customers. This was reiterated by ABA Chairman and NAB Managing Director, John Stewart: '[t]he Australian banking industry remains committed first and foremost to providing the highest quality services to domestic consumers through a competitive environment....'[550]

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[549] CCMC 2005 Annual Report

[550] Heather Wellard, 'Federal Government and ABA Committed to Enhancing Australia as a Financial Services Centre', 22 July 2008.

The 2004 CCMC's Annual Report identifies Committee members in 2004 as:

1. Anthony Blunn AO[551] was the CCMC Chairman from 17 November 2003 until January 2009[552]. He was *appointed jointly by the BFSO and subscribing banks*.

2. Ian Gilbert[553] was the member with senior level banking experience and was replaced by Russell Rechner on 14 September 2004. Both were *appointed by subscribing banks*[554].

3. David Tennant[555] was said to have relevant experience and knowledge to represent the banks' consumers and *appointed by consumer and small business members of BFSO*.

The activities of the Committee were supported by Executive Officer, Barbara Schade[556] from April 2004 until October 2006. This Committee was therefore appointed by associates of the subscribing banks who, when appointing them, were funded either directly or indirectly by the subscribing banks. These parties all knew that Stephen Martin and his committee were inspirational when pioneering the code and that earlier bank directors would have acted to ensure the code was applied in good faith. The Martin recommendations led to the appointment of a Committee to monitor code compliance by subscribing banks and investigate complaints when customers alleged banks breached the code.

In 2003-04, the bank parties were involved in selecting and/or appointing Committee members. During this period John McFarlene was ABA Chairman and Ahmed Fahour, Deputy Chair. Mr Fahour had replaced Citibank's Les Matheson.[557] The BFSO members also carried

[551] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on Tony Blunn AO
[552] Refer to the CCMC 2009 Annual Report
[553] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on Ian Gilbert who is currently the legal representative of the Australian Bankers' Association
[554] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on Russell Rechner
[555] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on David Tennant
[556] Refer to the CCMC 2004/2005 Annual Report for information on Barbara Schade
[557] ABA release: "Citibank's Ahmed Fahour Elected New Deputy Chairman", 29 April 2004

out an important role selecting and/or appointing Committee members Anthony Blunn and David Tennant[558].

2. The Banking and Financial Services Ombudsman (the BFSO)

Apart from the Committee, other parties had a special relationship with the subscribing banks. They would also have known that the Associations' constitution would create major obstacles for the Committee carrying out clause 34 duties. First among this group were the BFSO officers.

The BFSO officers had a role in scrutinizing the background and skills of proposed Committee members and appointing superior candidates. In carrying out this task the BFSO officers and senior managers needed to be briefed on the reputation and experience of candidates and the terms and conditions with respect of the Committee's duties and responsibilities.

Hence, the origins of the code and its high-principles, its efficacy and the application of these principles were essential to the Committee's mandate. That being the case, it seems difficult to appreciate how the BFSO dealt with the banks' justification for having an unpublished constitution and why this did not create some uneasiness. If it did, given the high-principles in the code, there is no readily available evidence setting out what step were taken by the BFSO to address this inconsistency.

BFSO officers and senior members, 2004[559]:

[558] Refer to C. 1 to identify the directors the BFSO who appointed Blunn and Tennant in their capacity as Committee members.

- Jillian Segal [560] – Chair (Appointed 1 September 2002 - 3 September 2004)
- Michael Lavarch – Chair replacing Ms Segal (Appointed 6 September 2004)
- Jill Lester - Bank member representative (29 August 2001 - 28 August 2006)
- Deborah Batten – Bank member representative (3 June 2002 - 21 August 2007)
- Jeremy Griffith - Bank member representative (4 May 2003 - 19 August 2008)
- Sujeetha Mahalingham – Consumer rep. (1 September 2002 - 28 February 2007)
- Carolyn Bond - Consumer representative (30 November 2001 - 20 February 2006)
- Roger Du Blet – Small Business Representative (1 October 2003- 19 August 2008)
- Colin Neave – BFSO Chief Ombudsman, 2004, and
- Phillip Field – Banking and Finance Service Ombudsman in 2004.

The BFSO 2004 Annual Report[561] sets out details of its substantial charter. Its primary role is dispute resolution with 30 bank and 17 non-bank members and it reported having received 36,382 calls during the year and 6,117 closed cases.[562] It stated the proportion of individual and small business bank consumers using the BFSO procedure was similar to the previous year with it receiving 7.2% telephone enquiries and 11.4% written disputes from member bank small business customers.[563].

In 2004, the BFSO reported having investigated 5,859 new cases, a number reported to be less then the previous year.[564] Whilst it investigated fewer cases, the cases were said to

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[559] Details of BFSO directors in Historical Company Extract from ASIC database on 24/02/10
[560] Extract BFSO data http://fos.org.au/centric/home_page/about_us/governance/our_ombudsmen.jsp
[561] Banking and Financial Service Ombudsman's 2004 < www.fos.org.au/public/download.jsp?id3310 >
[562] Ibid 17
[563] Ibid 13
[564] Ibid 3

be more complex due to case managers having to resolve systemic issues. These were important as there were 19 systemic issues investigated during and they involved more than 100,000 customers and 15 of these cases were resolved[565].

In 2004-05, the Committee closed 10 cases with 1 determination.[566] By contrast, BFSO closed 3,949 cases referred by customers of subscribing banks in 2004.[567] The CBA had the greatest number with 1,105; followed by ANZ with 695; Westpac – 664; NAB – 649; St George – 193; Citibank – 178; Suncorp Metway – 117; Bankwest – 105; HSBC – 56; Bendigo Bank – 56; Adelaide Bank – 48; The Bank of Queensland – 38; Bank of SA – 24 and ING – 21.[568] The banks paying for complaint services in 2004 were faced with having 3,949 closed BFSO cases compared with 10 closed CCMC cases.

This sent a message to the Committee that banks and/or the Bank CEO were not very enthusiastic about using the Committee. Given the high-principles set out in modified code, banks might have been concerned that in spite of the constitution, Committee members might be swayed to comply with clause 34(b)(i)(ii) of the code. If they did, and they investigated *any complaint by any person*[569] *in good faith* (emphasis added) it might be ruinous for dishonest bank CEO's or directors.

The BFSO however provided a professional bank-friendly service and investigated many complaints and it suited banks as damages were *capped.*[570] On the other hand, if code breaches revealed unlawful conduct, the bank parties might suffer consequences that

[565] Ibid 1
[566] CCMC Annual Report 2004
[567] Banking and Financial Service Ombudsman's 2004, p21
[568] Banking and Financial Service Ombudsman's 2004 < www.fos.org.au/public/download.jsp?id3310 >
[569] Modified 2004 code of Banking Practice, clause 34(b)(ii)
[570] Ibid 1 notes June 2004 BFSO dispute cap is $150k which increased to $250k later that year.

were far greater than the ***capped*** BFSO payment. If the Committee found a senior bank person acted dishonestly or unlawfully, the consequences for the bank might be serious, and for a highly paid senior manager or director it could be ruinous. In other words, whilst many parties knew about the Association's constitution and the code's application flaws, the Committee's independence and wide ranging investigative powers would be more worrisome for subscribing banks, for reasons further developed in this report.

3. The Association, the BFSO and the Committee

After the 2003 code was published the banks weighed up the utility of dual-contracts. To put this in context, banks needed to trim the Committee's powers and required the BFSO support. The banks' lawyers devised a constitution and shortly after 20 February 2004 the banks seized control of the Committee. When the modified 2004 code was published, the Association had solved the banks problem by integrating the Committee's powers and duties with the banks freshly prepared constitution.

The 2005 FEMEG Review exposed the constitution but did not question the banks aspirations in relying on a dual-contract. The unpublished constitution was customer 'unfriendly' and provided the subscribing banks to have the pre-Martin ***opt-out*** litigation provision returned. The ***opt-out*** provision is not detectable by lawyers as bank Facility Offers and contacts require customers to obtain independent legal advice before signing bank documents but the banks make no mention of the constitution. In all likelihood, it is probably only required to be used by the subscribing banks if any senior manager or officer acted roguishly.

All senior bankers know customers will have no joy using clause 35.7 of the code when a severe complaint involve them. The ***opt-out*** provision means they don't have to activate the IDR process because the constitution stifles the Committee powers to investigate 'any' complaint as stated in clause 34(b)(ii) of the code. The IDR process is flawed as the *dual-contract* allows subscribing banks the right to commence litigation and then rely on clause 8.1(b) of the constitution.

This means the banks can claim the Committee are bound by the Association's constitution and cannot investigate a serious complaint which is contrary to the practices and tactics that the Martin Committee sought to erase in 1991. Martin's fairness principle was based on banks having vast funds that provide them with an unassailable financial advantage when using the Courts.

Small businesses are therefore in the '*no-win*' corner, unable to use major law firms due to the high cost. At the same time, major banks can spend whatever money is necessary to wear its client down. The major law-firms may also have banks' work-in-process and highly regarded Senior Counsels are also paid retainers to keep them from acting against major banks. As the Martin Committee found, the banks enjoy an unassailable financial advantage in Courts when competing against small businesses without deep-pockets.

Hence, the ***opt-out*** provision that can leash the Committee to the banks' needs, This is crucial for the protection of the subscribing banks if they intend retaining control of the customer-bank relationship and has continued for six years despite being concerns raised by the previous Committee members in their 11 March 2008 submissions sent to the code reviewers.

4. The Independent CCMC Reviewers

a) The Foundation for Effective Markets and Governance (FEMAG)

The first review of the modern code was carried out in 2005 by leading academics that comprised the FEMEG body. As early as 2005, some community groups had noted the growing predicament facing the self-regulated banking sector. In their report, FEMAG identified concerns that the Committee might not be as independent and effective as reported, and in fact advertised. The ABA PR targeted its message to the existing bank customers, aspiring bank customers and the bankers' political masters.

Whilst FEMAG identified this problem, the Committees lack of independence was mere speculation and its effect was not visible until later, when the banks' self-serving behaviour became a reality. Further, it seemed FEMAG presented an optimistic and mistaken view intending the banks fix any structural shortcomings or predicaments that were commented on by FENAG by the banks simply using 'good-old' common sense.

The subscribing banks did no such thing other than continuing to take advantage of the loophole whilst their PR machine made repeated promises to improve bank practices and services. It seemed the banks' self-serving behaviour was in stark contrast to David Bell's report bank customer approval was at a record high: '[d]espite customer satisfaction reaching record levels, '*I know that the banks will continue to strive to improve their products and services and aim for an even better result in the next survey* (emphasis added).' [571]

[571] Heather Wellard, 'Banks' customer satisfaction reaches record levels', 5 March 2010.

b) Jan McClelland Review – December 2008

Jan McClelland was appointed by the ABA on 29 November 2007 to be the independent code reviewer. McClelland had a long list of credentials and experience having worked in government agencies and privately-owned companies. An experienced senior executive, McClelland was Chair of NSW Businesslink Pty Limited in July 2004 and the former Director General of the NSW Department of Education and Training and Managing Director of the NSW TAFE Commission.

In addition, McClelland is a Fellow of the Australian Institute of Management, Fellow of the Australian Council of Educational Leaders, Member of the Australian Institute of Company Directors and Member of the Institute of Public Administration of Australia. It seemed Ms McClelland was highly qualified and capable of reviewing the effectiveness of the code. As a professional, McClelland would have make enquiries into the origins of the code, its efficacy and application so she had a sound knowledge of the history and events prior to her commencing the 2008 review.

Jan McClelland received submissions from interest groups including: The Financial Sector Union of Australia, CARE, COSBOA and the ABA. From these submissions, and her own research, McClelland will have distilled issues she considered most relevant such as the ones referred to her by the Committee. The Committee's issues raised much concerns about poor communication between banks and customers; inadequate use of the dispute resolution procedures and the need to strengthen Committee independence.

As an expert reviewer, McClelland will have audited the FEMEG recommendations and made certain she was an expert on 'hot' issues such as the constitution, dual contacts, use of the ***opt-out*** provision and KPI's in their recent CCMC Annual Reports.

Committee questions its independence

McClelland identified Committee's independence as a 'hot' issue and made a detailed response. In her summary, McClelland explained that the Association, through its constitution, hinders the Committee's ability to independently monitor as the constitution constrains it's monitoring and sanctioning powers. When making recommendations, the events of the past 27 years were not emphasised to promote outcomes that would tackle the Committee's concerns. She implied: 'a separate independent unit within the FOS reporting to and being accountable to the FOS Board for the performance of its functions under the code'[572] might remedy the problem. This was out of character with views expressed in the Committee's 11 March 2008 submissions and didn't address the crucial need for CCMC independence so the Committee could carry out their clause 34 duties.

Despite controversial findings, or perhaps because of them, McClelland's Final Report had little valuable weight to the constitution and connected issues and importantly, their effect. It cast doubts on McClelland's authoritativeness as there was an obvious lack of force and emphasis on the unpublished constitution. It allowed the bank parties to compromise the already poor CCMC performance.

The following are a list of the interest groups that put forward submissions to the McClelland's 2008 Review.

[572] Heather Wellard, 'Update on code Banking Practice – first quarterly report', 29 January 2010.

Submissions received for the Issues Paper

Name of Organisation			A	B	C
1	Financial and Consumer Rights Council Inc – Donna Letchford	**18/02/08**			**X**
2	NSW Office of Fair Trading - Lyn Baker	**01/03/08**		**X**	
3	code Compliance Monitoring Committee – Kirsten Trott	**11/03/08**	**X**		
4	Financial Counsellors Association of Queensland Inc – David Lawson	**06/04/08**			**X**
5	Australian Competition ad Consumer Commission - Nigel Ridgway	**09/04/08**		**X**	
6	Financial Sector Union of Australia – Leon Carter	**22/04/08**	**X**		
7	Australian Bankers' Association – Ian Gilbert	**30/04/08**	**X**		

Table 1 - Submissions for the 2008 Review of the code

Legend:

A – Raised the critical issue(s) in their submission but fail to ensure action was taken to remedy it
B – Would or should have known the critical issue(s) but fail to raise the problem in their submission
C – Submissions that raise issues that whilst important are unrelated to the critical issue(s)

Final set of submissions received

Name of Organisation			A	B	C
1	CARE Financial Counselling Service – Carmel Franklin	**24/06/08**	**X**		
2	Australian Payments Clearing Association	**01/07/08**			**X**
3	Credit Ombudsman Service – Paul O'Shea	**01/07/08**	**X**		

4	NSW Office of Fair Trading – Lyn Baker	**01/07/08**		**X**	
5	Financial Counsellors' Association of Queensland – David Lawson	**05/07/08**	**X**		
6	Northern Community Legal Service Inc – M.Aberdeen	**28/07/08**			**X**
7	code Compliance Monitoring Committee – Tony Blunn AO	**29/07/08**	**X**		
8	Australian Financial Counselling and Credit Reform Association – Jan Pentland	**30/07/08**		**X**	
9	Department of Business Law and Taxation, Monash Uni – Rhett Martin	**30/07/08**			**X**
10	CHOICE and Consumer Action Law Centre	**31/07/08**			**X**
11	Joint Submission on behalf of Consumer Advocates – Nicola Howell	**31/07/08**	**X**		
12	Australian Government Office of the Privacy Commissoner	**01/08/08**			**X**
13	Financial Sector Union of Australia – Leon Carter	**01/08/08**	**X**		
14	Financial Ombudsman Service – Philip Field	**04/08/08**	**X**		
15	Australian Bankers' Association – Ian Gilbert	**06/08/08**	**X**		
16	Legal Aid Commission of NSW -	**07/08/08**			**X**
17	ANZ Banking Group	**08/08/08**	**X**		
18	Westpac Banking Corporation -	**14/08/08**	**X**		
19	VEDA Advantage	**01/09/08**			**X**
20	code Compliance Monitoring Committee – Memo	**09/10/08**	**X**		
21	Director of Consumer Affairs, Victorian Department of Justice - Dr Claire Noone	**06/12/08**	**X**		
22	CARE Financial Counselling Service – Carmel Franklin	**19/01/10**	**X**		
23	DEACONS – Alison Deatz	**Undated**	**X**		
24	Greater Southern Area Health Service – June Price	**Undated**			**X**

Legend:

A – Raised critical issue(s) post 22 April 2008 and would have known the effect of the 11 March 2008 CCMC Submissions to the reviewer
B –Post 22 April 2008 when CCMC Submissions were published but may not understood the ramifications of the CCMCA Constitution.
C – Submissions that raise issues that whilst important are unrelated to the critical issue(s)

The McClelland Issues Paper and Final Report set out the issues she considered were significant and her recommendations indicated that the banks would agree with her findings. This demonstrates how important it is for the reviewer to be independent. Her Final Report was intended to reflect the key issues referred to her in light of her own research into the origins of the code and her judgement on how to rekindle the efficacy and applications of the bankers' high-principles. The principles were intended, ultimately, to be benchmarked against the aspirations of the legislators and regulators, and the public.

The banks implement changes the reviewer finds germane to improving the efficacy and utility of the code. Moreover, basic principles of transparency and honesty seemed to be missing suggesting the reviewer did not have access to the constitution despite FEMAG evidently having asses to it in 2005. In the end, McClelland's 2008 Final Report and her earlier Issues Paper seem, in conclusion, somewhat illogical and incoherent. This is especially with respect to the lack of importance placed on principles of good governance and the need for the bank parties to come-clean on the possible origin and justification of the problematic banking code.

c) The Richard Viney 2ND Review – December 2008

Viney knew about the origins of the 1993 code which evolved from 1991, following the Martin Committee's Report because Richard Viney had a pivotal role assisting banks drafting the revised 2003 code. He was commissioned again, this time by the Committee in 2008. He would look at the efficacy and application of them carrying out clause 34 duties monitoring bank compliance and investigation complaint allegations. Whilst this seemed a progressive step as Viney understood the Martin Committee's principles, by 2008 the culture and documentation changed and the Association's constitution limiting the Committee's independence.

Now Viney had an added advantage in being able to read McClelland's submissions and Issues Paper. He therefore considered matters she felt important for her review. He could weigh up the Committee's 11 March and 29 July 2008 submissions and the valuable insights, information and recommendations set out in the 2005 FEMEG review. Whilst this would have influenced Richard Viney's 2008 views, it was surprising McClelland and Viney both concluded that the Committee was performing its duties effectively, with no intractable problems.

These two reports were carried concurrently; both funded by the same subscribing banks. Neither report fully addressed the dubious governance practices, possibly due to having limited terms of reference. This may also have concerned FEMEG in 2005 and was a lost opportunity for the Committee because it missed out in being able to independently apply the clause 34 code principles. Both reviewers missed an opportunity to raise issues that impact on customers as everybody has bank accounts and this could easily destroy the public confidence in banks and bankers.

Chapter VI

FIRST GLIMPSE TROJAN HORSES

It has been established that the Martin Committee intended the banks to design a *code of Banking Practice* that would set out what banks believed to be 'good standards of banking practice'. To achieve this, the banks would need to have dispute resolution procedures that are expedient, within the financial means of bank customers, and above all, fair.

Their first attempt, the 1993 code, is a plainly worded document that describes broad principles of good banking, whilst limiting its powers to narrow practices. Such practices were limited to 'banking services', narrowly defined under the 1993 code as relating only to deposits, loans and similar bank facilities.[573] It failed to give effect to the intention of the code which was to set high standards across a range of practices that banks were obliged to comply with. Thus, even though it may be said that the 1993 code set out to improve the standards of banking practices, it can be criticised as lacking 'teeth' due to its restricted application to limited types of banking services, and consequently, its lack of enforceability.

Although this should have been identified and subsequently rectified after being independently reviewed in 2001, Richard Viney's review of the 1993 code however was not intended to produce a draft of the revised code; it would only provide recommendations for one. In Viney's words, 'It will remain for banks to take the

[573] *code of Banking Practice 1993*

necessary steps to arrange for the drafting of a new or revised code of Practice to give effect to the agreed recommendations.'[574]

Viney's final recommendations in 2001 led to the standards that were set out in the 2003 code, which were far more detailed than the 1993 code and included a range of initiatives that are still found in the most recent code. When the ABA finally published its revised 2003 code on 1 August 2003, they believed that the new code was "a major step forward by Australian banks in listening to community concerns and delivering change"[575].

The ABA's CEO, David Bell guaranteed the 2003 code 'meets and beats similar codes in other countries such as the UK, Canada, New Zealand and Hong Kong… [it] stands out both in scope and specific customer benefits it provides.'[576]

Despite this initial hoopla, the 1993 code failed to clearly define the dispute resolution procedures whilst, at the same time, it broadened the scope of 'banking services' which the banks subsequently relied on to justify their failure to investigate all complaints. These failures had the effect of providing banks unfettered discretion in interpreting the meaning of the word 'complaints' for breaches of the high standards set out in the code. It therefore allowed the banks to hand-pick complaints that they were willing to investigate rather than being obliged to investigate all complaints relating to their contraventions of the code.

A. *THE 2003 CODE – (PUBLISHED 1 AUGUST 2003)*

[574] Viney's 2001 code Review page18
[575] ABA Media Release, 'Revised code of Banking Practice' (2003) <www.bankers.asn.au> on 16 February 2010
[576] Ibid.

The code adopted on 1 August 2003[577], essentially embodied the Viney recommendations in his 2001 Final Report. His primary recommendation for monitoring mechanisms and sanctions were detailed in the ABA's Final Response[578] and led to the establishment of the CCMC and the subsequent appointment of expert monitors.

Clause 34 of the code entitled 'Monitoring and Sanctions' stipulates that subscribing banks agree to establish a code Compliance Monitoring Committee that was made up of three persons. It states that [code-subscribing banks] agree:[579]

> (a) to participate in establishing a code Compliance Monitoring Committee ("CCMC") comprising:
>
> > (i) One person with relevant experience at a senior level in retail banking in Australia, to be appointed by [the ABA member] banks that adopted the code;
> >
> > (ii) One person with relevant experience and knowledge as a [consumer] representative, to be appointed by the consumer and small business representatives on the Board of Directors of the Banking and Financial Services Ombudsman (BFSO), [580] and;
> >
> > (iii) One person with experience in industry, commerce, public administration or government service, appointed jointly by the BFSO and [the ABA member] banks that adopted the code to serve the Chairperson of the CCMC. [581]
>
> Clause 34 (b) [states] that the CCMC's functions will be:

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[577] *code of Banking Practice 2003*
[578] Ibid.
[579] Ibid cl 34
[580] Recently, BFSO was amalgamated into the Financial Ombudsman Service (FOS)
[581] *code of Banking Practice 2003* cl 34

(i) to monitor [subscribing banks'] compliance under this code;

(ii) to investigate, and make a determination on, any allegation from any person that [subscribing banks] have breached this code but the CCMC will not resolve, or make any determination on, any other matter;

(iii) to make any other aspects of this code that are referred to the CCMC by the ABA.[582]

The creation of the CCMC introduced a relationship between the bank parties. These included the subscribing banks, the ABA, BFSO, the CCMCA ("the Association") and now the CCMC and its monitors. All of these parties were involved in either the design or operation of the high standards embodied in the 2003 code, and the duties of the code Monitors. To this end, clause 34 required subscribing banks:

(c) to ensure that the CCMC has sufficient resources and funding to carry out its functions satisfactory and efficiently;

(d) to annually lodge with the CCMC (in a form acceptable to the CCMC) a report on [each banks'] compliance with this code;

(e) to empower the CCMC to conduct its own inquiries into [banks'] compliance with the code;

(f) to co-operate and comply with all reasonable requests of the CCMC in pursuance of its functions;

[582] Ibid.

(g) to require the CCMC to arrange a regular *independent* (emphasis added) review of its activities and to ensure a report of that review is lodged with ASIC … [and this] review is to consider with the periodic reviews in this code (see clause 5);

(h) to empower the CCMC *to carry out its functions and to set [its own] operating procedures* (emphasis added) dealing with the following matters, first having regard to the operating procedures of BFSO and then consulting with the BFSO and the ABA:

(i) receipt of complaints;

(ii) privacy requirements;

(iii) *civil and criminal implications* (emphasis added)

(iv) time frames for acknowledging receipt of a complaint, its progress, responses from the parties to the complaint and for recording the outcome;

(v) *use of external expertise ; and*

(vi) *fair recommendations, undertakings and reporting* (emphasis added); and

(i) to empower CCMC to name [banks] in connection with a breach of this code, or in the CCMC's report, where it can be shown that [banks] have:

(i) been guilty of serious or systemic non-compliance;

(ii) ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time;

(iii) breached an undertaking given to the CCMC;

(iv) not taken steps to prevent a breach re-occurring after having been warned that [a subscribing bank] might be named.[583]

[583] Ibid.

By its own provisions, the 2003 code 'sets standards of good banking practice for banks to follow when dealing with persons who are, or who may become, our individual and small business customers and their guarantors.'[584] Whilst this apparently provides widespread protection for customers of the banks which adopted the code, the use of discretionary words such as 'empower' rather than commitments by the CCMC on behalf of the banks undermines the integrity, honesty and independence of the CCMC.

This is evidenced in clause 34(i) above. This section empowers but does not require the CCMC to carry out its functions and therefore provides the banks an opportunity to evade their duties set out in the code. They can achieve this by marginalising the CCMC's ability 'to name [banks] in connection with a breach of this code'[585] despite the stated commitment by the industry that the code is a binding contract on those members who have formally subscribed to the code. [586]

1. Banks affirm their 2003 code is a binding contract

Clause 10.3 states that '[a]ny written terms and conditions will include a statement [by the banks] to the effect that the relevant provisions of this code apply to the banking service but need not set out those provisions.'[587]

A review by former BFSO legal counsel Anna Dea published 16 October 2003 titled '*The New code of Banking Practice – Issues for Litigation Lawyers*' goes further. It stated that 'the provisions of the code are part of the contract between the [subscribing] banks and

[584] Ibid cl 1.1
[585] Ibid cl 34.
[586] 'Taskforce on industry Self – Regulation: The Treasury: Appendix C – Regulatory framework for industry codes in Australia' 16 Oct 2003 <http://www.treasury.gov.au/documents/1123/HTML/docshell.asp?URL=appc.asp> on 5 February 2010.
[587] *code of Banking Practice* cl 10.3

its customers'.[588] Whilst this contractual aspect of the code was publicised and promoted by the BFSO, shortly thereafter the first Chairman of the CCMC, Mr Anthony Blunn AO was appointed.[589] There was also evidence that in April 2004, when the BFSO and the subscribing banks appointed the remaining code Monitors, they were also aware of the competing provisions of the Association's constitution.

It might be concluded that the BFSO/ Anna Dea views were published at or about the same time the constitution was being drafted. That being the case, the BFSO/ Anna Dea report provides evidence of the machinations in the planning by the banks and the appointment of the code Monitors by the banks and the BFSO which undermined the integrity, honesty and independence of the CCMC.

The ABA parties and the subscribing banks were also funding and publishing media statements regarding the introduction of the 2003 code and its high standards, as well as being a contract between the banks and customers. Chairman of the Australian Bankers Association, David Murray, supported by David Bell, CEO of the ABA, said:[590]

> The code sets out the banking industry's key commitments and obligations to customers on standards of practice, disclosure and principles of conduct for their banking services. … The ABA member banks agreed it was crucial that the new code be extended to cover small business and the aim was to treat personal customers and small business the same, wherever feasible. … The code is a valuable safeguard for these customers - it will benefit the customer and assist them have a better understanding of the standards the

[588] Anna Dea, 'The New code of Banking Practice – Issues for Litigation Lawyers'
[589] ABA Media Release, above n 3.
[590] 'New code of Banking Practice: Bank Customers to benefit from key industry standards on transparency, fairness, conduct and accountability' 12 August 2002 < http://www.bankers.asn.au/Review-of-the-code-of-Banking-Practice1145/default.aspx>

> banks will follow in day-to-day banking, complicated financial transactions and even if the customer experiences financial difficulty. … Once a bank adopts the code next year, it is explicitly committed to: act fairly and reasonably toward their customers in a consistent and ethical manner …. The adoption of the code will be a mark of quality and customers should be encouraged to check if their banks subscribes because it is a binding contract between a bank and its customers for which the institution will be held accountable… [as it] is a strong charter because its provisions have contractual effect.

The above statements by the ABA were supported by Colin Neave, "the independent Australian Banking Industry Ombudsman", who in the same media release said:

> The code is a positive initiative for bank customers and will greatly assist the dispute resolution work of the Ombudsman's office. … [and] I will have much greater guidance and support in reviewing a particular case, and it will help me decide whether a bank has observed good banking practice. I was pleased with the extensive consultation that Mr Viney employed in reviewing the code.

Clause 10.3 states that 'any written terms and conditions [between subscribing banks and customers] will include a statement to the effect that the relevant provisions of this code apply to the banking service but need not set out those provisions.' Again, the intentions of the banks are not clear as they confirm the provisions of the code apply and whilst referring to the banking service, make no statement that it is limited only to the banking service.

As a result, customers of the code subscribing banks are led to believe the high standards of the code apply and this is reinforced by Michael Quinlaln. He states that adopting

banks will be contractually bound by the promises made and will be potentially liable for damages for any breach[591] which is consistent with the BFSO/ Anna Dea report.[592]

The BFSO/ Anna Dea report seems to go further. It suggests that this clause creates a contractual obligation to comply with all laws and would also give rise to an entitlement to make a claim for loss or damage based on breach of contract. This part of the new code adds to the legal entitlements of existing and prospective customers.[593] This means that provisions of the new code could be relied on in breach of contract claims.[594]

Each of the above views seem consistent with the Fair-Trading amendments to the *Trade Practices Act 1974* (Cth), which took effect in 1998. The Act provides a general power to make industry codes of conduct enforceable at law.[595] Part IVB of the *Trade Practices Act 1974* (TPA) provides for industry codes to be underpinned in the Act. Section 51AD gives legislative backing to prescribed industry codes of conduct and provides for the ACCC to take action against breaches of prescribed codes. Section 51AE provides for industry codes of conduct to be prescribed in regulations proposed by the responsible minister.[596] These provisions amongst other statutory provisions are discussed in more detail later in the chapter.

2. code prescribes fairness

[591] Michael Quinlaln, et al, 'The code of Banking Practice and Unconscionability*' Allens Arthur Robinson*.
[592] Anna Dea, above n 15, 2
[593] Ibid 5
[594] Ibid 17
[595] 'Taskforce on industry Self – Regulation: The Treasury: Appendix C – Regulatory framework for industry codes in Australia' <http://www.treasury.gov.au/documents/1123/HTML/docshell.asp?URL=appc.asp> on 16 February 2010.
[596] *code of Banking practice 2003*

The *Corporations Act* 2001 (Cth) requires people who carry on a business of providing financial services to hold an Australian Financial Service Licence ('AFS Licence').[597] In doing so, they must operate efficiently, honestly and fairly. They must ensure that their staff and representatives are properly trained and supervised and have proper complaints handling procedures and must belong to an independent complaints scheme. This lays the backdrop of fairness in all financial services, which include banking services among others.

The 2003 code which is intended to apply to individuals and small business customers creates an obligation on the part of the subscribing banks to 'act fairly and reasonably in a consistent and ethical manner.'[598] To give effect to this clause, the 2003 code contained more detailed provisions on disclosure,[599] principles of conduct,[600] and periodic code review[601] compared to its predecessor.

Arguably, the obligation to act with 'fairness' towards bank customers must not be taken lightly in light of legal developments relating to concepts of fairness and equity. There is a dictionary meaning of the word 'fairness', which is 'acting equitably, impartially; in accordance with the rules'. Aside from the dictionary meaning, the NSW Law Reform Commission (NSWLRC) and the High Court of Australia considered the concept of

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[597] ASIC 'Do you need an AFS license' <http://www.asic.gov.au/asic/asic.nsf/byheadline/Do+you+need+an+AFS+licence%3F?openDocument> on 1 October 2010.
[598] *code of Banking Practice 2003* cl 2.2
[599] Ibid.. ccl 10-14
[600] Ibid.. ccl 15-33
[601] Ibid.. cl 5

'fairness' (or lack thereof) to include issues of unconscionable conduct in light of decided cases and other statutes which refer to and require a consideration of fairness.[602]

Thus, it can be said that the concept of fairness, as understood by individual and small business customers of the banks and interpreted by the law, has developed beyond the limitations of procedural fairness to include substantive fairness in the actual contractual terms. The NSWLRC refers to the *European Directive on Unfair Terms in Consumer Contracts* which states that unfair contracts include those 'contrary to the requirement of good faith... [and] causes a significant imbalance the parties rights and obligations under the contract.'[603]

As a result of the expanded community and legal meaning of the concept of fairness, practices which may have been considered acceptable in previous decades may be ruled as unfair today. Examples of such practices include '*terms irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract* (emphasis added).'[604]

3. code prescribes internal (IDR) and external (EDR) dispute resolution

The code states that the banks have both internal and external procedures for dispute resolution.[605] These provisions are also consistent with the duties of the BFSO and the CCMC and are said to provide an opportunity for banks who have failed to investigate

[602] Anna Dea, above n 15, 4
[603] Janine Pascoe, 'Women's Guarantees and 'All Moneys' Clauses' [2004] *QUTLJ* 17, 24
[604] Ibid
[605] *code of Banking Practice 2003* ccl 34-36

allegations that they breached the code to resolve financial disputes and code complaints without the need to use the courts.

The following discussion summarises clauses 34 to 36 of the 2003 code.

code subscribing banks are obliged to have internal processes for handling a complaint between the bank and its customers. A dispute exists when a complaint has been made by a customer about a breach of the code that has not been immediately resolved. The process must be free of charge and meet Australian standards. It must also meet the time frames described below and subscribing banks must provide written reasons for their decision: s35.1.[606] Banks must respond within 21 days of becoming aware of the dispute.

Within that time, banks must either complete the investigation and inform the customer of the outcome or advise more time is needed: s 35.3[607] Where banks cannot resolve a dispute within a 45-day period, they must inform the customer of their reason [and] provide monthly progress updates and specify a date when a decision may be expected: s35.5[608] This clause commits banks to have an IDR for handling complaints which, among other things, meets standards set out in the *Australian Standard AS 4269 – 1995* and any other standards the ASIC declares apply to the new code.[609]

The banks must also have available an external process for resolving disputes which is impartial. This process must be free to the customer and be consistent with the *ASIC Policy Statement* 139 'Approval of External Complaints Resolution Schemes': s 36.[610] In practice, subscribing banks are members of the Banking and Financial Industry

[606] Ibid.
[607] Ibid.
[608] Ibid.
[609] Anna Dea, above n 15
[610] Ibid.

Ombudsman Scheme which deals with financial disputes for dealing with claims by bank customers up to $150 000.[611]

In summary, the 2003 code set out detailed procedures for banks to comply with when they investigate disputes and/or complaints from individual and small business customers. These resolution procedures should be free of charge and transparent with respect to the investigating officers duties and their findings and provide an opportunity for parties with limited funds to deal with 'code complaints' and 'financial disputes' without excessive legal costs. In other words, clauses 34 to 36 aim to provide a level playing field that is fair and reasonable, and accessible to all parties.

Despite the procedures contained in the 2003 code, further investigation reveals there are apparently significant loopholes which allow the banks an opportunity to circumvent their high standards and practices set out in the code.

As suggested earlier, one such get-out which has been used by some, if not all of the, code subscribing banks is to confuse the terms 'complaint' and 'dispute'. Evidence of this is seen by glancing at the CCMC Annual Reports which confirm only few complaints are referred to them by bank customers. This apparently exists because complaints submitted to the banks can be stonewalled. When this happens, the CCMC also support the banks' failure to comply with clause 35 by referring to PART F: APPLICATION AND DEFINITION includes definitions under clause 40. Whilst customers can read and understand the application of the code and the high standards it purports to uphold, clause 40 represents a totally different culture that underpins the code.

[611] Presently the BFSO can investigate customer complaints or disputes to a limit of $280,000

In PART F, the code subscribing banks, with the support of other bank parties, have set out definitions which define a 'banking service' which means 'any financial service or product'. From the inception of the 2003 code, the ABA which published the code and the banks which adopted it, whilst providing a definition for 'dispute', failed to define the meaning of 'complaint'. This provided the banks and later the CCMC considerable latitude in determining which complaints they would investigate, if indeed they ever intended to investigate breaches of the code by the banks.

To explain this, the 2003 code included 'wriggle words' suggesting banks had little interest in handing over control to the Committee pre-2003. Clause 40 provided them an ability to promote motherhood statements such as 'we *will act fairly and reasonably* (emphasis added) towards [you] in a consistent and ethical manner [and] in doing so we will consider your conduct, our conduct and the contract between us.'[612] Whilst the banks made this commitment and promoted it through PR media, stating the Committee had a duty to 'monitor compliance under the code' and 'investigate, and make a determination on any allegation from any person…'[613] the evidence suggests bankers did not intend to investigate '***any***' complaint prior to publishing the revised 2003 code.

It seems wriggle words are used by banks to evade their code duties, and follows:

1. A customer refers to the code and states a bank acted disingenuously or dishonestly and takes the first step by making a complaint to the bank's IDR.

2. The bank ignores the complaint when its customer alleges it failed to act fairly and in an ethical manner when it breached clause 35 in point 1 above.

[612] *code of Banking Practice* 2003 'PART B: OUR COMMITMENTS AND GENERAL OBLIGATIONS' cl 2.2
[613] Ibid cl 34(b)(i) and 34(b)(ii).

3. The customer then refers the complaint to the CCMC stating that the bank breached its ethics clause and failed to investigate the complaint.
4. The CCMC then refers the complaint back to the bank that declines to provide relevant information needed to resolve the complaint, claiming it is privileged.
5. The CCMC refers the banks' position to the customer who then provides evidence the bank breached the ethics clause and its IDR duties set out in clause 35.
6. The CCMC responds stating clause 40 precludes it investigating complaints other than disputes, stating clause 40 defines dispute as complaints in relation to 'a banking service' which means 'any financial service or product'.
7. As such, the CCMC has few powers to comply with its clause 34 duties and therefore, the high standards set out in PARTS A to E of the code means the CCMC is unable to investigate any complaint and carry out its duties.
8. This sophisticated cycle means that the 2003 code was engineered so that individual and small business customers are ultimately required to use the courts to enforce their rights.

Hence, subscribing banks, whose ABA published the code, can muddy-the-waters by alleging clauses 34 to 36 are not a '*financial service or product*' as they fall outside their duties referred to in the definitions in PART F. Likewise, by providing subscribing banks an opportunity to breach clause 35 and preclude the CCMC investigating and naming the bank, the ABA's code adopted by the subscribing banks can be used to cover-up allegations of serious misconduct and this undermines the intention of the code to protect all of the banks' customers.

... Just Following Orders

An example of how this potentially disingenuous practice is applied was set out in a letter to a Westpac customer dated 1 September 2009 and signed by Westpac's Senior Counsel, Dispute Resolution Group, Felicity Booth[614]. In this letter, the bank refers to a complaint that refers to the constitution.

Westpac's reply states the code 'identifies a number of standards of practice, disclosure and principles of conduct with respect to banking services.' Westpac fails to refer to the bank's duties set out in clause 35.7 which states [its] "dispute resolution process is available for all complaints other than those that are resolved to [your] satisfaction". Westpac alleges clause 35 is limited to only to resolving disputes which refers to a banking service rather than investigating code complaints.[615]

Westpac's views do not match the intentions of the CCMC. In its 1 April 2004 to 31 March 2005 Annual Report, the CCMC states:[616]

> The code of Banking Practice sets standards of good banking practice and requires banks to work continuously work towards improving the standards of practice and service in the banking industry. The establishment of the [CCMC] represents a significant addition to the banking landscape. The Committee was established under a unique section of the new code... which requires the creation of a body specifically charged with monitoring compliance with the code. The Committee's role is to monitor subscribing banks' compliance with the code of Practice; and "investigate complaints that [allege] the code

[614] 1 September 2009. Felicity Booth, Westpac, letter to Westpac customer regarding its decision not to investigate a complaint relating to the customer's rights set out in the code. A copy of this correspondence may be available upon request.
[615] Ibid.
[616] *2004 – 2005 CCMC First Annual Report* published by the inaugural member of the Committee: Anthony Blunn AO (Independent chairman), David Tennant (Consumer and small business representative), Ian Gilbert (Retail banking representative), and Barbara Schade (CCMC chief executive officer).

> has been breached. The Committee fulfils its role by accepting, investigating and making determinations on any allegations by any person that the code has been breached.[617]

These views are further supported by the CCMC's document headed *'How do I complain?'* that directs complainants to the CCMC by email address *info@bankcodecompliance.org*. In this document, the CCMC states its duties were 'established to monitor and ensure banks' compliance with the code [and it can] investigate complaints from any person or organisation that a bank has breached its obligations under the code.' This interpretation was the subject of an internal memorandum sent to the compliance officers of the CCMC the subscribing banks, on 15 November 2004 by Executive Director, CCMC, Barbara Schade, which states:[618]

> The CCMC defines disputes as "complaints by customers that are not resolved at the first point of contact, and are escalated to a complaints handling or customer relations area of the bank. This is slightly different to the BFSO's definition of disputes in light of the differences between the CCMC's compliance role and the BFSO's dispute handling role.
>
> A bank obligation to respond to a complaint before the CCMC about a breach of the code is not extinguished if the bank resolves the underlying dispute directly with its customer. The CCMC will continue to investigate whether the banks conduct constitutes a breach of the code, although the CCMC will take into account any action taken by the bank to remedy an alleged breach, including settlement of the dispute. [code subscribing] [b]anks should ensure that their response to any CCMC investigation focuses on the issue of code compliance rather than dispute resolution.

[617] This statement is consistent with the 2004 code, PART E: RESOLUTION OF DISPUTES, MONITORING AND SANCTIONS, clause 34(b)(ii).
[618] 15 November 2004, Barbara Schade, Executive Officer, CCMC, memorandum to CCMC's compliance offices in reference to the first CCMC bulletin to subscribing banks setting out the CCMC's approach to compliance issues that has arisen.

The differences which exist between the alleged policies of the subscribing banks and the CCMC following the publication of the May 2004 code, and the appointment of the code Monitors seem to have been addressed by legislation.

In particular, the *ASIC Regulatory Guide 183* (RG 183) empowers ASIC to enforce emerging administrative mechanisms to address customers' complaints about breaches of the code. In RG 183 clause 73, such administrative mechanisms were stipulated as:[619]

> "Administration
>
> RG 183.73: A code applicant must establish that the code is effectively administered. For a code to work effectively there needs to be an administrative body charged with overseeing the operation of the code that:
>
> (a) is independent of the industry or the industries that subscribe to the code and provide the body's funding (e.g. with a balance of industry representative and consumer representatives and an independent Chair); and
>
> (b) has adequate resources to fulfil its functions and to ensure that code objectives are not compromised.
>
> RG 183.74: Without such a body, there is a risk that oversight of industry compliance with the code will be reduced, systemic problems will not be identified, and industry and consumer awareness of the code will be low.
>
> RG 183.75: The code administration body should also be responsible for:
>
> (a) establishing appropriate data reporting and collection procedures;
>
> (b) monitoring compliance with the code;
>
> (c) publicly reporting annually on code compliance;

[619] Information on changed legislation in 2003 when the code was drafted provided to the author by Tony Windsor MP and was said to have been sent to him by the Federal Parliamentary Library, August 2010.
[619] 15 November 2004

(d) hearing complaints about breaches of the code and imposing sanctions and remedial measures as appropriate;

(e) reporting systemic code breaches and instances of serious misconduct to ASIC;

(f) recommending amendments to the code in response to emerging industry or consumer issues, or other issues identified in the monitoring process;

(g) ensuring that the code is adequately promoted;

It seems ASIC's mandate provides it with overarching policies that ensure industry codes are not inconsistent with Commonwealth legislation. RG 183.27 incorporates the *Corporations Act* 2001 (Cth) and states that code 'must not be inconsistent with the Act or other relevant Commonwealth laws for which ASIC is responsible'. It states:[620]

'ASIC may only approve a code of conduct where:

(a)The code... is not inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities (see RG 183.28-RG 183.30); and

(b)ASIC considers that it is appropriate to approve the code given:

(i)The ability of the applicant to ensure that persons who claim to comply with the code will comply with the code (see RG 183.310); and

(ii)The desirability of codes of conduct being harmonised to the greatest extent possible (see RG 183.32-RG 183.35).

The *ASIC Regulatory Guide 183* provides ASIC jurisdiction to determine if codes are inconsistent with the *Corporations Act* 2001 (Cth).[621] In Part 7.10 headed 'Market

[620] *ASIC Regulatory Guide 183*, 5 July 2007
[621] Ibid, RG 183.28

Misconduct and Other Prohibited Conduct', the Act prohibits false and misleading statements, dishonest conduct and misleading and deceptive conduct (ss 1041E, 1041G, 1041H) which suggests ASIC's responsibility extends beyond the code.

ASIC can investigate factual circumstances and behaviour related to the code in order to ensure that such conduct is not inconsistent with the Act. As such, it seems that RG 183 relates to ASIC's mandate and jurisdiction to investigate bank parties' conduct with regard to their code practices if there are grounds for finding them guilty of prohibited conduct as set out in the *Corporations Act*.

4. Statutory unconscionability provisions and breach of code

Of particular relevance in the context of unconscionability is clause 2.2. It states that banks 'will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.'

Also relevant is clause 25.2 'With your agreement, we will try to help you to overcome your financial difficulties with any credit facility you have with us. We could for example, work with you to develop a repayment plan.'[622]

It then seems relevant to review the growing trend of regulations prescribing contractual terms and conditions, in particular how each one defines and deals with the concept of 'unfairness and unconscionability'.

Section 12CC of ASIC Act 2001 mirrored in s51AC of TPA 1974

[622] Michael Quinlan, above n 19, 22 - 23.

The *ASIC Act* and the *Trade Practices Act* tackle boundaries of substantive unfairness.[623] Section 51AC of the *Trade Practices Act 1974* (Cth) (TPA) makes particular reference to specific conduct and circumstances that courts may have regard to, including:

1. The relative strength of the bargaining positions of parties. Which looks at whether as a result of the conduct, the debtor was required to comply with conditions that were not reasonably necessary to protect the legitimate interests of the creditor;

2. Undue influence or pressure or unfair tactics;

3. Failure to disclose intended conduct that would affect the debtor's interests or risks that the creditor should have foreseen that would not have been apparent to the debtor; and

4. The extent to which the creditor was willing to negotiate the terms and conditions of any contract and the extent to which the parties acted in good faith.[624]

Most significantly, courts may take note of the requirements of any 'applicable industry code' or 'any other industry code' if the debtor acted on the reasonable belief that the creditor would comply with that code. Elizabeth Sexton, General Counsel to the Banking and Financial Services Ombudsman is reported to have said that the code has the potential to be relevant to causes of action brought under s12CC *ASIC Act*.[625]

PART B: OUR KEY COMMITMENTS AND GENERAL OBLIGATIONS, clause 4 of the code headed 'Retention of [customers'] rights' specifically refers to the TPA. In this clause, the banks state that the code 'imposes an obligation on [banks] in addition to

[623] Janine Pascoe, above n 35, 21
[624] Michael Quinlan, above n 19, 23
[625] Ibid.

obligations applying under the law, [banks] will also comply with the code…' Therefore, depending on the circumstances, banks may also be liable for unconscionable conduct under the *Amadio*[626] doctrine or under ss51AA and 51AC of the TPA. Although the *ASIC Act* has mirror unconscionability provisions, these apply to financial services.

Whether by way of statute or in contract, the conduct of creditors in their dealings with debtors is subject to increasing scrutiny. Notwithstanding that the debtors may be well-advised commercial entities, the aggressive, self-interested pursuit of creditors' rights is open to greater risk of being challenged.[627]

The factors indicating unconscionability under s 51AC(3) include the respective bargaining positions of the parties, the extent of disclosure of relevant risks, the ability to negotiate the terms of the contract and the extent to which the parties acted in good faith.[628]

Dr. Janine Pascoe states 'a uniform, national approach to harsh and unconscionable standard form contracts is needed.'[629] The issue of uniform unfair contract law has recently come under the scrutiny of the standing committee of Officials of Consumer Affairs ('SOCA') national working party, which released its discussion paper on 1 February 2004. The paper noted that in recent times it is the standard form contract which has become the focus of allegations of unfairness. Clauses in financial service contracts,

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[626] *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447
[627] Michael Quinlaln, above n 19, 24
[628] Janine Pascoe, above n 35, 25
[629] Ibid 26

including guarantees, were amongst the types of unfair terms noted in the Discussion Paper.[630]

The expanded scope of s51AC, goes beyond traditional indicators of unconscionability under the general law principles as incorporated in s51AA. Section 51AC of the TPA was designed to protect 'business consumers.' The expanded criteria reinforce the need to prevent procedural unfairness in pre – transaction negotiations and substantive unfairness in the actual terms of the contract.[631] S51AC factors include, 'The requirements of any applicable industry code' s51AC(3)(g).[632]

There is little doubt s51AC has a far-reaching and flexible potential application… The courts will have the discretion to apply a requirement of good faith disclosure to surety transactions. Moreover the lender's conduct can be judged by the normative standards incorporated into relevant industry codes.[633]

However, as discussed, the code contains wriggle words and loopholes such as the lack of a definition for 'complaint' that effectively excludes the operation of the protective and beneficial safeguards of s 51AC of the TPA.

The Contracts Review Act 1980 (NSW)

[630] Ibid
[631] Ibid 29
[632] Ibid 30
[633] Ibid 31

The above provisions, in conjunction with s7 of the *Contracts Review Act 1980* enables relief to be granted where court find a contract to have been unjust in the circumstances relating to the contract at the time it was made.[634]

5. General Obligation to act in 'Good Faith'

The inclusion of factors such as good faith and risk disclosure, allows a court to focus squarely on the issue of substantive unfairness. It is also consistent with the increasing tendency by Australian Courts to imply a general obligation of good faith into contracts. It is suggested that the insertion of these factors actually apply new moral and ethical standards to business dealings.[635]

6. Remedies available for a breach of the code

A court may impose remedies including, damages to consumers or business customers who have been hurt. Injunctions can restrain companies from engaging in conduct that is in breach of the code. Court orders can also declare a contract to be void or vary the terms of contract and make orders requiring money to be refunded.[636] The availability of ancillary orders under s87 of the TPA for conduct which breaches s51AC of the TPA also gives the court similar discretion to partially rescind the contract.[637]

The NSWLRC noted that the implementation of this approach can be achieved through powers under the TPA. Section 80 of the TPA allows the court to grant an injunction in terms it deems appropriate in relation to contraventions of the Act. It is possible that a

[634] Ibid
[635] Ibid.
[636] 'Taskforce on industry Self – Regulation', above n 25
[637] Janine Pascoe, above n 35, 31

similar approach can be achieved by the court's broad powers to grant injunctions to prevent conduct in breach of provisions under the Trade Practices Legislation relating to unconscionable conduct and misleading and deceptive conduct. The provisions however, remain untested in this regard. [638]

The ACCC has in fact had recourse to the injunctive powers of the TPA in a guarantee case - *ACCC v National Australia Bank Ltd*.[639] The court ordered by consent injunctions against the bank and one of its managers to restrain the bank from obtaining personal consumer or business guarantees in Tasmania without properly explaining the nature of the guarantee and the need to obtain independent legal advice before signing the guarantee. The Court also ordered by consent that the bank include in its Internal Lending Manual a statement requiring its entire lending staff throughout Australia to strictly comply with these procedures when obtaining personal consumer or business guarantees. It ordered the bank to circulate its lending staff a bulletin to this effect.[640]

Therefore, although there are likely remedies within the court system, the code which was intended by the Martin Committee to avoid costly litigation, was reiterated by Dr. Janine Pascoe in her report. She stated '*taking legal action is the very mischief that the proscription of unfair provisions is aimed at preventing* (emphasis added).'[641] Hence, the code with effective enforcement mechanisms and this was not properly addressed by the ABA and the bank parties in 2003.

B. *CODE COMPLIANCE MONITORING COMMITTEE*

[638] Ibid 24
[639] Unreported Federal court of Australia 5 June 2001
[640] Janine Pascoe, above n 35, 24
[641] Ibid 23

Following the requirements of the revised 2003 code to establish the CCMC, the officers of the BFSO and code subscribing banks were responsible for jointly appointing the first Chairman of the CCMC, Mr Tony Blunn AO on 17 November 2003.[642]

The CEO of the ABA, David Bell and the BFSO Chair, Jillian Segal proudly announced the joint decision of their two organisations to establish the CCMC. Ms Segal stated that she was looking forward working with the code Monitors in resolving disputes between banks and customers.[643]

Mr Bell emphasised the CCMC's role and importance by stating:

> [t]he CCMC will have a very important role especially when it comes to taking action against a bank, naming a bank means that the members of the public and regulators will know about the breach with resulting damage to the bank's reputation. *The code is contractually binding* (emphasis added), so a regulator might even consider action of its own.[644]

C. *THE MODIFIED 2004 CODE – (PUBLISHED 11 MAY 2004)*

Less than a year later, on 10 May 2004, amendments were introduced to the August 2003 code to accommodate changes in disclosure requirements for prospective guarantors. [645] The amendments included:

- expansion of clause 28.4 (d) (i)
- addition of clause 28.16,

[642] ABA Media Release, above n 3.
[643] Ibid.
[644] Ibid.
[645] Alan Tyree, above n 38

- slight changes to clause 34.1 (i) and (iii) with regard to BFSO replacing ABIO
- in clause 40 deletion of the definition for ABIO, addition of BFSO; expansion of the definition of code by including 'any amendments from time to time which have been published by the ABA and publicly adopted by [subscribing banks]'; expansion of the definition of commencement date to include 'any subsequent amendments made to the code means the date from which [subscribing banks] have publicly announced having adopted these amendments'; inclusion for a definition of debit user, direct debit and direct debit request.

It is apparent that when the ABA and its officers approved and subsequently published the 10 May 2004 Modified code, and officers of the code subscribing banks approved and adopted it shortly afterwards, the machinations referred to earlier were further entrenched by the bank parties when they omitted providing any reference to the competing provisions of the Association's constitution.

As such, the bank parties set about funding the cost of publishing and promoting the code, whilst the subscribing banks adopted it and advised their customers accordingly without making reference to the Association's constitution which limited the rights of their customers and the powers of the CCMC from 20 February 2004.[646] Likewise, according to clause 34 of the code, these banks and their officers agreed to participate in establishing the CCMC.

Both the 2003 and the Modified 2004 codes were inadequate because they did not have adequate compliance or enforcement systems which resulted from significant conflicts of

[646] *CCMCA Constitution* dated 20 February 2004.

interest. These included the relationships between the banks, the ABA, the BFSO, the CCMCA and the code Monitors which were not at arms-length. The fact that it was the code subscribing banks which substantially funded all these parties that may have allowed the banks to believe it was their code and their rights to determine how the code was to be applied.

Allegations of conflict of interest might be rebutted by banks as there were consumer advocates who were part of the wider group of bank representatives. It could be argued that this, however fails to overcome the conflict as the banks, supported by their associates, acted to appoint the consumer representatives of the BFSO and CCMCA. As such, there must be a higher standard of safeguard against conflicts of interest, and arguably, even appearance of conflicts of interest, in order to preserve the semblance of independence and integrity which is essential to the banking industry.

A comparison may be made with the judiciary, whose members are required to resign from private practice upon taking on the judicial role because even an appearance of conflict of interest can undermine the image of the judiciary as an independent institution. This is particularly relevant today in light of the spate of banking scandals (including in the US) that impacted on the GFC and economies of the world today.

The existence of the CCMCA constitution and its capacity to manipulate on the code and the code Monitors are expanded upon in the next chapter. As the code is a contract, enforceable by law, and if the provisions are breached, there should be adequate provisions available through the Courts within the TPA, which are mirrored in the ASIC Act, to provide a wide-range of remedies for consumers.

Without appropriate legislation and effective regulation this, of course, requires that individuals and small businesses use the courts where banks enjoy a decisive 'resources' advantage as the cost of winning or losing is incidental and, anyhow, is met by the banks' shareholders. This is not what the Martin Committee wanted having expressed a 'need for cheap, speedy, fair and accessible alternatives to the traditional court system if customers are to receive justice in their dealings with the banks.'[647]

[647] Ibid, 395, para 20.67

Chapter VII

ALARM BELLS RING

A. *INTRODUCTION*

Shortly after the 2003 code was published, the CCMC was established and its Committee were appointed, on 1 April 2004 and from the commencement of the restructuring period, it was evident that self-regulation relied on independent monitoring for enforcement.

The CCMC was designed and reported to be an independent monitoring body and its enforcement mechanisms were widely promoted to create a community perception that the banks would honour their commitments in the code. After the CCMC was established, ASIC limited its role enforcing self-regulated voluntary industry codes.

Whilst the government was motivated to modify its policies and the oversight role of its regulator, ASIC, there was widespread belief that the CCMC was capable of handling its role independently of banks and without the need for government interference. This had the effect of distancing ASIC from safeguards provided by the code, and left the CCMC to act as sole guardian for consumer protection. The evolution of the modern codes that were introduced in 2003 and 2004 following the Viney report, made it clear to all the stakeholders that the success of the CCMC and its Committee rested on its institutional integrity, honesty and independence, and the willingness of the subscribing banks to cooperate and comply with their duties in the code.

In October 2005, the Foundation for Effective Markets and Governance (FEMAG)[648] was commissioned by the Committee to conduct the initial review of the CCMC's activities.[649] The review was made in accordance with requirements of Clause 34(g) of the code[650] with FEMAG members having considerable experience and expertise in public policy and administration with backgrounds in good governance, expertise in consumer protection and competition policy and in regulation and accountability of systems. The Committee has a duty under this clause to 'ensure that the independent review of its activities… is lodged with ASIC'.[651]

The decision by the Committee to commission FEMAG to carry out this initial review seemed apt due to the extraordinary credentials and widespread expertise of its officers which included patron Prof Allan Fels AO[652] and directors Allan Asher[653] and John Braithwaite[654].

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[648] The Foundation is affiliated with the Australian National University and is located within the Regulatory Institutions Network (RegNet) of Research School of Social Sciences. See FEMAG Report, 35. Its overarching mission is to contribute to the welfare of people, especially the least advantaged, by assisting in optimal application of the market mechanism. See the FEMAG website: http://femag.anu.edu.au/.

[649] FEMAG, 'Report of the Initial Review of Activities of the code Compliance Monitoring Committee: The CCMC Monitors Compliance with the Banking code of Conduct' ('FEMAG Report'), Australian National University, October 2005, 12.

[650] code of Banking Practice 2003 Cl 34 (g): banks must require the CCMC to arrange a regular review of its activities and ensure a report of the review is lodged with ASIC, the initial review should be made after the first year and after which must coincide with the periodic reviews of the code. Available at http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172 on 19/03/2010

[651] *code of Banking Practice 2004* cl 34(g)

[652] Professor Allan Fels AO Patron: Former Chair of Australian Competition and Consumer Commission (ACCC) and Founding Dean of the Australian and New Zealand School of Governance

[653] Allan J Asher BCom LLB: Director, CEO, UK Energy Watch, Co-chair, International Network of Civil Society Organisations on Competition, President, International Society of Consumer and Competition Officials and formerly Deputy Chair, ACCC, Chair, OECD Consumer Policy Committee, Manager, Australian Consumers' Association, Member, Executive Committee of the Australian Federation of Consumer Organisations and the Council of Consumers' International

[654] Prof John Braithwaite BA(Hons), PhD (QU): Director, Research School of Social Sciences, Australian National University, Chair, Regulatory Institutions Network and formerly Chair and CEO, Australian Federation of Consumer Organizations, Member, Economic Planning Advisory Council, Associate Commissioner, Trade Practices Commission and Australian Consumers' Association

FEMAG consisted of highly competent and esteemed academics with expertise in public policy and administration who sought to contribute to community welfare, 'especially the least advantaged, by assisting in optimal application of the market mechanism and good governance'.[655] Its members have proficiency and global experience in the design and implementation of consumer protection, competition policy, regulation and accountability of sustainable systems.

The FEMAG review in 2005 was undertaken by:[656]

- Robin Brown BA, M Public Policy (ANU) - Director, Secretary-General and Consultant in Consumer Affairs, Council Member, Australian Consumers' Association, Member, International Network of Civil Society Organisations on Competition and code Authority of the Australian Direct Marketing Association; formerly Chair and CEO of the Australian Federation of Consumer Organisations, Member, Australian Life Insurance Industry Complaints Tribunal
- Bill Dee BA (ANU) LLB (Adelaide University) – President, Society of Consumer Affairs Professionals in Business (Australia), Member, Standards Australia International Committee on business governance standards and convenor of its working group on fraud and corruption control, internal whistleblowing systems, organisational codes of conduct and Corporate Social Responsibility; formerly Executive, ACCC and responsible for development of legal compliance programs, codes of conduct and self-regulation.
- Howard Hollow - Executive Director; formerly Senior Officer, ACCC, Project Manager, Consumer Assistance Facilitation Project Philippines

[655] FEMAG Report, 35
[656] FEMAG website, 'People' <http://femag.anu.edu.au/web/people/index.html>

- John Wood - Council Member, Australian Consumers' Association, Chair, Consumer Advisory Panel, ASIC; formerly Deputy National Ombudsman in Australia, Director, Australian Federal Bureau of Consumer Affairs, President, Society of Consumer Affairs Professionals in Business, Editorial Board of the International Journal of Consumer Policy.

The Committee evidently commissioned the most highly qualified organisation to carry out the CCMC's first review at the end of its first year of operation. The information that FEMAG had to rely on however was limited and many of its recommendations may have been based on the aspirations of the Committee rather than historical evidence of its effective performance.

The CCMC 2004-2005 Annual Report sets out the results achieved from its inception on 1 April 2004 until 31 March 2005, at the end of its first year of operation. It is headed 'The code of Banking Practice' and the cover notes that it 'sets standards of good banking practice and requires banks to continuously work towards improving the standards of practice and service in the banking industry'.[657] The report is also aspirational and states the Committee's role is to:[658]

- Monitor subscribing banks' compliance with the code; and
- Investigate complaints that the code has been breached; and fulfils its role by:
- Accepting, investigating and making determinations on *any allegation by any person* (emphasis added) that the code has been breached;
- Requiring banks to complete a comprehensive statement addressing all aspects of compliance annually;

[657] CCMC Annual Report 2004-05 <www.codecompliance.org/pdf/CCMC_2004-6_AR.pdf>
[658] Ibid 1

- Undertaking compliance monitoring exercises including compliance visits;
- Liaising with other schemes that have regard to the code such as BFSO;
- Engaging in dialogue with banks on their obligations under the code;
- Encouraging stakeholders such as consumer advocates to keep the Committee informed on systemic code issues, and working with banks and others to understand the code and address misunderstanding and uncertainty;
- Require banks work continuously towards improving their standards of practice;
- Promote better informed decision about their banking services;
- Promote information about rights and obligations that arise out of the banker/ customer relationship and contract;
- Require banks to act fairly and reasonably in a consistent and ethical manner as set out in clause 2.2 of the code.

Aspirations of the CCMC during 2004

The aspirations of the CCMC during this period is set out in the internal memorandum sent to the code subscribing banks on 15 November 2004 by the CCMC Executive Director, Barbara Schade.[659] In her correspondence Schade defined the meaning of 'dispute' as a complaint not resolved by the banks' complaints handling department. This is different to the BFSO definition of dispute due to the difference between the CCMC's compliance role and the BFSO's dispute handling role.

When FEMAG was commissioned by the Committee to carry out its review in 2005, it was on the understanding that '[*b*]*anks should ensure that their response to any CCMC investigation focuses on the issue of code compliance rather than dispute resolution*

[659] See above note in Chapter 6 of this Report.

(emphasis added).'[660]

CCMC's 2004 complaints handling flowchart

The complaints handling flowchart introduced by the CCMC sets out twelve steps which were:[661]

1. A complaint sent to the CCMC is received and assessed by the Executive Officer;
2. If the Committee cannot look at the matter raised, for example where it predates the code, the customer is advised and the case is closed;
3. If the Committee can look at the matter, the complaint is referred to the bank;
4. The bank is asked to respond to the complaint;
5. The complaint and the bank's response are reviewed by the Executive Officer;
6. The complaint is referred to the members of the Committee for review;
7. The Committee meets to consider the complaint;
8. Notice of Proposed Determination is issued to the complainant and the bank;
9. Any submissions in response to the notice are reviewed by the Committee;
10. Determination is issued to the complainant and the bank;
11. The Committee liaises with the bank in respect of any remedial action required;
12. The case is closed.

In carrying out its review of the CCMC's activities during its first year, FEMAG would have considered how effectively the above steps were implemented by its Committee and Executive Officer. The 2004-05 Annual Report notes that the Committee investigated and

[660] Barbara Schade Memorandum dated 15 November 2004
[661] CCMC Annual Report 2004-05, 5

made a determination '*in one case*' (emphasis added) only whilst the other 18 complaints remained open or were considered inappropriate due to:[662]

- 5 complaints predated the banks' adoption of the code (no reference was made as to whether this refers to the 1996, 2003 or the 2004 code).
- 2 complaints were simple queries that did not require determination.
- 1 complaint had insufficient information to make a determination.
- 1 complaint was about a financial service provider, not a bank.
- At the end of the year, 9 complaints remained open.

As there was only one complaint investigated in accordance with the CCMC's flowchart, and because the Committee determined that no breach occurred, the further aspirations of the CCMC and the FEMAG Report had to rely on remedies and sanctions which had not been tested. The 2004-05 Annual Report notes that 'where there is a breach of the code, the Committee *can* (emphasis added) require a bank to take remedial action or give an undertaking as to future conduct. A bank *can* (emphasis added) be publicly named if it fails to take the action prescribed by the Committee, or where the breach is of a serious or systemic nature.'[663] As such, these principles were not applied during 2004-05.

In reporting its views with respect to how effective the CCMC practices were being implemented, FEMAG would rightly consider the force of the Committee's aspirations and its stated independence to ensure the future application of the high principles were paramount. Having regard to the CCMC's resources, operating procedures, interpretation of its role under the code and its relationship with other industry bodies, FEMAG tackled

[662] Ibid 4; no details were provided with respect to this complaint and why no determination was warranted.
[663] Ibid

issues relevant to the institutional integrity and effectiveness of the newly formed consumer protection systems.

While the review mentioned issues related to the Association's constitution (that it was unable to explore), it concluded that the CCMC was performing *largely* (emphasis added) in accordance with its aspirations. FEMAG stated, however, the potential existed for significant failures to arise due to *flaws in the code and the restrictive and opaque nature of the Association's constitution* (emphasis added).[664]

B. *THE ASSOCIATION'S CONSTITUTION*

In hindsight, it seems difficult to appreciate how the aspirations of the Committee might be compromised by the constitution in the early days of the CCMC. FEMAG were mindful of the contradictions between the principles of the code and the Association's constitution however it seems neither the Committee nor FEMAG anticipated problems that undermined the high principles set out by the Martin Committee in 1991. These were discussed earlier in this report and stem from the notion that individuals and small businesses require an alternate forum for resolving complaints and disputes with banks other than having to use the courts.[665]

As discussed earlier, this was summed up by Sir Ninian Stephen: *'[t]he Chief Justice of a State said to me just the other day that on his salary he could not possibly afford to*

[664] FEMAG Report, 4
[665] Martin Committee Report.

litigate in his own court.'[666] This underpinned the principles embodied in the 2004 code that were affirmed by FEMAG.

Its report identified that 'for a reporting system to work effectively [it needs]… strong, sustained leadership supporting a culture of open disclosure, transparency and effective response to performance problems.'[667]

1. Committee and FEMAG affirm 'industry best practices'

In undertaking its review, FEMAG was of the belief that:

> Those who subscribe to the notion of self-regulation should be able to demonstrate a high level of compliance with self-regulatory codes if credibility with the public at large, regulators and important stakeholders is to be achieved This requires a level of commitment and resources.[668]

This was supported in an interview which FEMAG reported that suggested:

> there had been a view amongst both consumer and government stakeholders that the industry was not accountable to anyone regarding the code, but that the CCMC's establishment now provided the needed assurance to stakeholders.[669]

Hence, the CCMC is vitally important for promoting the legitimacy of the subscribing banks' code because it provides needed assurance to stakeholders that the banking industry has a body it is accountable to.[670]

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[666] Ibid, 394, para 20.65
[667] FEMAG Report, 28.
[668] FEMAG Report, 4
[669] Ibid 14
[670] Ibid 14

CCMC's objective – 'to achieve highest compliance by banks'

Though not stated in the code, FEMAG suggested it is clear that the CCMC's objective is to achieve the highest possible compliance with the code by signatory banks.[671] To achieve this end, the code gives the CCMC two broad functions (reiterated in the Association constitution):[672]

1. general monitoring which involves planning and administering programs for the monitoring of banks' compliance with the code; and
2. investigating and determining code breach allegations and publicly naming banks for serious or systemic non-compliance with the CCMC's requests.

2. The Committee's need for independence, transparency and fairness

FEMAG supported the Martin Committee's underlying principles in the first code which were set out by the ABA and supported by stakeholders. With respect to independence, FEMAG noted in 2004-05 that:

> Although it does not use the word 'independent', *arguably the code implies that the CCMC is to be able to operate as an independent agency without influence from the banks and other parties and this seems a necessary threshold condition for pursuit of the above objective*.[673] (emphasis added)

The FEMAG Report was the first to make public the issue of the Association's unpublished constitution. During 2004-05, the principles of the code and protection that it provided individuals and small businesses were such that conflict of interest and abuse of the system were not foreseen. The report however provided a small window into how the

[671] Ibid 15
[672] Ibid 5
[673] Ibid 15

banks parties later used the constitution to restrict the independence of the Committee and the operation of the CCMC.

The muddled organisational structure that was in place following the establishment of the CCMC which was bound by an unpublished constitution required the code subscribing banks, with the support of the BFSO, to appoint the first Committee. This paradox could undermine the principle of independence as the bank parties and the BFSO were privy to the Association's constitution however it seems possible, if not probable, that the Committee and FEMAG failed to fully consider the potential limitations that the constitution might impose on the CCMC.[674]

As a consequence, FEMAG noted that clauses 3.1 and 4.3 of the constitution ***generally*** (emphasis added) reflected the intent of the code in empowering the CCMC to carry out its functions.[675] Likewise, with respect to the need for the Committee to have fair and transparent practices for investigating alleged breaches of the code, FEMAG stated that while the CCMC has in place well-prepared documents setting out its procedures:

> [t]his document has only been used 'in-house' thus far. A number of stakeholders suggested that the procedures document and the form letters used in the course of investigations should be published on the CCMC website and circulated to key stakeholders… this information should appear in the CCMC's annual report and on its website as complaints are made and resolved.[676]… CCMC could be more visible and transparent in its procedures and should frequently communicate with the banks on what it considered were the current issues… Banking representatives interviewed in the course

[674] CCMC Submissions to Jan McClelland dated 11 March 2008
[675] Ibid
[676] Ibid 19-20

> of the review supported meetings with the CCMC because it would give them an open forum to identify industry-wide systemic issues, problems in relation to the code, ways to improve processes which are the source of complaints, query interpretations and to explore ways in which the CCMC may be able to do things better in its relationship with the banks... It was also suggested that the CCMC might make recommendations for amendment to the code if they perceived problems with its practical application in the marketplace.[677]

FEMAG states 'need for effective self-reporting by banks'

For the principles set out in the code to be effective, FEMAG emphasised the need for effective self-reporting by subscribing banks.

> Self-reporting of [code] breaches as they occur would be a useful extension of this. This would be similar to self-reporting by financial institutions under the FSR legislation... [and] immediate self-reporting against the code would certainly be a powerful demonstration of commitment to the code by signatory banks. … [and] stakeholders suggested that currently there is a culture of defensiveness when potential code breaches are brought to the attention of some signatory banks (We don't agree with you. We don't think that there is breach'). Clearly community perception of commitment to self-regulation is enhanced if the banks, in their relationship with the CCMC, are not adversarial or defensive, but rather co-operative and transparent; where disclosure about breaches and their rectification is the norm.[678]

FEMAG noted stakeholders suggested that 'the procedures document and the form letters used in the course of investigations should be published on the CCMC website and

[677] Ibid 22
[678] Ibid 27-28

circulated to key stakeholders.'[679] Additionally, its report reinforced the CCMC's duties which included ensuring:[680]

- annual compliance statement are completed by the banks and
- investigating and making determinations on complaints lodged with the Committee.

The FEMAG Report also noted that the Association was an unincorporated, unregistered entity. Because its constitution did not provide for a governing committee, the affairs of the Association would therefore be governed by general meetings of members.[681] These members consequently had an opportunity to exert influence over the appointment of the Committee and the continuing activities of the CCMC. In general terms, the Committee were appointed by the Association's members and bank parties who could agree on the selection and continuing appointment of their preferred candidates.

… is paved with good intentions

In essence, the subscribing banks' officers controlled the publishing of the code and its promotion through the administration and funding of the ABA, the Committee's high standards and CCMC practices through the Association's constitution and, finally, with the support of the BFSO appointed preferred Committee members as set out in clause 34 of the code. Throughout this process, it seems that all these parties had access to the Association's unpublished constitution.

3. CCMC and its relationship with stakeholders

[679] Ibid 7
[680] Ibid 10
[681] Ibid

FEMAG invitations for submissions and/or interviews were sent to the following:[682]

1. Tony Blunn AO, code Compliance Monitoring Committee Chair
2. Russell Rechner, code Compliance Monitoring Committee Member.
3. David Tennant, code Compliance Monitoring Committee Member
4. Barbara Schade, Executive Officer, code Compliance Monitoring Committee
5. Ian Gilbert, ABA
6. Colin Neave, Ombudsman and senior staff of the BFSO
7. Peter Kell, CEO, Australian Consumers' Association
8. Jan Pentland, President Australian Financial Counselling and Credit Reform Association (AFCCRA)
9. Roger Knight, Former Head of Compliance, British Banking Standards Board
10. Carolyn Bond, Consumer Credit Legal Service
11. Marylyn Webster, Good Shepherd
12. Karen Cox and Katherine Lane, Consumer Credit Legal Centre
13. Australia and New Zealand Banking Group Limited (ANZ)
14. Westpac Bank
15. St George Bank
16. National Australia Bank (NAB)

Other invitations were provided to:[683]

1. Australian Chamber of Commerce and Industry
2. ASIC
3. Brotherhood of St Laurence
4. Commonwealth Treasury

[682] Ibid 12
[683] Ibid

5. Consumer Credit Legal Service Victoria
6. Consumers Federation of Australia
7. COSBOA
8. Victorian Financial Counsellors Association

Written submissions were also received from the following stakeholders:[684]

1. Australia and New Zealand Banking Group Limited
2. Australian Bankers' Association
3. Commonwealth Bank of Australia
4. Banking and Financial Services Ombudsman
5. Consumer Credit Legal Centre NSW
6. Government fair trading agencies in: NSW; WA; SA and Victoria

Whilst most of the first and third groups above had some knowledge of the Association's constitution, there is no evidence that prior to the publication of the FEMAG report, the second group did. From meetings with these stakeholders and from its own research, FEMAG produced its October 2005 report.

FEMAG also formed a view that the CCMC should be more proactive rather than reactive in making itself available and accessible to its stakeholders.[685] To emphasise this point, its report stated that 'only a few stakeholders have had any interaction with the

[684] Ibid 12
[685] Ibid

CCMC and this interaction has been quite limited.'[686] The report provided recommendations for improved practice:[687]

- For CCMC to circulate quarterly email updates to its stakeholders and conduct forums with them regularly,
- For CCMC to expand its stakeholder base to include COSBOA, the Small Business Coalition and State / Territory small business commissioners,
- For CCMC to inform ASIC, ACCC and other State and Territory fair trading / consumer protection agencies on compliance issues on an as needed basis and in conjunction with email updates.

These recommendations are supported by the few complaints by banks customers that were referred to the CCMC in 2004-05.[688] This demonstrates that, at this early stage, there was a need for the Committee to improve its accessibility and transparency to its publics and stakeholders. FEMAG stated that 'the public profile of the CCMC thus far is quite low and a banking representative made the comment… that the lack of a public profile by the CCMC limits its effectiveness.'[689]

4. Effectiveness of the Committee's compliance monitoring

The Committee is required to publish an annual survey, which it commenced publishing in June 2004. This survey is a two-part process largely based on the UK Banking code Standards Board's standards.[690] The review commented that the CCMC's survey could be improved by including more meaningful information such as how many complaints were

[686] Ibid. 9
[687] Ibid. 8
[688] CCMC 2004-05 Annual Report, 4
[689] FEMAG Report, 24
[690] Ibid

referred to the BFSO, how many involved possible code breaches and how many actual breaches were found.[691] When assessing the effectiveness of the CCMC's compliance monitoring activities and techniques, FEMAG stated there is a need for:

> Benchmarks key performance indicators (KPIs) against which these matters should be measured. [These] KPIs need to be developed from objectives. In paragraph 8 [of its report it] makes suggestions on objectives the Committee might consider adopting. Monitoring by the CCMC to date has been done by two means: an annual compliance statement that has to be completed by the banks and the handling of complaints lodged with the Committee.[692]

In its report, FEMAG recommended the following KPIs, to:[693]

- provide independent and objective verification of compliance with the code
- ensure banks implement controls for code compliance; and for the KPIs to
- provide the public with a degree of confidence that the self-regulatory scheme is working.

These recommendations should have been implemented when the Committee was appointed. Any framework which relies on self-regulation can potentially lack direction and enforceability without clear objectives being established. Regular reporting of the CCMC's performance against its KPIs to its publics and stakeholders and to regulatory bodies such as ASIC, ACCC and Fair Trade agencies is needed to ensure that self-regulation is working and is independent, transparent and fair, not controlled or constrained by a few vested interests.

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[691] Ibid 10
[692] Ibid 27
[693] Ibid 33

C. *KEY ISSUES SIDE-LINED*

Banking plays an important part in the economic well being of all Australians and whilst it is subject to a number of legislative requirements, the code presented an opportunity for the banking industry to demonstrate its commitment to a self-regulatory approach in its relationship with its customers.[694]

In addition to the above issues raised, the FEMAG Report identified key issues that were beyond the scope of its review. This is unfortunate, given that the issues raised were relevant to the task at hand.

It is possible that FEMAG either did not have the financial resources to pursue its inquiry to significant depths or that it was constrained in terms of access to materials that might have assisted its review.

1. Restrictions on Investigative Powers

FEMAG states there is an overlap in the roles of the CCMC and the BFSO and therefore continuing co-operation is necessary. FEMAG noted that the lack of public profile limits the CCMC's effectiveness however it 'should not seek to achieve a similar profile from the public at large to that achieved by the BFSO.'[695] In commenting on the difference in profile, FEMAG commented that:

> as far as the CCMC is concerned, provided that when a person obtains information about the BFSO from its website or otherwise, they can readily access effective information that allows them to decide whether they should raise a matter with the CCMC. It may, in

[694] Ibid 4
[695] Ibid 24

> fact, be appropriate for the BFSO to encourage a consumer who makes a complaint to consider whether their complaint might involve a breach of the code and if so to make a simultaneous complaint to the CCMC to ensure that a possible breach of the code does come to the attention of the CCMC. It is not possible under the current arrangements for the BFSO to refer the matter to the CCMC because of the privacy rights of a BFSO complainant without obtaining consent from the complainant.[696]

According to FEMAG, the CCMC's investigative powers are set out in the code. In its report however, it was not suggested that these investigative powers were inadequate due to restrictions imposed by the Association's constitution.[697] It seems that the review avoided drawing adverse conclusions by distinguishing between evidence of *factual* non-implementation of the high principles of the code, and evidence of *structural flaws* that may give rise to future failures.

The review did acknowledge, however, that there are instances when the CCMC may be constrained from performing its duties due to provisions in the Association's constitution. As discussed earlier, clause 34 of the code makes it clear that the stakeholders have a right to believe that the Committee has the power to investigate all complaints other than those that are resolved by the subscribing banks to the satisfaction of customers.[698]

This statement appears to give wide berth to categories of complaints the Committee can investigate. Yet, according to the review, paragraph 8.1(b) of the constitution restricts the Committee from investigating complaints where it is or may be determined in another

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[696] Ibid 25
[697] Ibid. 36
[698] code of Banking Practice 2003, Cl 34 Available at http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172 on 19/03/2010

forum.[699] FEMAG reports that in the constitution, term 'forum' has been defined widely as 'any court, tribunal, arbitrator, mediator, independent conciliation body, complaint/ dispute resolution body, complaint/ dispute resolution scheme … or Ombudsman, in any jurisdiction'.[700] This paragraph provide banks an *opt-out* provision detracting from high principles banks introduced in response to the Martin Committee recommendations that were incorporated in the first code, published by the banks in 1996.

While the report noted that this *opt-out* provision competes with paragraph 34(i) of the code, it raises potential limitations 'for action by the CCMC where there may be serious or systemic non-compliance and it may the case that in some instances the CCMC is better able to take action to deal with systemic matters than either the BFSO or ASIC.'[701]

Prior to the Martin Report and the publication of the first code by the banking industry, banks could rely on their significant resources to use and potentially abuse the courts to dispose of complaints and cover up serious misconduct that affected individuals and small businesses. This was investigated in-depth by Martin because his committee believed that the use, or threats, by rogue banks and senior bankers with access to vast resources meant that they could potentially misuse the courts when dealing with complaints by individuals and small businesses that could not defend themselves or seek redress should banks seek to cover up serious and systematic breaches.

By adopting the 11 May 2004 code and remaining silent on the Association's 20 February 2004 constitution, it would appear banks successfully effected a *coup d'etat* on

[699] FEMAG Report, 36
[700] Ibid. 37
[701] Ibid

the already feeble self-regulatory system. Because the ***opt-out*** provision excludes the investigatory powers of the Committee where an alternate forum has jurisdiction, the paragraph 8.1(b) of the constitution allows banks and senior bankers to transfer any serious complaints or disputes that they do not want the Committee to investigate to the courts or any other alternative forum where they enjoy an unmatched advantage.

1. Restrictions on Resources

Whilst the above matters confounded the Committee three years later, when they reported their views to McClelland, during 2004-05 FEMAG stated that the CCMC required 'additional resources if it's full potential [was] to be realised.'[702] FEMAG was concerned that the Committee might not have sufficient resources to successfully discharge all of its functions set out in the code. It states that the CCMC:

> was obliged to deal with a number of allegations of breaches of the code very early in its life… and these… required the commitment of a substantial proportion of the CCMC's limited resources… in order to inform itself of issues in code compliance and to allow it to develop procedures for this side of its work from real experience. In the code itself, the function of monitoring of compliance is paragraph 34 (b)(i) for the investigation and determination of code breach allegations in paragraph 34(b)(ii).[703]

The FEMAG Report reinforces the notion that the Committee is reliant on funding that is obtained from banks to carry out is two main function of monitoring bank compliance and investigating and making determinations on customer complaints. In setting out its report, it noted that:

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[702] Ibid 4
[703] Ibid 16

> case management was very good,[704] but the lack of resources available to the Committee in this area was a matter of concern and that additional resources were needed to ensure a continuing capacity to manage cases and obtain the greatest benefit from their results in terms of code compliance in general.[705] [And that the Committee requires additional funding to meet] banks separately [and to fund its] activities aimed at increasing the effectiveness of the Committee and, through this, its credibility [which] requires increased resources and … commitment from the signatory banks. We consider that the Committee needs personnel to undertake… strategic thinking, business planning and drafting budgets, liaison with banks and other stakeholders at a senior level, writing bulletins and high level policy papers and drafting determinations; managing general monitoring activities; managing cases of code breach allegations; special inquiries and office administration.[706]

2. Regulators – ASIC, ACCC and state and territory fair trading agencies

FEMAG states that:

> ASIC is naturally aware of the operations of the Committee, but submissions from State and Territory fair-trading/consumer protection agencies tell us that they are lacking in information about the Committee and its role and activities. This is of some concern since they are responsible for administration of credit regulation. [FEMAG comments] that ASIC, ACCC, State and Territory fair-trading/consumer protection agencies be informed of code compliance issues [and should]… receive email bulletins and dedicated quarterly

[704] It should be noted that this comment was aspirational as only one determination was made by the Committee in 2004-05.
[705] Ibid 20
[706] Ibid 17

> reports even if these are to advise that there are no significant compliance issues current and that they be invited to the recommended forums.[707]

FEMAG notes that clause 13.3 of the Association's constitution

> empowers the chairs of the Association and the BFSO to jointly determine the budget of the CCMC. This could be seen as potentially allowing the subscribing banks to limit the resources and thus the effectiveness of the CCMC although the code does oblige the banks 'to ensure that the CCMC has sufficient resources to carry out its functions satisfactorily and efficiently'. To improve the resource control situation and give greater confidence that adequate resources were being provided, a more defined and accountable planning and budget process could be valuable.[708]

Regardless of whether the vulnerability of the Committee has been exploited, this admission indicates the dynamics that may come into play which are largely invisible.

4. Restrictions on Public Sanctioning

In the FEMAG Report, Appendix 2, in the section headed 'MATTERS BEYOND THE SCOPE OF THIS REVIEW' it notes that:[709]

> the constitution constrains the CCMC and each member from making public statements on behalf of the CCMC other than in the Annual Report without the prior approval of both BFSO and Association chairs. This could… preclude members of the CCMC speaking publicly at conferences or industry forums where they are seeking to raise the profile of the Committee and improve relationships with the banks or other stakeholders. Besides qualifying [constraining] the CCMC's independence, it implies a lack of trust in

[707] Ibid 23
[708] Ibid 36
[709] Ibid

> the Committee. There may well be matters the CCMC should make public from time to time other than in its Annual Report and the code does not prevent it from doing so.

It is of paramount public interest that the public perceives the CCMC as both a responsible and accountable independent body regulating the banking industry.[710]

Requiring the Committee to obtain approval of the bank parties which appointed them, the BFSO and Association Chairs, before it can issue any public statements must be seen by stakeholders to severely undermine the perception of impendence. At issue is also the timeliness with which information is made publicly available. By requiring prior approval, the bank parties can silence their critics and according to the review 'it could be some 12 months before a bank found to be in systemic breach could be named'.[711]

The conduct of banks, being fiduciary institutions, is often measured against the highest standards of care.[712] It is contrary to public interest that a bank in breach of its own code be afforded protection from the scrutiny of the public eye.

5. Indemnity and exerting influence over Committee members

FEMAG responds to the need for '***full indemnity***' (emphasis added) to be provided by the Association's members to the Committee however it may be reciting comments made to it by the bank parties. The Association's members will have considered the most appropriate structure when they received the Viney Report in 2001 and preferred unincorporated associations to manage the Association's and the CCMC's affairs.

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[710] Ibid.
[711] Ibid.
[712] See for example John Glover, 'Banks and Fiduciary Relationships', *Bond Law Review* (1995) Vol.7: Iss.1, Article 5.

FEMAG comments on the effect of this decision without commenting on the banks' motives and states:[713]

> paragraph 14.1 and 14.2 of *the constitution provides for a 'full indemnity by the Association, or its members, of CCMC members against liabilities arising out of their actions as CCMC members* (emphasis added).' However the Association being unincorporated, the status of Committee members being unclear and doubts about access to liability insurance cover suggest that Committee members might not be adequately protected in all circumstances.

FEMAG concluded stating that 'consideration be given to establishing the CCMC as a legal entity in its own right.'[714] This suggestion diverts attention from the core issues of responsibility and accountability. If the Committee is carrying out a public function, there should be a high level of accountability that arises from its members should their actions or conduct cause damage. To indemnify the Committee against such responsibilities appears to weaken the obligation they have to the public to monitor the high standards set out in the code and to conduct themselves with integrity in regard to their duties.

It needs to be asked what the bank parties' motives were when the Association drafted its constitution in 20 February 2004 which limited the independence and powers of the Committee. Instead, the bank parties introduced the *opt-out* provision which potentially safeguarded the banks' managers and officers if they acted dishonestly or contravened the code. It is unlikely that either the individual and small businesses or FEMAG would have suspected that the banks' failure to incorporate the CCMC as a limited liability company meant that they could justify indemnifying the Committee for damages which might flow

[713] FEMAG Report, 40
[714] Ibid

from the CCMC's failure to comply with clause 34 of the code. Certainly, had that been the case, FEMAG would have raised this in their 21 recommendations provided to the CCMC in their October 2005 report.

5. Merging of the bank parties; CCMC and BFSO

The FEMAG report analysed the advantages and disadvantages of forming a single dispute resolution and code compliance body through the amalgamation of the CCMC with the BFSO. It preferred amalgamation, as it concluded that this would establish a stronger link and foster cooperation between the two.[715]

The issue of Committee's autonomy and accountability should have been prioritised before any suggestion of amalgamation with an associated industry body. Independence is critical to the Committee in carrying out its role of compliance monitoring and for self-regulation to function effectively.

D. *RECOMMENDATIONS AND SUMMATION*

1. The FEMAG recommendations

FEMAG made the following recommendations in its 2005 report which are not dealt with or evaluated by the CCMC in its 2006 Annual Report that it:[716]

(R1) develop its own budget associated with a business plan;

[715] Ibid
[716] Ibid 5-11

(R2) following the development of a business plan, its resources be increased to provide for further employment of staff and contracted consultants;

(R3) increase the commitment of Committee members for the next two years and thus to increase in their remuneration for that period;

(R4) as result of the above suggestions, any improvements in procedures be invited;

(R5) that the Committee give consideration to this;

(R6) email bulletins to member banks each quarter and conduct forums with bank code compliance staff on a regular basis;

(R7) email bulletins to financial counsellors and consumer organisations each quarter and conduct forums with them on a regular basis;

(R8) email COSBOA, State/Territory small business coalitions and commissioners update bulletins;

(R9) inform ASIC, ACCC, State and Territory fair-trading/consumer protection agencies of compliance issues and email quarterly reports inviting them to CCMC forums;

(R10) distribute an abridged version of its annual report to parliamentarians and seek to be included in the industry-based ombudsmen's 'road shows';

(R11) build its profile amongst stakeholder groups, but do not seek to attain a high profile with the general public;

(R12) seek professional advice in the operation and effectiveness of it's, the BFSO and other appropriate websites and to have links on all appropriate websites;

(R13) monitor the level of compliance with paragraph 9 of the code concerning the display and availability of the code at bank branches;

(R14) have a brief resume of it's and the BFSO role, with contact details in code booklets distributed by banks and require same in the next version of the code;

(R15) seek data on how many complaints referred to the BFSO involve possible code breaches and for how many actual breaches were found to exist;

(R16) obtain feedback on survey forms within 3 months of the receipt of all of the completed survey forms;

(R17) include all of the above techniques in its business plan as the CCMC'S resources allow;

(R18) discuss this idea further with the BFSO;

(R19) share information with the BFSO with a view to the BFSO developing a mechanism to transfer information about code breaches to the CCMC;

(R20) discuss better ways of informing consumers about the two bodies and encourage contact with the CCMC in relation to code issues; and

(R21) develop a business plan for a 3-year period which sets out the methods of monitoring that the CCMC will use.

2. Summation of the October 2005 FEMAG investigation

The Committee has been established as an unincorporated body separate from the ABA and the BFSO. The FEMAG report looks to investigate whether the Committee is able to effectively and efficiently undertake its functions set out in the code. The report makes the point that this 'may clearly be ***constrained*** (emphasis added) by the manner of its establishment.'[717]

For the Committee's functions to be undertaken effectively and efficiently, FEMAG sets out conditions which need to be satisfied. They include having:

1. satisfactory investigative powers;
2. adequate resources;
3. access and ability to collect compliance information regarding breaches of the code as soon as possible after their occurrence ;
4. authority to interpret the code independently or to obtain authoritative interpretations;
5. ability to make public statements on code compliance and to publicly name banks and as and when it thinks fit;
6. ability to act with confidence as to the professional liability of Committee members.[718]

Whilst FEMAG concludes:

> these conditions are ***largely*** (emphasis added) satisfied… however we think there are some issues that could very usefully be considered when the constitution of the Association… [and] the code [are] reviewed.[719]

[717] Ibid 14
[718] Ibid 15-16
[719] Ibid 16

FEMAG makes reference to Appendix 2 headed 'MATTERS BEYOND THE SCOPE OF THIS REVIEW'.[720] It states that[721]

> We were told, and we fully agree, that *increased general monitoring by the Committee would add greatly to the public confidence and through this the public credibility of the self-regulatory approach* (emphasis added). It demonstrates commitment by banks to the code and self-regulatory apparatus designed to deliver outcomes.
>
> A number of stakeholder representatives raised concerns about the Committee's access to information from the BFSO relating to code breaches...we have recommended that the Committee require banks to provide information on code breaches that the BFSO has raised with them …[banks] will not see complaints might relate to code provisions
>
> Other than banks, the BFSO is currently the main potential source of possible instances of code breaches …but potential code breaches also need to come to the Committee. In some cases this will occur because the complainant or…their adviser, sees value to the operation… of making a parallel complaint to the CCMC.
>
> Complaints that come to the BFSO which involve loss and which are potential instances of code breaches are dealt with by the BFSO. The BFSO may not pursue…a code breach as to do so may not be in the interest of efficiently. … there may well be a significant number of potential instances of code breaches that do not get attended to.
>
> Even where a complainant raises a potential instance of code breach simultaneously with the BFSO and the Committee, the Committee's action is currently constrained. *Paragraph 8.1(b) of the constitution prevents the Committee considering a complaint if it is being or may be considered in another forum* (emphasis added).

[720] Ibid 15-16
[721] Ibid 30

It is difficult to ascertain the extent to which FEMAG reviewers were constrained from exploring key issues raised in Appendix 2. Regardless of limitations, of greater concern to individual and small businesses (the public), is that neither succeeding code reviewers or bank parties who adopted the code, later referred to this insightful FEMAG report. Nor does it seem FEMAG fully appreciate the banks' options in Paragraph 8.1(b).

At the very least, substantive issues were raised by FEMAG regarding dubious structures and extraordinary relationships should have been dealt with more carefully by following reviewers. These structures and relationships signalled motives behind the unpublished constitution that should have raised alarm bells. Bank motives seemed well disguised in a set of ethics and best-practice principles. FEMAG only suggested how banks might later control their Committee members. It seems dubious structures and flawed practices may have been excluded because they were beyond the scope of this review.[722]

[722] Ibid 31

Chapter VIII

BELLS RING LOUDER

A. *INTRODUCTION*

Clause 5 of the code is headed '*Review of this code'*:

Clause 5.1 states – [subscribing banks] will require the ABA to commission an *independent and transparent review* (emphasis added) of this code every three years or sooner if appropriate, with the review to be conducted in consultation with:

(a) banks which adopt this code;

(b) consumer organisations;

(c) other interested industry associations;

(d) relevant regulatory bodies; and

(e) other interested stakeholders.

Clause 5.3 states - [banks] will require the ABA to establish ..,.a forum (including consumer, small business and banking industry representatives) to exchange of views on:

(a) banking issues; and

(b) *the effectiveness of this code* (emphasis added).

Whilst the commitments were made by the subscribing banks to customers, it seems from submissions, and comments previously made by FEMAG, that these commitments were not all carried out in good faith.

The ABA commissioned Jan McClelland in late 2007 to carry out a review under clause 5 of the code. In its media release dated 21 December 2007, the ABA stated:

> The *code sets out the banking industry's key commitments and obligations to customers* (emphasis added) on standards of practice, disclosure and principles of conduct in relation to banking services. … McClelland outlined the process which will be followed in the review:
>
> 1. Consultations will be held with interested stakeholders [including]… banks, consumer groups, other interest groups, regulatory bodies and other interested stakeholders;
> 2. Then an Issues Paper will be produced which outlines draft recommendations on changes to the code;
> 3. Further consultation will occur on the Issues Paper with interested stakeholders;
> 4. A report with recommendations about what changes are considered necessary and reasonable for the code will be completed mid-year, 2008.
>
> McClelland is reported to be an experienced reviewer as she has previously headed Government Reviews in NSW into the Consumer, Trader and Tenancy Tribunal, NSW Government Recruitment, Mine Safety, Police Education, Road Safety Education, Business Planning and Corporate Governance, and Shared Services, Asset Management and Procurement. … [and] was the former NSW Director-General Education and Training and Managing Director of the NSW TAFE Commission… *In 2005, Ms McClelland was Chair of the Australian Consumers Association now known as CHOICE* (emphasis added).[723]

There were a series of 'Key Considerations' that the ABA required McClelland to review and these included:[724]

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[723] H Wellard, 'Review of the code of Banking Practice' 21 December 2007 <http://www.bankers.asn.au/default.aspx?ArticleID=1145>

[724] Ibid

- In conducting the review the reviewer is to have particular regard to the provisions of clause 5 of the code
- *Clause 2.1 (a) of the code concerning banks continuously working towards improvement in standards of practice and service in the banking industry* (emphasis added);
- The provisions of comparable industry codes and other self regulatory arrangements including the Electronic Funds Transfer code of Conduct;
- Changes which have occurred in the legal and regulatory environment since the last review of CBP;
- Consistency with other self regulatory initiatives and formal regulation;
- *The principle of certainty of contract between bank and customer* (emphasis added);
- *The requirement of banks to act in accordance with prudential standards necessary to preserve the stability and integrity of the Australian banking system* (emphasis added).

McClelland's scope of review required her to report with recommendations on:[725]

- Generally how the code has operated since its last review and the perception of the code among community, consumer, industry, regulatory and political interests;
- Means for addressing any interpretation or comprehension difficulties by banks or customers in relation to the provisions of the code;
- Means for addressing *compliance difficulties, including significant competitive disadvantages, that banks have in conforming with the code* (emphasis added);

[725] Ibid

- *The structural, organisational and operational aspects of the relationship between internal complaints handling, external dispute resolution and monitoring of banks' compliance with the code* (emphasis added)

The inclusion of Key Commitments in the 2004 code seemed to reflect a real and accountable commitment on the part of bank parties to raise standards of practice by seeking the trust and confidence of consumers. In many ways, FEMAG indicated that this trust could be abused as a result of the Association's constitution and its effect on the Committee's inability to carry out its code duties.

Hence, the task to be undertaken by McClelland was considerable and this chapter will raise awareness of ambiguities and flaws in the current monitoring and dispute resolution practices that have evolved as a result of the competing provisions of the Association's constitution and the code.

B. *OBSTACLES IMPLEMENTATING 2004 CODE*

1. Poor Communication between Banks and Customers

In the submissions provided to the McClelland Review, the Committee evidenced poor communication between the banks, their customers and their customers' representatives as a major impediment to implementation of the code. Examples of poor communication included failures to respond to customers' correspondence in a timely and effective manner, and failures to disclose relevant banking information in an accessible form.[726]

[726] code Compliance Monitoring Committee '*Submission to the review of the code of Banking Practice*' (2007 – 2008), Annexure D See

2. Inadequate Use of Dispute Resolution Mechanisms

McClelland Review submissions reveal that many banks and financial institutions had trouble distinguishing between the compliance-monitoring role of the Committee and the dispute resolution function of the BFSO/ FOS.[727] The code vests monitoring and investigatory powers to the Committee in order to make determinations of compliance however individual resolution of disputes (for example, compensation for overcharging fees), if not handled to the customer's satisfaction by banks' internal dispute resolution (IDR) mechanism, should be referred to the BFSO's external dispute resolution (EDR) function. Both the BFSO and the Committee can also determine whether there are systemic breaches of the code, and refer unresolved concerns to ASIC.[728]

There have been suggestions that in some cases, complaints that should have been guided through the bank's IDR were alleged by banks to not be a breach of a banking service as defined in clause 40 of the code, thereby providing an avenue for banks to intentionally remove most code complaints from the Committee's jurisdiction. The lack of a definition in the code for the word 'complaint' and the application by subscribing banks' of their Association's constitution may be responsible for this confusion.

3. Failure to Report Breaches

<http://www.reviewbankcode2.com.au/ArticleDocuments/215/code%20sub%20Ax%20D-%20substantive.pdf>

[727] Ibid. Annexure A, 2

[728] Ibid. Annexure C, 10

Concerns were raised that 'banks rarely, if ever, admit to a breach of the code; they simply make a commercial decision not to pursue the matter'[729] when resolving disputes through either IDR or EDR mechanisms, even when customers are awarded compensation. During the McClelland Review, Nicola Howell noted: [730]

> *there is no requirement for the bank to acknowledge that a problem occurred; or to implement systems to rectify the problem* (emphasis added).

As will be demonstrated, the lack of clarity in regard to code breaches and the fact that the Committee's investigatory powers are undermined by the existence of the Association's constitution restricts the Committee's ability to exercise its powers under the code, yet would seem responsible, in part, for any structural inadequacies.

C. *CODE & CONSTITUTION BEDFELLOWS*

The modified 2004 code neither provided for the Association's unpublished constitution nor an association of banks and financial institutions that govern the Committee's operations which is claimed by the banks to be in response to the CCMC's unincorporated status.[731] The Association is understood to have approved the constitution and agreed on the appointment of its Chair.[732]

On 11 March 2008, the Committee's submission to McClelland made it clear that the Association and its constitution posed a major impediment to the institutional integrity of

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[729] Nicola Howell, 'Joint submission to the review of the code of Banking Practice and the Review Issues Paper' (31 July 2008), 29
[730] Ibid
[731] Australian Bankers' Association, 'Submission to the Review of the code of Banking Practice' (2007-2008), Letter to Jan McClelland (30 April 2008), 2
[732] Ibid. 1

the Committee. The Committee described the inconsistencies between the code and constitution as rendering their duties set out in the code '*unworkable*' (emphasis added).

The Committee insisted that current arrangements were inadequate and claimed that the review was long overdue.[733] Significantly, they asserted that it interfered with their ability to enforce the code and effectively monitor compliance. The constitution restricted the interpretation and implementation of the high principles set out in the code.

1. Monitoring and Enforcement Powers

a) *The Committee's Monitoring Powers*

The Committee regarded themselves as being bound by obligations that were inconsistent with their independent investigatory powers with respect to monitoring complaints referred to them by subscribing banks' customers. Whilst the CCMC was established to monitor breaches of the code, the Committee was unable to act independently of the bank parties' collective wills. Firstly, the Committee was unable to make public statements without the approval of the banks. Secondly, as the Committee was funded by the subscribing banks,[734] they were subject to financial oversight powers by representatives of the banking and financial institutions.

The constitution provides for chairs of the Association and the BFSO,[735] parties responsible for drafting and/ or relying on the constitution, to have oversight powers with regard to the Committee that included:[736]

[733] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure A
[734] Ibid. Annexure C, 5
[735] Now the Financial Ombudsman Service (FOS).

- The obligation to seek prior approval of any public statements by the Committee and its members from the BFSO and CCMCA Chairs;[737] and
- The power for the BFSO and CCMCA Chairs to determine the funding, budget and remuneration for the Committee.[738]

According to the Committee itself, *this is inappropriate and inconsistent with its role as an independent monitor* (emphasis added).[739] It was the Committee's view that the constitution should be replaced with a charter from subscribing banks that confirms the importance and centrality of the code and leaves the Committee as an unincorporated entity.[740]

> 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.

In order for the Committee to be publicly accountable and accessible it must be able to engage freely with stakeholders and to communicate broadly about the code and its role.

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[736] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure B, 1
[737] The code Compliance Monitoring Committee Association Constitution, Cl 10.7; See FEMAG-ANU 2005 Report page 39
[738] The code Compliance Monitoring Committee Association Constitution; Cl 13 See FEMAG-ANU 2005 Report page 36
[739] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure B
[740] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure A

These restrictions concerned the Committee members that they may not be independent of either subscribing banks or the BFSO.[741]

b) *The Committee's Enforcement Powers*

Previously, subscribing banks were required to report code breaches to the Committee under clause 3.1. Following staunch opposition by the ABA in the McClelland Issues Paper, this clause was removed.[742] The lack of a statutory duty for subscribing banks to report their own breaches of law therefore requires the Committee to monitor serious breaches allegations through investigative powers under the code. Other than the practical issue of transferring this responsibility to the CCMC, a non-judicial, under-resourced regulatory body, it forced the Committee to potentially deal with concerns of law when the Association's constitution limited their powers.

Paragraphs 8.1(b) and (c) of the Association's constitution restricts the Committee from investigating complaints:[743]

- to the extent that the complaint relates to a subscribing bank's commercial judgment in decisions about lending or security; or
- if the Committee considers that the complaint is frivolous or vexatious; or
- if the complainant was aware of the events to which the complaint relates, or would have become aware of them had they used reasonable diligence, and the complaint was raised by the notifying the CCMC in writing within one year.

[741] Ibid.
[742] Ibid. Annexure A and C
[743] CCMCA Constitution dated 20 February 2004.

The constitution also limits the Committee's powers to sanction banks in breach of its provisions under the code. Clause 34(i) of the code states that the banks:

> Empower the Committee to name [banks] in connection with a breach of the code or in the CCMC's report, where it can be shown that [banks] have:
>
> (i) been guilty of serious or systemic non-compliance;
>
> (ii) ignored the CCMC's request to remedy a breach or failed to do so within reasonable time;
>
> (iii) breached an undertaking given to the CCMC; or
>
> (iv) not taken steps to prevent a breach reoccurring.[744]

Clause 11 of the constitution however limits the Committee's enforcement powers to name banks in the CCMC Annual Report.[745] The Committee makes the point that:[746]

> Clause 11 of the constitution purports to limit the manner in which the Committee can use its power to name a bank, following a finding of serious or systemic non-compliance with the code.

2. Interpretation of the code by bank parties

a) *Provision of Internal Dispute Resolution (IDR)*

The constitution effectively excludes customers from having their complaints investigated through the IDR provisions set out in clause 35 of the code.[747] Clause 35.1

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[744] The code of Banking Practice, Clause 34 Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172> on 19/03/2010
[745] Ibid
[746] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure G
[747] *code of Banking Practice* 2004

imposes an obligation on the banks to investigate disputes internally and for this process to comply with either *Australian Standards of Internal Dispute Resolution* or any other guideline that ASIC approves. It states 'we will have an internal process for handling disputes with you.'[748]

Clause 35.1(b) states that the IDR process for handling disputes will 'meet the standards set out in the *Australian Standard AS4269-1995* or any other industry dispute standard or guideline which ASIC declares to apply to this code'[749]

> In order to satisfy ASIC's IDR requirements, subscribing banks must comply with the *Corporations Regulations 2001* (Cth) reg.7.6.02,[750] namely, the complaints handling standard developed by the International Organisation for Standardisation, the *AS ISO 10002-2006*.[751]

On the other hand, paragraph 8.1 of the constitution states that:

> The CCMC must consider any complaint alleging that an Association member has breached the code, except that the CCMC *must not* consider a complaint:
>
> (a) 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* (emphasis added) make a final determination as to whether a breach of the code has occurred. In such case the CCMC *must not consider the relevant complaint* (emphasis added) until the relevant Forum has determined, or declined to

[748] Ibid.
[749] Ibid.
[750] *Corporations Regulations 2001* (Cth) reg.7.6.02 (1)(a). Accessed at <http://www.austlii.edu.au/au/legis/cth/consol_reg/cr2001281/s7.6.02.html> on 19/03/2010.
[751] Available at <http://www.saiglobal.com/PDFTemp/Previews/OSH/AS/AS10000/10000/10002-2006.pdf> on 19/03/2010

determine (for whatever reason) whether the breach of the code has occurred. If the Forum determines whether a breach of the code has occurred, the CCMC must adopt the Forum's finding; or

(ii) was heard… by another Forum, and the Forum has determined whether a breach of the code has occurred. In such a case the CCMC must adopt the finding of the relevant Forum as to whether a breach of the code has occurred.

Forum is defined very widely to mean 'any court, tribunal, arbitrator, mediator, etc… in any jurisdiction'.[752] The consequence of these provisions means that subscribing banks have an option to choose the forum they prefer a complaint to be dealt with. This ***opt-out*** provision has been in place prior to the 2004 code being published and adopted by the subscribing banks.

Individual and small business customers would not have considered this was appropriate if they knew its application curtails the powers and independence of the Committee. In fact, the ***opt-out*** provision contravenes the intention and recommendations of the Martin Committee when it set out the high principles intended for the code in 1991.

Likewise, the fact that this provisions provided the banks an option to circumvent the principles of the code, would suggest that the ***opt-out*** provision is in breach of clause 2.2 of the code. Clause 2.2 requires the code-subscribing banks to act 'fairly and reasonably towards [customers] in a consistent and ethical manner.'[753]

[752] FEMAG-ANU 2005 Report, page 37
[753] *code of Banking Practice 2004*

The constitution imposes restrictions on the Committee in relation to their ability to exercise their monitoring and investigatory powers. It limits the utility of the code to safeguard individuals and small businesses when the Association's constitution is not available for the very clients the code is intended to protect.

3. Lack of Transparency

The bankers knew the constitution could be applied when they published the modified 2004 code. They also knew the constitution could be used to constrain the Committee from carrying out their duties.[754] Further, it is apparent that subscribing banks' legal counsel and law firms knew about this, and in all likelihood, supported the *opt-out* provision. This provision meant paragraph 8.1 of the constitution could always be used by banks to retain the lopsided relationship and remove the utility of the code intended to remedy when published in 1993.

It is therefore legally significant that paragraph 8.1 of the constitution, drafted by Mallesons Stephens Jacques dated 20 February 2004 affect and undermine the purpose and high principles of the code.[755] It is also significant that the constitution is not publicly available and has been kept from bank customers for the past six years. Adding to the lack of transparency, the Association is not registered, does not host a website or list its contact details through any public directory.

[754] See for example the CCMCA Constitution - Para 8.1 'Considerations of Complaints About code Breaches'
[755] Ibid

The Committee's website[756] is restricted to listing the code and procedures.[757] In the Committee's submission to McClelland they stated being concerned: '*the constitution, which affects [the] code's interpretation and administration, is not a public document and has not been made available to community and customer advocacy groups* (emphasis added).' [758] The lack of transparency starkly contrasts with principles of 'effective disclosure of information' under clause 2.1(b) of the code.[759]

The constitution is especially mischievous as it is intended to constrain the operation of the code[760], which forms part of the terms and conditions between banks and their small business customers. This is referred to in 'PART F: APPLICATION AN DEFINITIONS' which states in clause 39.1 that on or after the commencement date of banks adopting the code, subscribing banks[761]

> will be bound by this code in respect of:
>
> (i) any banking service that we provide to you; and
>
> (ii) *any guarantee we obtain from you* (emphasis added)

When making this commitment, none of the subscribing banks chose to make reference to the Association's constitution. Further, it may be found by APRA at a later time that

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[756] www.codecompliance.org
[757] See <http://www.codecompliance.org/pdf/CCMCprocedures.pdf viewed> on 19/03/2010.
[758] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure G
[759] Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172> on 19/03/2010
[760] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure B, 1
[761] Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172> on 19/03/2010 See also Everett & McCracken, Banking & Financial Institutions Law 6th Edit., 2004., 322.

bank parties who withheld information regarding the constitution could potentially be guilty of misleading and deceptive conduct.[762]

D. *BURYING ISSUES: McClelland's 2008 Review*

The restricted application of the code resulting from restrictions imposed by the Association's constitution was brought to the attention of the McClelland Review in 2004. The Committee stated that *subscribing banks must either accept the obligations of the code as a whole; otherwise they could not realistically be regarded as being bound by it*[763] (emphasis added). Reform has been stymied by the unwillingness of industry representative bodies, and possibly regulatory bodies, and code reviewers, to investigate and properly address the issue. Hence, greater authority and purpose within the improved regulatory structure is needed.

Given the partisan concerns of many private stakeholders involved in such consultations, a code review may not be the ideal avenue through which such issues can be raised and genuine reform initiated.

1. The McClelland Issues Paper

a. The Issues Paper Submissions

Submissions were presented to McClelland prior to the release of the Issues Paper in May 2008 from:

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[762] The Trade Practices Act 1974 (Cth) s52 'misleading and deceptive conduct' requires only that constructive intention or awareness of the misleading or deceptive nature of the relevant representations be made out.

[763] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure A

(i) code Compliance Monitoring Committee (the Committee)

(ii) ACCC

(iii) Finance Sector Union of Australia (FSU)

(iv) Australian Bankers Association

(v) Financial and Consumer Rights Council Inc

(vi) Financial Counsellors Association of Queensland Inc

(vii) NSW Office of Fair Trading

(i) The Committee (CCMC) - 11 March 2008

In their 11 March 2008 submissions, the Committee set out its concerns with regard to the existence of the Association's constitution that limited their powers, independence and authority. The Committee stated: [764]

> Whilst the composition, function and authority of the Committee are provided for in the code, the Committee was established under the [Association's] constitution… which sets out powers and obligations for the Committee. On the face of it, that constitution imposes some qualification and restrictions on the actions of the Committee. In part, it does that by identifying the ways in which the Committee will carry out its role.

Concerns raised by FEMAG in 2005 were further amplified by the Committee in their 2008 submissions. By any standards, the seriousness of the concerns do not appear to have been properly investigated and appropriately dealt with by McClelland.

(ii) The ACCC – 9 April 2008

[764] Ibid. 1-2.

The ACCC proposed a number of changes in response to perceived weaknesses in the 2004 code. It noted that to avoid ambiguities as to its meaning and relevance, the code should contain a statement that clearly identifies its objectives, written in a way that allows the performance of signatories to be evaluated against it.[765] Also, *the ACCC recommended that the code stipulate stronger sanctions for non-compliance where it is commercially significant* (emphasis added). Sanctions should reflect the nature, seriousness and frequency of the breach and might include warnings, corrective advertising, fines and expulsion from the code and/or the ABA.[766]

The ACCC stated that the code should incorporate greater accountability, such as giving power to the Committee to name signatories for breach of code regardless of how egregious that breach is.[767] What the ACCC considered appropriate following the FEMAG Review is difficult to interpret from statements set out in their submissions.

(iii) Financial Securities Union (FSU) - 22 April 2008

The FSU at this time represented 50,000 employees from the banking and financial sector. In their submission, they stated that they 'support the need for effective policy and regulatory instruments to protect consumers'[768] and that they concurred with the Committee's 11 March 2008 submissions, specifically with regard to the ambiguous

[765] ACCC, 'Re: Review of the code of Banking Practice', (9 April 2008). Available at http://www.reviewbankcode2.com.au/default.aspx?FolderID=215&ArticleID=1178 on 19/03/2010
[766] Ibid. See particularly Observation and Recommendation 6, 3.
[767] Ibid. 5
[768] Financial Sector Union of Australia (FSU), 'Re: code of Banking Practice', (22 April 2008), 1.

scope of power available to the Committee under the dispute resolution, enforcement and compliance mechanisms.[769]

The FSU stated the code was not widely understood by stakeholders, let alone the public[770] and suggested the ABA should fulfill its obligations.[771] While the FSU supported the Committee's submissions to McClelland, they may '***not***' (emphasis added) have considered the serious lack of probity the constitution introduced. If they had, it's likely the FSU would have questioned sizable bonuses paid to the CEO and increasing shareholder dividends when FSU members were inadvertently promoting high-standards in the problematic code. A FSU member commented irritably he was *trained by the bank to make promises* (emphasis added) that were totally untrue then told to lie to his customers about code standards and protection that probably don't exist.

FEMAG and the FSU seem to have accepted the high principles and aspirations set out in the code and failed to consider that banks might ever circumvent the Committee's powers by invoking the *opt-out* provision in paragraph 8.1 and other potential limitations imposed by the Association's unpublished constitution. Moreover, the FSU have reason to be disturbed by the subscribing banks' conduct as their members were trained by the banks to advise customers that they "have adequate knowledge of the provisions of the code[772]", when in fact they had no knowledge that their bank's CEO drafted a constitution that limited the Committee's powers.

(iv) ABA - 30 April 2008

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[769] Ibid. 2
[770] Ibid
[771] Ibid
[772] ABA, code of Banking Practice 2004, clause 7(b)

It is important to consider the recommendations by the ABA and bank CEO's in light of what it failed to address rather than the less important matters it raised. They suggested the Association's constitution be amended to define more clearly the Committee's role in overseeing and promoting best banking practice.[773] This statement seemed self serving since the ABA published the 2004 code and is now a corporation managed by a Board made up of the CEO's of banks that potentially derive a benefit from the Association's constitution. Confusion stems from the fact that these parties also manage the affairs of the Association and could have amended the code to define the Committee's role more clearly, any time since the publication of the constitution in February 2004.

The ABA said that because the Committee's operating procedures were already subject to pre-consultation measures with the BFSO and ABA under Clause 34(h) of the code,[774] efficiency goals may be met by simply integrating compliance monitoring with the BFSO dispute resolution service.[775] As noted earlier, the ABA recommended clause 3.1 of the code be deleted when this clause required that where signatories contravene the law, the Committee must investigate.[776] Hence, the proposed changes to this provision are confusing and would also appear to be self serving.

The ABA further suggested that the Committee's reporting obligations be restricted to defined categories such as systemic/ significant breach in order to cope with the numbers and complexity of the complaints.[777] Again, subscribing banks appear to be acting without regard to their commitment to high standards set out in the code and their duty to

[773] ABA, 'Review of code of Banking Practice', (30 April 2008), 2
[774] Available at http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172 on 19/03/2010
[775] ABA, 'Review of code of Banking Practice', (30 April 2008), 3
[776] Ibid.9
[777] Ibid.19

customers. Clause 2.1(a) of the code requires banks to 'continuously work towards improving the standards of practice and service in the banking industry.'

b. *Response: The Issues Paper*

Whilst McClelland acknowledged the constitution and Committee's concerns,[778] her Issues Paper seemed short on investigating the concerns raised in their submissions. It suggests the underlying principles in clause 5.1 that required the ABA to commission 'an *independent and transparent review* (emphasis added) were compromised by her failure to explain and report the negative effects of the 'problematic' code that concerned the Committee. Neither did McClelland comment on any potential lack of independence and/or conflict of interest arising from an arrangement between code subscribing banks and the FOS when they jointly appointed all the Committee members since the modified code was published and that all the members were bound by the constitution.

McClelland's recommendations in the Issues Paper were that:[779]

1. The relationship between the CCMC and FOS be clarified in the context of a merger between the FOS, FICS and IOS.
2. All alleged breaches of the code be referred to the FOS in the first instance for determination as to whether they should be referred to a FOS case manager or the CCMC for consideration and as to whether there had or had not been a breach of the code.
3. The composition of the CCMC includes:

[778] Jan McClelland, Review of the code of Banking Practice (2007-2008): Issues Paper, 46-47. See <http://www.reviewbankcode2.com.au/default.aspx?FolderID=212&ArticleID=1175> 19/03/2010.
[779] Ibid. 59-60.

a. A consumer representative appointed by the consumer representative on the FOS Board;

b. An industry representative appointed by the subscriber banks through the ABA;

c. And independent Chair jointly appointed by the consumer representatives on the FOS Board and the ABA on behalf of subscriber banks.

4. The role of the code Compliance Monitoring Committee requires it to:

a. Monitor code compliance through referrals, reports and data received from FOS;

b. Make determinations on allegations that a bank has breached the code, which are referred to the CCMC by FOS;

c. Conduct enquiries into systemic issues in relation to the code that are identified by FOS and the CCMC;

d. Conduct its own enquiries into banks' compliance with the code;

e. Determine sanctions in accordance with the current code provisions;

f. Prepare an annual report on compliance with the code;

g. Contribute to joint publications between the CCMC and FOS on code issues; and

h. Promote awareness of the code with banks through the provision of feedback on emerging code compliance issues.

5. The charter, constitution, terms of reference and operating protocols of the CCMC incorporate principles of procedural fairness and provide guidance on the factors that should be considered in determining a matter.

6. Consideration should be given to broadening sanctions available to the CCMC such as a warning, requirement to rectify of an issue within a specified time and conduct of a

> compliance audit, so that sanctions imposed are commensurate with the extent and severity of the breach.

This report makes no comment on submissions presented to McClelland by the Financial and Consumer Rights Council Inc; Financial Counsellors Association of Queensland Inc and NSW Office of Fair Trading as it is unlikely any of these parties understood the potential limitations imposed by the Association's constitution on powers, independence and authority of the Committee.

It is also noted that McClelland's recommendations in her Issues Paper are not consistent with the seriousness of concerns raised by the Committee in their 11 March 2008 submissions. McClelland's response to their submissions seem, at best, non-specific and at worse, an attempt by the banks to maintain the questionable relationship and conflict of interest between bank parties who appointed the Committee and their duty to protect the banks' customers' rights set out in the code.

2. Jan McClelland's Final Review

a. *Submissions in Response to the Issues Paper*

In response to the Issues Paper, 24 further submissions were sent to McClelland that are set out in the *2007-08 Review of the code of Banking Practice* website.[780] Half of these submissions were received from parties who apparently had no access to the FEMAG Report in 2005 or the Association's constitution. This report will look behind comments made by parties who would likely have considered the FEMAG Report and had an understanding or access to the Association's constitution.

[780] Available on <http://www.reviewbankcode2.com.au/default.aspx?FolderID=219&ArticleID=1183>

(i) CARE Financial Counselling Service Inc – 24 June 2008

Care Financial Counselling Service Inc (CARE) is a corporation established to assist people on a low to moderate income who are experiencing financial difficulties.[781] On 24 June 2008 Carmel Franklin, acting director of CARE wrote to McClelland and expressed a view that the corporation intended to contribute to the joint submission by Nicola Howell on behalf of Consumer Advocates.

Franklin previously presented views of the Australian Financial Counselling and Credit Reform Association and Care Financial Counselling Service to McClelland which were supportive of the code providing the industry confirms that it takes its obligations set out in the code seriously. Franklin also stated that CARE strongly opposed any watering down of protection afforded by banks to guarantors.

CARE states that it 'supports the views that there must be a clear distinction between external dispute resolution and code compliance and monitoring:[782]

> We see the current recommendations in the Issues Paper to be a significant step backwards, that if implemented would undermine the quality and credibility of any monitoring process.

CARE Director, Tennant,[783] was a Committee member during this period,[784] appointed under clause 34(a)(1) of the code as the consumer representative on 1 April 2004.[785] He

[781] CARE Inc is funded by ACT Department of Disability, Housing and Community Services via the Community Services Program, Commonwealth Department of Family and Community Services via the Commonwealth Financial Counselling Program, and the NSW Department of Fair Trading via the Financial Counselling Trust Fund and Housing ACT. See the CARE Inc website: http://www.carefcs.org/ on 19/03/2010.
[782] CARE Inc, 'Re: code of Banking Practices Issues Paper' (19 March 2008). See <http://www.reviewbankcode2.com.au/default.aspx?FolderID=213> on 19/03/2010
[783] CCMC, 'The code Compliance Monitoring Committee 2007–08 Annual Report', 3. See

remained in that position until shortly after McClelland published her Final Report on 16 December 2008[786] and was replaced by Nicola Howell in January 2009. Tennant presented the CARE Director's report and Carmel Franklin, the Client Service Coordinator's report. When CARE presented its submission to McClelland, it was a participant in the Nicola Howell report. At the same time, CARE, Tennant and Franklin were seemingly bypassed important matters raised in the submissions presented by the Committee to McClelland on 11 March 2008, when Tennant was still the consumer representative member of the Committee.

At about the time CARE submissions were presented to McClelland, its 30 June 2008 Annual Report notes the following were Board Members:

- Elizabeth Grant, Chairperson
- Timothy Johnstone, Secretary
- Ruth Mackay, Treasurer
- Malise Arnstein, Committee Member
- Ian McAuley, Committee Member
- Nick Seddon, Committee Member
- Kris Sloane, Committee Member

(ii) The CCMC (the Committee) – 29 July 2008

<http://www.codecompliance.org/documents/7460_CCMC_AR_8.pdf> on 19/03/2010
[784] code Compliance Monitoring Committee, 'CCMC Annual Report 2008-2009' See <http://ccmcannualreport.codecompliance.org/Whoweare.html> 19/03/2010.
[785] 2004-05 *CCMC Annual Report* for the period 1 April 2004 to 31 March 2005
[786] 2008-09 *CCMC Annual Report* dated 31 March 2009, p 3

On 29 July 2008, Tony Blunn AO expressed disappointment that many of the points raised in the Committee's submissions were not considered in McClelland's Issues Paper.[787] According to Blunn, 'Where Committee views are referred to, their treatment does not reflect the weight of experience that supports them.'[788] Blunn noted with concern that 'relatively few of the submissions listed in Appendix B of the code Review Issues Paper are publicly available on the website' and that 'a number of sources referred to in the issues paper remain undisclosed.'[789]

Blunn concluded that this is not common practice, unless non-disclosure has been specifically requested. Shortly after the McClelland final report was published on 16 December 2008, Blunn resigned from the position of CCMC Chair in January 2009.

(iii) Nicola Howell - Consumer Advocate – July 2008

Nicola Howell is a well-known and widely regarded academic. Howell's Joint Consumer submission was funded by the Consumer Advisory Panel of ASIC.[790] While she has gained a strong reputation as a consumer advocate in Australia, it could be said that she failed to adequately address the issues of misleading and deceptive conduct arising from signatory banks allowing their promise to adhere to the code – itself part of the terms and conditions of the contract between the institution and their customer – to be restricted by the constitution. As noted above, the constitution effectively excludes customers from

[787] CCMC, 'Submission to the Review of the code of Banking Practice 2007-2008', (29 July 2008). Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=213arefcs.org/> on 19/03/2010
[788] Ibid
[789] Ibid.
[790] See <http://www.law.qut.edu.au/staff/lsstaff/nhowell.jsp> on 19/03/2010

having complaints investigated through the IDR provision in clause 35 of the code[791] if the banks choose to invoke the ***opt-out*** provision in paragraph 8.1 and other provisions of the unpublished constitution.[792]

Regardless of their status at law, these convoluted and undisclosed terms tie the hands of an ordinary person and small business when entering into a contract with well-resourced banks by relying on an unpublished constitution to render the Committee impotent. In the joint Howell submission however, little or no emphasis is placed on the ineffectiveness of the code as a result of the Constitution.

Howell was of the view that the Committee should be independent of the subscribing banks and of the FOS,[793] acting as an independent compliance body.[794] They suggested that the body responsible for compliance monitoring should be sufficiently resourced and empowered to make its own enquiries and reviews, in addition to responding to complaints.[795] However, they mentioned the Association's constitution only in a positive light:

> The constitution (and/ or other governing documents) and the code make it clear that individuals and organizations have the right to make complaints about code breaches directly to the CCMC.[796]

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[791] Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172> on 19/03/2010
[792] See Annex A
[793] Nicole Howell 'Joint consumer submission to the review of the code of Banking practice and the Review Issues Paper' (31 July 2008) 37 Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=213> on 19/03/2010
[794] Ibid.. 28
[795] Ibid.. 31
[796] Ibid.. 37

However, despite acknowledging that 'it is vital that consumers have access to a free, independent and effective dispute resolution service that has a clear mandate and capacity to resolve disputes',[797] the fact that the constitution restricts the Committee's ability to perform its investigatory role with regard to unsatisfactory processing or resolution of such complaints is neglected.

Consumer Advocates' submission also noted that sanctions should be broadened,[798] however Howell failed to acknowledge the limiting nature of the constitution on the Committee's powers under the code. Although Howell has written extensively as a consumer advocate on consumer protection, her joint submission would seem to have failed to properly analyse the unjust practices and limitations imposed on the Committee.

Howell presented herself to ASIC, the banks and consumer organisations as being an expert on consumer affairs and customer protection. Her submission however could be said to have not fully addressed the serious concerns raised by the Committee in their 11 March 2008 submissions.

Following the 16 December 2008 Final Report presented to the ABA by McClelland, it is noted that Howell was appointed by the consumer representatives of FOS as the consumer representative on the CCMC Committee.[799] When she was appointed on 14 January 2009, Howell was fully briefed on the questionable principles and damages that might flow from the potentially untruthful code.

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[797] Ibid.. 31
[798] Ibid.. 37
[799] See <http://www.codecompliance.org/about.html> on 31/03/2009

At the time of this report, 20 months after her appointment, Howell has apparently made no public statements on the substantive issues raised by the earlier Committee despite being considered an expert in consumer affairs and customer protection and also the independent consumer representative on the Committee.

(iv) CHOICE – 3 October 2008

On 31 July 2008, CHOICE and the Consumer Action Law Centre presented submissions to the McClelland Review. Their submission endorsed the Howell views and dealt specifically with the issues regarding banks' penalty fees. CHOICE had been the public face of the not-for-profit Australian Consumers Association and declares itself to be the number one advocate for consumers in Australia. It is noted however that the CHOICE submission failed to reinforce or champion the concerns raised by the Committee and question the limitations that the constitution imposes on the Committee.

In its 6 March 2006 Charter, it notes CHOICE 'is an independent non-profit, non-party-political organisation established in 1959 to provide consumers information and advice and to promote and protect their interests.'[800] They claim that they 'exist to unlock the power of consumers'.[801] With around 200,000 subscribers, they provide 'unbiased product reviews, comparisons and consumer action.'[802]

CHOICE sets provisions in its code of Ethics, including:[803]

[800] CHOICE *Council Charter and Guidelines* accepted 6 March 2006
[801] CHOICE website < http://www.choice.com.au/ > accessed on 15 October 2010
[802] Ibid
[803] Ibid

There are certain basic ethical values that underpin their role as directors of CHOICE. Councillors and will therefore:

- Diligently apply themselves to the business of the Council with the level of skill and care expected of a director under the Corporations Act.
- Act at all times with integrity and in the interests of the Association as a whole.
- Avoid any situation of conflict of interest so far as is possible, and manage any conflict which cannot be avoided.
- Not make improper use of information gained through their position as director.

The other CHOICE officers are well-regarded public figures:[804]

- Rachel Dixon (Deputy Chair)
- Sandra Milligan
- Ian Spight
- Peter Bray
- Frank Muller
- Nicole Rich
- Charles Berger
- Bill Davidson
- Nick Stace (CEO)

Ms Jenni Mack, Chairperson, CHOICE and consumer advocate with expertise in consumer compensation schemes and good governance is also a director of the FOS and

[804] Ibid

Chairs the ASIC Consumer Advisory Panel and was recently appointed to the Board of the Food Standards Australia and New Zealand. In the mid-nineties, Ms Mack was Deputy Legal Ombudsman in NSW and NSW Judicial Commission member.[805]

In this role, Ms Mack's overarching responsibility is:

> to ensure that the Council properly fulfils its responsibilities... [and] that the Council fully utilises the knowledge and skill available to it. Inside the boardroom… to ensure [the] Council considers the right matters… properly, [and] comes to clear conclusions, and ensures decisions are implemented.[806]

It seems paradoxical that the Chair of such an important organisation as CHOICE with an extensive background in consumer protection and corporate governance would not find the submissions presented by the Committee to McClelland on 11 March 2008 worthy of further investigation. It is equally concerning that Mack, a consumer representative on the FOS, appointed Nicola Howell to the Committee in 2009 without requiring the ABA to further investigate the allegations made by the Committee in 2008.

(v) BFSO/FOS – 4 August 2008

The FOS replaced the BFSO and commenced its operations on 1 July 2008. Its function is to provide ***free dispute resolution services*** (emphasis added) for the financial services industry.[807] The External Dispute Resolution (EDR) service provided by FOS is approved

[805] CHOICE Governance website < http://www.choice.com.au/About-Us/Governance.aspx >
[806] CHOICE *Council Charter and Guidelines* accepted 6 March 2006
[807] FOS, 'Operational Guidelines to the Terms of Reference', (last updated January 2010), 4 Available at <http://www.fos.org.au/centric/home_page/about_us/terms_of_reference_b.jsp> on 19/03/2010

by ASIC[808] and provides an alternative to litigation, with its jurisdiction covering disputes relating to the provision of a 'financial service'. [809] However, the limitations placed on the dollar value of the disputes they can investigate means that it is incapable of investigating the wide ranging principles of the code.

The FOS submissions to McClelland stated that its relationship with the Committee should be more clearly defined. It suggested that there should be a principal means of addressing consumer complaints outside the IDR process and 'was concerned that there is an overlap between the functions of FOS and the CCMC, particularly in relation to the investigation of systemic issues.'[810]

It is unclear whether the FOS is willing to perform a greater role in code compliance monitoring and complaints handling when suggesting the Committee might limit some of its powers under the code.

The FOS Board on 1 June 2008 comprised:[811]

- Michael Lavarch (Chairman)
- Catriona Lowe (Consumer representative)
- David Coorey (Consumer representative)
- Jenny Mack (Consumer representative)
- Brendan French (Banking representative)

[808] FOS, 'Australian Consumer Law Consultation, Submission by the Financial Ombudsman Service', see <http://www.treasury.gov.au/documents/1501/PDF/FOS.pdf> on 19/03/2010
[809] Ibid
[810] Ibid 3
[811] *Current Company Extract for FINANCIAL OMBUDSMAN SERVICE LIMITED* extracted from ASIC's database on 04/02/2010

- Russell McKimm (Banking representative)
- David Squire (Banking representative)
- Denis Nelthorpe (Consumer representative)

Auditor is Deloitte Touche Tohmatsu at 550 Bourke Street Melbourne.

The FOS is governed by an independent board of consumer and financial industry representatives. The Board seeks expertise and advice from Specialist Advisory Committees drawn from FOS members and consumer organisations. The Board's role is to monitor the performance of the FOS, provide direction to the Ombudsman on policy matters, set the budget and review the Terms of Reference including jurisdictional limits of the Ombudsman. The Board does not get involved in cases which come before the Ombudsman as that would prejudice the independence of the Ombudsman.[812]

The Chair of the Board in 2009 was the Hon Michael Lavarch who is also currently the Executive Dean of the Faculty of Law at Queensland University of Technology. He is a former Federal Attorney General and Secretary General of the Law Council of Australia.[813]

In light of the reported independence of the Ombudsman and the credentials of the Board and its Chair, the consumer and industry representatives should have required that McClelland thoroughly investigate and make a recommendation in respect of the issues raised in the 11 March and 29 July 2008 submissions of the Committee.

(vi) ABA – 6 August 2008

[812] Financial Ombudsman Service, 'Our Board' <http://fos.org.au/centric/home_page/about_us/governance/our_board.jsp>
[813] Ibid

The affairs of the ABA are managed by its Board which consists of the CEOs of the code subscribing banks. In earlier submission to the Issues Paper, the ABA raised challenges for the banking sector.[814] It acknowledged that the potential weaknesses in the structure and in the governance processes of the Committee, and its relationship with the FOS and subscribing banks was critical to the credibility of the code.[815]

The ABA however maintained that the Committee could not operate without an overarching structure of governance and suggested that the following principles need to be employed:[816]

a) The CCMC must be accountable to an entity that is independent from the banks;
b) The CMC and FOS must be guaranteed independence from the banks in the performance of their functions;
c) The FOS and CCMC guarantee independence, one from the other;
d) There must be a free flow of information between the FOS and the CCMC;
e) There must be a common entry point into the FOS for consumers and their representatives to access dispute resolution and code compliance monitoring services.

Given the intertwined relationship between the code subscribing banks, the ABA that published the 2004 code and the FOS who acted with the banks appointing Committee members since 1 April 2004, it has been the responsibility of the ABA members to establish the principles set out in their 6 August 2008 submission since they drafted the Association's constitution.

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[814] ABA, 'Review of the code of Banking Practice: Submission in Response to Interim Recommendations and Other Issues', (6 August 2008), 1. Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=213> on 19/03/2010
[815] Ibid.12
[816] Ibid.13

The ABA submitted that: [817]

- Both the CCMC and FOS needed to share a reasonable level of information to work effectively;
- The Committee must be accountable to an entity that is independent from the banks and provides governance for the CCMC to discharge its powers under the code;
- A common entry point is desirable between the CCMC and the FOS and would involve the FOS directing clients to the CCMC when the FOS is unable to resolve matters;
- The description in the bank appointed member of the CCMC should be amended to make it clear the member is the representative of the code subscribing banks.

It appears that in spite of the Committee's concerns, there was no initiative by the ABA to investigate the relationship between the ABA and its directors, the subscribing banks, the FOS and its directors and the Committee. What does seem clear however is that an investigation into the concerns raised by the Committee might determine whether the bank parties control or seek to control consumer representatives who act to safeguard the rights of individuals and small businesses.

(vii) ANZ – 8 August 2008

The ANZ position in 2008 was not clear. It supported the recommendation to accommodate the Committee within the FOS in order to avoid multiple complaint gateways, duplication of investigations, and to provide access to data.[818] However, the

[817] Ibid 12-15
[818] ANZ, 'Review of the code of Banking Practice Issues Paper: Submission to the Independent code Reviewer Jan McClelland', (August 2008), 14. Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=213> on 19/03/2010

bank suggested that the current powers of the Committee to name non-complying banks are sufficient:[819]

> the Committee has not used this power suggesting that compliance with the [code] has been good and/or this power has been a significant driver for banks to rectify non-compliance with the [code]… ANZ questions the need for the CCMC to be given additional powers when its existing powers have not been needed.

This relies on an assumption that the Committee's investigatory powers are sufficient to monitor code compliance and investigate code breaches. While ANZ raised definitional issues, *particularly regarding the distinction between dispute and complaint* (emphasis added) and the ambiguity faced by customers assessing available remedies,[820] the bank failed to identify the link between the *opt-out* provision in paragraph 8.1 of the constitution which limits the Committee's powers to investigate either complaints or code disputes.

On 20 February 2004, John McFarlane, ANZ Chief Executive was also Chair of the ABA when the constitution was reported to have been drafted. In 2008-09, Michael Smith was ANZ's Chief Executive and during this time he was also an officer of the ABA and a member of the body which appointed the Committee bound by the constitution.[821]

During 2008-09, Charles Goode was Chair of ANZ Bank.[822]

(viii) Westpac – 14 August 2008

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[819] Ibid.
[820] Ibid. 22
[821] ABA New Release 'John McFarlane elected new ABA Chairman' dated 17 June 2003
[822] 'Shaping our Future' *2009 ANZ Annual Report*

Westpac submitted a response[823] to the McClelland Issues Paper on 14 August 2008 that also seemed confusing. The bank supported the ABA's submission that the Committee be integrated within the FOS due to the need for proper accountability for the Committee and the necessity for the long term viability of the code.[824] The Westpac position seems aligned with submissions presented to McClelland by FOS and the ABA and, like these two bodies, took little or no notice of the serious concerns raised by the Committee in their 11 March and 29 July 2008 submissions.

Westpac maintained that those areas of banking practice that fundamentally affect the rights of consumers were already regulated under statute, and that substantial penalties and other forms of remediation already exist for breaches of those laws.[825] Westpac argued that subscribing banks were already subject to review and audit requirements under the *Financial Services Reform Act* (FSR) and the *Uniform Consumer Credit code* (UCCC), additional auditing powers were likely to be burdensome and duplicative.[826]

On 20 February 2004, Westpac's present Chief Executive, Gail Kelly, was CEO of St George Bank and during the period when the Association's constitution was being drafted in 2003, she was Deputy Chair of the ABA, retiring on 29 August 2003.[827] In 2008-09, Kelly was Westpac's Chief Executive and during this period was also an officer of the ABA and member of the body that appointed the Committee which were bound by the Association's constitution.

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[823] Westpac Banking Corporation, 'code of Banking Practice (code) Review', (14 August 2008) Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=213> on 19/03/2010
[824] Ibid. 2
[825] Ibid. 3
[826] Ibid
[827] ABA News Release 'Matheson replaces Gail Kelly as ABA Deputy Chairperson' dated 29 August 2003

Throughout this period, Kelly was also an appointed of the Financial Sector Advisory Council (FSAC)[828], a non-statutory body established in March 1998 to provide advice to Government on policies to facilitate the growth of a strong and competitive financial sector. Federal Treasurer Peter Costello stated:

> Ms Kelly brings broad knowledge to the Council from the banking sector through her current position as Chief Executive of St George Bank, and has previously held senior positions with the Commonwealth Bank.[829]

At the time of her appointment, it is also noted that fellow St George Bank Director, Ms Linda Nicholls was also a member of FSAC.[830]

The Charter of the FSAC notes that its mission is to "provide advice to the Treasurer on policies that will maintain an efficient, competitive and dynamic financial sector, consistent with the objectives of fairness, financial stability and prudence."[831]

During this same period, the 2007-08 CCMC Annual Report notes that 'for the first time the Committee has named a bank for serious non compliance with the code.'[832]

> In December 2007, Westpac advised the Committee that since July 2007 it had not been complying with subclauses 28.4(d) and 28.5 of the code in that it had not been providing specific information to a class of potential guarantors in relation to equipment finance guarantees. Despite having been formally advised of the seriousness with which the Committee regarded the breach and that it might be named, *the Bank has indicated that it*

[828] Treasury Media Release 'Membership of the Financial Sector Advisory Council' dated 15 November 2005
[829] Ibid
[830] Ibid
[831] Charter of the Financial Sector Advisory Council 2010
[832] 2007-08 *CCMC Annual Report,* 1

> *does not intend to remediate the breach or to take steps to prevent the breach reoccurring* (emphasis added).

In 2008-09, Mr Ted Evans AC was Chair of Westpac and Ms Gail Kelly was a Director of both Westpac Bank and St George Bank.[833]

2. Response: The Final McClelland Report

Jan McClelland limited her discussions when referring to the Committee's governance issues to promoting the need for structural changes in the relationship between the Committee and the FOS. McClelland's recommendations were that:

1. The CCMC be established as a separate independent unit within the FOS reporting directly to and accountable to the FOS Board for the performance of its prescribed functions under the code.
2. Separate terms of reference of the CCMC be developed by the Committee in consultation with the ABA, the FOS, ASIC and consumer interests which should be consistent with the compliance monitoring, investigation and reporting functions of the Committee published on the CCMC, FOS and ABA websites.
3. Terms of reference of the Committee make it clear it and FOS have different code compliance monitoring and dispute resolution functions guaranteeing independence of one from the other, as well as being independent from banks.
4. The charter, constitution, terms of reference and operating protocols of the FOS Board and of the CCMC and code make it clear that individuals and organisations have the right to make complaints about code breaches directly to the Committee.

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[833] 'Shaping our Future' *2009 ANZ Annual Report*

5. The code makes it clear that the Committee retains its powers under the code to conduct investigations in response to complaints of code breaches from any person or organisation, and to initiate investigations and reviews on its own initiative and to make determinations in relation to those investigations.

6. The code also spell out the Committee's functions including to:

    a) conduct its own enquiries into banks' compliance with the code;

    b) prepare an annual report on compliance with the code;

    c) contribute to joint publications between the CCMC and FOS on code interpretation and compliance issues, and;

    d) promote awareness of the code with banks through the provision of feedback on code issues.

7. The charter, constitution, terms of reference and operating protocols of the FOS and the Committee make it clear that the following arrangements apply in matters that are referred to the FOS or the Committee:

    a) Where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue and finds that there has been a code breach, that determination is a final determination as to whether a code breach has been established. FOS must report its determination to the CCMC for further monitoring as appropriate and provide access to its case file on the matter if required by the CCMC.

    b) Where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue and finds that there has been no code breach, the determination of FOS is final and the CCMC cannot investigate the matter. FOS

must inform the CCMC of its decision and provide access to its case file if required by the CCMC.

c) Where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue, but does not make a determination on this aspect of the dispute, the FOS must refer the issue to the CCMC and provide access to its case file if required by the CCMC.

d) Except where the FOS, in performance of its prescribed function of dispute resolution, identifies a code issue and determines whether there has been a code breach, in all other cases the CCMC shall have sole responsibility to make a determination whether a breach of the code has occurred.

e) If a customer seeks to refer a dispute to the FOS alleging a breach of the code but there is no financial loss, the FOS must advise the customer of the right to take the matter to the Committee.

f) Where the Committee, in accordance with its prescribed function of code compliance monitoring, determines whether a breach of the code has occurred, that determination is a final determination as between the Committee and the FOS as to whether a code breach has been established.

8. There will be free flow of information between the FOS and the Committee to enable the FOS and the Committee to perform and discharge their respective functions properly.

9. That the FOS and the Committee ensure that the community is aware of the Committee's existence, role and separate function in relation to compliance monitoring and establish a Memorandum of Understanding that sets out their respective roles, agreed protocols for handling code matters, and protocols for the sharing of information.

10. FOS and Committee staff be jointly trained on distinctions between dispute resolution and compliance monitoring function and protocols for handling matters including referral of matters from FOS to the Committee and sharing of information in accordance with the MOU between the FOS and Committee.

11. That the description in clause 34(a) (i) of the code of the bank-appointed member of the Committee be amended to make it clear that the appointee is a representative of code-subscribing banks. [834]

In her 16 December 2008 Final Report, McClelland failed to address or recommend a thorough investigation into the issues which were raised by the Committee and caused them to act as whistleblowers when publishing concerns with respect to the Association's constitution in their 11 March and 29 July 2008 submissions.

E. *CONCLUSION*

The majority of submissions referred to McClelland's Issues Paper and Final Report focused on ancillary issues and failed to recognise the connection between the code and the Association's 20 February 2004 constitution. Despite the experience and commitment by the reviewer, the paradoxical issues referred to in Part 2 of this report should have been recognised, investigated and reported on if it was the true intention of the bank parties to review the efficacy of the code.

It is noted that several of the parties that made submissions to McClelland would have sighted or known about the Association's constitution and the consequences that flowed

[834] Jan McClelland, 'Review of the code of Banking Practice: Final Report', (2008), 15-17. Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=217&ArticleID=1181> on 19/03/2010

to the high standards in the code and the independence of the Committee. However, they said nothing.

On the other hand, there were other parties that made submissions to McClelland who had no knowledge of the constitution and were therefore unable to realise the substance of the Committee's 11 March and 29 July 2008 submissions. Parties who were privy to the constitution made no effort to make appropriate recommendations that might support changes that would remedy the institutional integrity of the Committee and its governance structure.

It is difficult to know who within ASIC had a duty to review the Issues Paper and Final Report published by McClelland which included the 11 March 2008 submissions by the Committee. These submissions made it perfectly clear that the Committee's concerns, acting as whistleblowers, should have been investigated and a determination made by ASIC in light of the very serious statements made by the whistleblowers prior to them resigning without completing their terms of appointment. This should not be overlooked now by legislators, regulators and the industry because all of the protection that was promised to consumers in 1993 is taken away in 2003.

It seems well-regarded and highly-respected policy makers and senior academics with expertise in consumer protection found themselves believing that the code was capable of being enforced by a committee which was not regulated and less than independent of the subscribing banks. It also seems inappropriate that the McClelland Review failed to take advantage of the research and recommendations of the 2005 FEMAG Review.

Chapter IX

FURTHER REFLECTIONS

A. *INTRODUCTION*

On 22 July 2008, the Committee commissioned Richard Viney to carry out an independent review of the activities of the CCMC under clause 34(g) of the code[835]. In PART E: RESOLUTION OF DISPUTES, MONITORING AND SANCTIONS, clause 34(g) requires:

> The CCMC to arrange a regular independent review of its activities and to ensure a report of that review is lodged with ASIC, which review is to be initially held after the first year in which the CCMC operates and after which it is to coincide with the periodic reviews of the code [by the ABA]

Chapter VII of this report sets out the investigation principles and findings of the FEMAG Review which carried out the initial review of the CCMC in 2005[836]. Viney's review in 2008, whilst it was the second CCMC review, was carried out simultaneously with the ABA's McClelland review and Viney sent copies of his terms of reference

[835] Viney R.T. Report of the Second Review of Activities of the code Compliance monitoring Committee (CCMC), Introduction, p 1

[836] Report of the Initial Review of activities of the CCMC; The CCMC Monitors Compliance with the Banking code of Conduct, October 2005, Foundation for Effective Markets and Governance, Regulatory Institutions Network, R.S.S.S., Australia National University

which sought to answer a set of questions, invited submissions, obtained views of different stakeholders and held a number of discussions and interviews[837].

In carrying out his report, Viney had access to all of the submissions made public by McClelland in her Issues Paper and Final Report. In particular, he would have been required to investigate the concerns raised by the Committee in their 11 March and 29 July 2008 submissions to the ABA. The Committee's statements regarding the existence of the Association's constitution that limited their powers, independence and authority will have been central to the Viney review presented to the CCMC and copied to ASIC.

The questions in Viney's terms of reference confirmed the existence of the constitution. For example, a question in Viney's terms of reference was '[H]as the CCMC acted independently and appropriately with respect to its role under the code and its constitution?'[838] Despite the lack of basis in the code for the constitution, Viney never questioned the legality of its existence nor of its lack of publication.

Viney will have also considered the findings of FEMAG and noted the fact that in 2004-05, the CCMC Annual Report noted there were only 19 written complaints alleging breaches of the code referred to the CCMC and the Committee only issued a determination in one case finding that a breach of the code had not occurred.[839]

In a similar vein, Viney carried out his report as required by the Committee and managed to answer YES to the following questions:

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[837] Viney report he had discussions and obtained views from representatives of the ABA, the Chief Financial Ombudsman and the Banking & Financial Ombudsman. He also said he interviewed CCMC Members and Executive Chief Manager, Ibid. above n. 1 at p iv.
[838] Ibid above n. 1, see question 4b.
[839] 2004-2005 CCMC Annual Report, page 4

- Is the CCMC properly interpreting its role under the code?
- Has the CCMC adopted an appropriate approach to monitoring compliance with the code?
- Are the CCMC's human resources adequate for the CCMC to fulfill its role?
- Are the CCMC's sanctions appropriate to its role?
- Has the CCMC's performance of its role lent credibility to the code as a self-regulatory scheme?
- Does the CCMC have an appropriate public profile?
- Has the CCMC established an appropriate and beneficial relationship with the Banking and Financial Services Ombudsman?
- Does the CCMC have adequate access to necessary information from stakeholders to assess bank compliance with the code?
- Has the CCMC been appropriately accessible to stakeholders?
- Have fair and transparent procedures for dealing with alleged breaches been put in place? Are these procedures being adhered to?
- Does the CCMC have adequate systems for the collection, recording and processing of information about code compliance and alleged breaches?
- Has the CCMC met its reporting requirements?
- Has the CCMC acted independently and appropriately with respect to its role under the code and its constitution?
- Has the Committee appropriately responded to the recommendations made in the first CCMC review?

B. *COMPLIANCE MONITORING ACTIVITIES AND TECHNIQUES*

Viney looked at three previous CCMC Annual Reports and had discussions with several consumer advocates to review the effectiveness of the Committee's compliance monitoring activities and techniques. During the process he commented on the length of time taken to complete investigations. An experienced financial councillor who he met with and had referred a number of complaints to the Committee in the previous 12 months, reported a 'lack of appropriate sanctions available to the CCMC' and that it seemed 'very easy for the offending bank to advise that it had taken action to prevent further breaches'.[840]

From the Committee's files, Viney found that in some cases, banks were slow in responding to the CCMC's requests for information and he observed that 'banks did not seem to have a good understanding of the investigation process and their need to respond in a timely manner.' Irrespective of his research and subsequent findings, Viney reported favourably on the Committee's compliance-monitoring activities and stated that they were being performed diligently and effectively.[841]

C. *APPROPRIATE SANCTIONING POWERS*

Viney was critical of the one and only sanction that the CCMC could impose; naming a bank in the circumstances outlined in clause 34(i) of the code and clause 11 of what he, in his report referred to as the constitution. Clause 34(i) states:

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[840] Jan McClelland, Final Report (2008), 8-10.
[841] Ibid. 10

> [Subscribing banks] agree to empower the Committee to name [them] in connection with a breach of this code or in the CCMC's report, where it can be shown that [the bank] has:
>
> (i) Been guilty of serious or systemic non-compliance;
>
> (ii) Ignored the Committee's request to remedy a breach or failed to do so within a reasonable time; or
>
> (iii) Breach an undertaking given to the Committee; or
>
> (iv) Not taken steps to prevent a breach reoccurring after having been warned that [the bank] might be named

The combined effect of this clause was to limit the authority of the Committee to name a subscribing bank for non-compliance with the code in their Annual Report, and in no other way and at no other time. Furthermore, Viney noted that clause 10.7 of the constitution prohibited the CCMC and each member of the Committee from making any public statement on behalf of the CCMC except in the Annual Report or with the prior approval of the Chair of the BFSO and the Chair of the ABA. Viney stated:

> As this limitation on the authority of the CCMC to name a bank flows directly from the code and the instrument by which the CCMC is created (the constitution), I find it difficult to envisage, in a legal sense, how it could be inappropriate. If the question was whether that sanction as the only sanction was reasonable, I would be inclined to the view that a more flexible provision might be preferable, such as one which authorised the Committee to name a bank in an official notice issued by the Committee but not until a period of 60 or 90 days had passed since the CCMC formally advised the bank of its

> decision to name. Some consumer advocates consider additional sanctions should be available.[842]

In this context, Viney cited section 4.6 of CCMC's formal procedures which stated that if the Committee determined that a subscribing bank had breached the code, it could request the bank to remedy the breach within a specified time or to take specified steps to prevent the breach from recurring. Despite its use of the term 'request,' section 4.6 set down procedures that ultimately enabled the Committee to name the bank if it failed to comply with the request.[843]

Viney concluded that 'while the existing sanction is that mandated by the code and the constitution, consideration should be given to providing more flexibility [to the Committee] in the imposition of sanctions.'[844] In making such a decisive statement, it is unclear how Viney formed his conclusion that the Committee's sanctions were already appropriate.

D. *CCMC LENDS CREDIBILITY TO SELF-REGULATION*

Viney acknowledged much was left to the subscribing banks and the manner by which these banks chose to act. He stated:

> In my view the answer to this question lies in whether subscribing banks take the CCMC's activities seriously and co-operate with the Committee's compliance-monitoring programs. The evidence before me is that since its establishment, the CCMC has put in place compliance monitoring programs that are transparent and well targeted

[842] Ibid. above n. 1 at p11
[843] Ibid.
[844] Ibid. above at 12

> and, relevantly for the current question, require active participation and co-operation on the part of banks.[845]

Viney concluded that the Committee's performance has lent *credibility to the code as a self-regulatory scheme* (emphasis added).[846] When making these remarks, he failed to take account of the Committee's strong objection to the "suggestion by some banks that they have the option to choose which provisions of the code they will observe whilst maintaining a position that they will subscribe to the code."[847] The Committee also noted its disapproval with the "absence of any requirement in the code that banks should observe the terms and conditions of their contract with their customers." [848]

The notion of the code being a contract between 'bank and customer' was observed in McClelland's May 2008 Issues Paper as paramount to the code's functionality. In practice, this was questioned again in the 2008 Senate Standard Committee on Economics, Senator Andrew Murray asserted:

> A breach of the code, given that it says participants are contractually bound, *could in certain circumstances therefore trigger misleading and deceptive provisions if people allege the conduct of the bank was contrary to their agreement* [849] (emphasis added).

Senator Murray proposed that people might not want to sign a bank agreement because of liability issues. Senators Cassidy and Samuel did not answer the question, but noted however that Jan McClelland performed the 2008 Review of the code the month before.

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[845] Ibid
[846] Ibid
[847] Submission to the Review of the code of Banking Practice 2007-2008, (code Compliance Monitoring Committee), 11 March 2008, Annexure A at 4
[848] Ibid
[849] Commonwealth, Budget Estimates 3-5 June 2008, Senate Standing Committee on Economics, Treasury Portfolio, Senator Andrew Murray, 5 June 2008, E117-E118

Viney, however, failed to address these concerns stating only that the code formed the banks' contractual commitment with its customers[850].

E. *THE CCMC PUBLIC PROFILE*

Viney shared the opinion that if the Committee would like to expand their public profile, they might be inhibited to some extent by clause 10.7 of the constitution. This clause limits the authority of the Committee to make public comments on behalf of the CCMC.[851] Viney concluded that promoting knowledge and awareness of the code, especially to smaller advocacy bodies in regional areas, was more important than the public profile of the CCMC.[852]

Viney does not mention, however, that the Committee's 11 March and 29 July 2008 submissions to McClelland, setting out the Committee's concerns that their governing document, the Association's constitution, that "affects the code's interpretation and administration, is not a public document and has not been made available to community and customer advocacy groups."[853] These comments are in contrast to Viney's findings that the Committee's compliance monitoring programs are transparent.

F. *CCMC AND FOS RELATIONSHIP*

Viney expressed two concerns in relation to whether the relationship between the Committee and the FOS was beneficial. Firstly, in cases when there was a complaint

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[850] Ibid. above n 1 at Appendix One, Terms of Reference, p25
[851] Ibid. above n, at 13
[852] Ibid
[853] Submission to the Review of the code of Banking Practice 2007-2008, Annexure G, p16 (code Compliance Monitoring Committee), 11 March 2008

seeking compensation was made to FOS and upheld after a breach of code was found. Secondly, in cases when a complaint was made to the FOS but was not investigated as a possible breach of the code.

However, when making his concluding remarks, Viney stated that the Committee had established a reasonably effective relationship with the FOS but there was an opportunity for both bodies to continue to work to enhance their relationship. In particular, Viney emphasised the need for effective information flows and on liaison where both bodies were providing guidance.[854]

G. *CCMC PRIORITISING COMPLIANCE-MONITORING*

Viney cited that provisions of the Association's constitution had an impact on the ability of the Committee to prioritise their various compliance-monitoring activities. He drew attention to the lack of flexibility that the Committee had as a result of the provisions of the constitution.

In relation to investigations of alleged breaches of the code, Viney cited clause 8.1of the constitution, the ***opt-out*** provision. This clause requires the Committee to consider a complaint, unless it fell within the range of exceptions specified in the sub-clause. [855] Viney fails to comment on the implications that flow from the ***opt-out*** provision whereby subscribing banks can impede the Committee from investigating serious code violations or breaches of law by commencing proceedings in another forum following a complaint being received by a subscribing bank.

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[854] Ibid. above n. at 18

[855] code Compliance Monitoring Committee Constitution Association 20 February 2004, clause 8.1 at 14

Clause 8.1(b) – Opt-Out provision

Viney comments on banks using clause 8.1 but stops short of explaining how they can use it to avoid having the Committee investigate allegations in respect of conduct of CEO's and bank officers. The *opt-out* provision can be invoked by a subscribing bank at any time for the purpose of restricting the Committee from investigating a complaint the bank doesn't want investigated. By using litigation, which is time-consuming and very expensive, the ***opt-out*** provision provides banks a right to make the Committee's dispute resolution procedures powerless, ineffective and irrelevant.

Viney cited clause 16.1, which required the Committee to draw up operating procedures in accordance with clause 34(h) of the code. In doing so, the Committee must have regard to the operating procedures of the FOS and consult with the FOS and the ABA. Viney found that the Committee had no discretion to decline investigating any complaint unless *it fell within exceptions specified in the options clause 8.1 of the constitution* (emphasis added). According to Viney, the Committee had little, if any, flexibility or scope for prioritisation in the investigation and determination of complaints alleging breaches of code obligations.[856]

By contrast, Viney noted that clause 9 of the constitution vested in the Committee complete discretion as to what inquiries it conducted of its own motion, so long as the sole purpose of its inquiry was to monitor a bank's compliance with the code.[857] In Viney's opinion, the Committee prioritised wisely in determining which areas of code compliance should be the subject of its own motion inquiries. Viney gave attention to

[856] Ibid. above n 1 at p19-20
[857] Ibid

code obligations that were particularly important to vulnerable and disadvantaged consumers and which had been the subject of complaints.[858]

However clause 34(e) of the code sought to "empower the Committee to conduct its own enquiries into the subscribing banks' compliance with the code," and clause 35.7 states that the "dispute resolution process is available to all [customers, and their guarantors] for complaints other than those which are resolved to [the customers] satisfaction."

This is neglected in Viney's analysis of how well the Committee prioritises compliance-monitoring activities and suggests the Committee lacks discretion to investigate all breaches of the code. Therefore, it could be argued that the public perception of the code, as a document constructed to protect subscribing bank customers, would not infer a requirement to prioritise complaints but rather that all the complaints referred to the Committee are addressed. Viney worded his conclusion guardedly stating 'to the extent the Committee does has the discretion to prioritise compliance-monitoring activities, it had done so effectively.'[859]

H. *INDEPENDENT CODE MONTORING*

Viney irrevocably states that the "Committee has acted independently and appropriately with respect to its role under the code and constitution."[860] Although his statement refers to conduct under both governing instruments, Viney did not recognise the Committee's position with regard to their own independence when they recommended that the

[858] Ibid
[859] Ibid. above n.1 at 20
[860] Viney R.T. Report of the Second Review of Activities of the code Compliance monitoring Committee (CCMC), at 24

constitution be revoked because "the structure suggests that the committee is less than independent of subscribing banks" and "some provisions of the constitution vest unnecessary power in the Chair of the FOS and the Association."[861]

The Committee stated that: "The constitution provides the Chairs of the FOS and the Association with oversight powers which the Committee views as inappropriate and inconsistent with the Committee's independent role.[862] The Committee also noted that the CCMC is fully funded by the subscribing banks. [863]

Read in light of Viney's earlier 2001 review which led to the revised 2003 code and the pledge by the subscribing banks to act 'fairly and reasonably towards our customers in a consistent and ethical manner'[864] Viney's 2008 statements on the essentially unchanged modified 2004 code were noticeably absent on these matters.

Despite the Committee's 11 Mach and 29 July 2008 submissions which raised the lack of definition between 'compliance monitoring' and 'dispute resolution'[865] and the August 2008 ANZ submission to Jan McClelland [866] requesting the clarification of the words 'dispute' and 'complaint' the Viney 2008 Review was silent on these crucial issues which had the effect of frustrating the Committee from carrying out their clause 34 duties.

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[861] Submission to the Review of the code of Banking Practice 2007-2008, (code Compliance Monitoring Committee), 11 March 2008, Annexure A, p2
[862] Submission to the Review of the code of Banking Practice 2007-2008, (code Compliance Monitoring Committee), 11 March 2008, Annexure G, p15
[863] Submission to Review of the code of Banking Practice 2007-2008, Annexure C, p8 (code Compliance Monitoring Committee), 11 March 2008
[864] Richard Viney, Final Report (2001), 25
[865] Submission to Review of the code of Banking Practice 2007-2008, Annexure A, 1 (code Compliance Monitoring Committee), 11 March 2008
[866] See Chapter XII *An Unpublished Constitution – The Whistleblowers*

The word *complaint* is not defined under definitions in clause 40 of the code whilst the word *dispute* is and it seems 'dispute' is narrowly defined as being only one of several 'complaint' alternatives and limited to being 'in relation to banking services or products'[867]. The evidence however suggests subscribing banks argue that there is only limited scope for customers and the Committee to remedy code breaches. The terms conflict with recommendations of Viney in 2001 which resulted in the construction of the codes guiding principles of fairness under clause 2.2.

By answering positively to all the questions posed by Viney when he was commissioned to carry out the CCMC review and by failing to investigating and address the concerns of the Committee in their submissions to McClelland (despite access to all CCMC records relevant to his review[868]), Viney concluded by presenting a favourable review of the CCMC despite the Committee being dissatisfied with the contradiction that existed between the code and the constitution.

The following persons and organisations were contacted by Viney in 2008 and invited to make submissions to his review:

- Acting Chief Executive, CHOICE
- Director Compliance, Australian Securities and Investments Commission
- Chief Executive Officer, Australian Bankers Association
- Chief Ombudsman, Financial Ombudsman Service Limited

[867] Banking Service (clause 40 of code) any financial service or product provided by **us** in **Australia**: (a) any financial service or product provided by **us** whether supplied directly or through an intermediary; and (b) in the case of a financial service or product provided by another party and distributed by **us**, extends only to **our** distribution or supply of service or product to **you** and not to the service or product itself. p23.
[868] Viney R.T. Report of the Second Review of Activities of the code Compliance monitoring Committee (CCMC), Executive Summary Page iv.

- Federal Minister for Superannuation & Corporate Law
- Federal Shadow Treasurer
- Chief Executive Officer, Council of Small Business Organisations of Australia
- Minister for Consumer Affairs, Victoria
- Minister for Fair Trading, New South Wales
- Attorney-General and Minister for Justice, Queensland
- Minister for Justice, Tasmania
- Chairman, Australian Securities and Investments Commission
- Chairman, Australian Competition and Consumer Commission
- Director Retail & Regulatory Policy, Australian Bankers Association
- Ombudsman – Banking & Finance, Financial Ombudsman Service Limited
- Federal Minister for Competition Policy & Consumer Affairs
- Australian Financial Counselling and Credit Reform Association
- Attorney-General, ACT
- Minister for Justice, Northern Territory
- Minister for Consumer Affairs, South Australia
- Minister for Consumer Protection, Western Australia[869]

Viney concluded his 2008 Review reporting he received two (2) formal submissions and did not state which of the above partiers provided the submission.

[869] Ibid. above n. 1 at Appendix Two: Persons and organisations notified about the review, p 27

Chapter X

BANKERS RETAIN CONTROL

After the 2008 McClelland and Viney reviews, it became apparent that there were two separate points of view existing among the bank parties. On one side were the ABA, subscribing banks and their Chief Executives who were directors of the ABA and members of the CCMCA, the FOS and the reviewers who were apparently unconcerned about the undermining effect of the constitution on the Committee and the code. It is important to note that McClelland acknowledged this issue in her first draft, but subsequent submissions failed to properly address this concern.

On the other side were the previous Committee members who raised this issue with McClelland. Since then, it would seem that the bank parties have assiduously sought to maintain the status quo that was provided to them on 20 February 2004 when provisions of the Association's constitution were drafted. It has since been argued that the banking industry requires less protection to remain competitive whilst this report suggests that it is the rights of the banks' customers that need to be re-evaluated and revised.

The events above must be considered in light of Australia's changing political and economic landscape. The circumstances which followed the GFC and Australia's role in Asia will be looked at later in the report. What is evident however is that on 16 October 2010, the ABS reported Australia's population was (about) 22,491,330[870] and that the

[870] Australian Bureau of Statistics, accessed on 16 October 2010, http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument

ATO reported the number of small businesses in Australia totalled 2.4 million[871]. As such, the events which followed the 1991 Martin Report have significantly affected the rights of millions of bank customers contracted to the 12 major Australian banks.

The legislative changes which flowed from the Wallis Report and the introduction of the revised 2003 code and modified 2004 code, affect everyone. Consumer protection that is provided and funded by the banks through their Ombudsman and CCMC bodies, which is the focus of this report, seeks to relive the courts of their unenviable task of resolving complaints and disputes between banks with unlimited resources and their customers with no capacity to protect their rights in the face of non-complying behaviour by the banks. During 2008-09 despite the large number of bank customers and businesses, there were only 6,731 new disputes lodged with the FOS[872]. During the same period there were 11 determinations only carried out by the CCMC[873] and this was up from nine (9) determinations reported during the previous year.

By any standards, the millions of dollars spent by the Federal Government to provide an industry structure that allows banks to compete successfully whilst protecting the rights of individuals and small business customers is flawed. Again, later in this report there will be a discussion on how the 12 major banks orchestrated their lopsided approach to monitoring customer complaints and providing effective dispute resolution.

A. *DUTIES OF BANKERS IN LAW*

[871] Consultative Forum, Department of Innovation, Industry, Science and Research Address presented by Geoff Fader COSBOA on 18 June 2010
[872] REGULATION IMPACT STATEMENT: ENHANCEMENTS TO THE NATIONAL CONSUMER CREDIT PROTECTION REGIME
[873] CCMC 2008-2009 Annual Report, page 14

It seems relevant to undertake a comprehensive review of specific duties bankers have according to law. By doing so, it will allow the legislators to determine what steps ne4ed to be taken to ensure the banks and the bank parties have acted and will be required to act in accordance with their duties under law.

1. Legal Relationship between Banks and Customers

Banks and financial institutions enter into relationships with their customers in the myriad of products they offer and the services that they perform. At the heart of these relationships lies a promise. Assuming proper formation and constitution,[874] this relationship will be governed by general principles of contract law, which assumes that all parties are autonomous agents, have equal bargaining power, and therefore retain the capacity to freely bind themselves in legal obligations with one another.

For example, in the case of a deposit, the property (the deposit) would pass from the depositor to the bank and become the property of the bank subject to contractual qualifications as to how the bank may use it, and clear rights as to when the customer may expect to demand back from the bank the initial sum. Where banks act as creditor by providing loans, they are governed by the same contractual principles. The concept of a bank has accommodated financial institutions other than banks since 1998 following

[874] Put simply, that there has been an "offer" by one party, an "acceptance" by the other, and that these actions are sufficiently certain to become legally binding. The intention to form legal relations must be present on the part of both parties, 'consideration' must have been exchanged, and vitiating factors such as misrepresentation and unconscionable conduct must be absent. Finally, in many industries statute or industry practice requires the contract to be in a specific form (ie written).

amendments to the *Banking Act 1959* (Cth),[875] but before that time was largely limited to the concept of a deposit-taking institution where deposit-taking was its primary role.

2. Banks' Contractual Duties to Customers

Where a contractual relationship exists between the bank and its customer upon agreement by the customer to open an account, take a loan or purchase a financial product, a duty of care arises between a bank or financial institution and their customer where a contract expressly states that the institution will exercise "reasonable care". It may also arise if implied in the contract by the courts under Common Law, in relation to the performance of professional obligations.[876]

Assuming a contract between the bank and its customers, the actual terms of such a contract are not however entirely clear. Firstly, while the express terms and conditions of a contract will generally be paramount, they will be subject to relevant statutory obligations. For example, the implied contractual terms contained in the provisions prohibiting misleading and deceptive conduct and unconscionable conduct in both the *Trade Practices Act 1974* (Cth)[877] and the *Australian Securities and Investments Commissions Act 2001* (Cth)[878] have increasingly been litigated in recent years. In addition, many terms and conditions have been implied into such contracts by courts,[879] with reference to the common law and general legal principle, and on the basis of

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[875] See Pt II Div 1 ss 7-11

[876] See the discussion in Seddon and Ellinghaus, *Cheshire & Fifoot's Law of Contract* (9th Aus ted, Sydney: LexisNexis Butterworths, 2008) at [10.53]

[877] ('TPA') Pts IVA, V

[878] ('ASIC Act') Pt 2, Div 2.

[879] Such terms include, for example, the obligation of the bank to replay the initial deposit amount upon request, and to give reasonable notice before ceasing operations with the customer: see *N Joachimson v Swiss Bank Corp* [1921] 3 KB 110, 127 (Atkin J)

business efficacy[880] or necessity.[881] The courts will approach such cases with differing presumptions depending on the nature of the transaction.

Such legal obligations (both express and implied) arising within a contractual relationship will not be valid at the time prior to its formation, and will cease to bind the parties where the contract is validly terminated, or when the customer becomes bankrupt or is liquidated.[882] This means that the customers ability to pursue the banks in court for breach of such provisions is severely limited by the point at which the contract was formed and terminated, and by the terms of the contract itself, which are often numerous and difficult to understand for non-legal parties. Additionally, there may be other legal obligations that co-exist or exist regardless of contractual duties.

3. Bankers' Duty of Care to Customers

A duty of care may arise in tort either contiguously with or irrespective of an existing contractual relationship, such as where the bank adheres to the contractual terms but their actions are negligent and cause harm to the client. Banks and financial institutions are therefore likely to come under a duty to exercise "reasonable care" prior to the formation of a contract.[883] Since the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[884] this has included negligent misstatement of, for example, the financial prospective of a financial product offered by the bank, and may give rise to an action in damages for pure economic loss. Ultimately however, it will be up to the courts to make the decision as to

[880] See *Joachimson*, 121, 129 relying on *The Moorcock* (1889) 14 PD 64
[881] See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 104, applying *Liverpool City Council v Irwin* [1977] AC 239
[882] See Ellinger, Lomnicka and Hooley, Modern Banking Law (Oxford: Clarendon Press, 2005), Ch 5
[883] This is in addition to any fiduciary and statutory duties that are imposed
[884] [1964] AC 465

whether, as a matter of policy, the financier would owe a duty of care. Where the financier is specifically requested to advise, a duty to do so with due care and skill will likely arise,[885] but the less vulnerable the client,[886] and the more tenuous the relationship with financier, the more difficult it will be to establish a duty.[887] A pre-emptive 'disclaimer' of such a duty, particularly if accepted by the recipient, is also regarded by the courts as entirely possible in many circumstances.[888]

If a duty of care is established, what the bank or financial institution must actually do in order to fulfill that duty of care will depend upon the individual circumstances of the case with regard to the seriousness of the risk involved. However, without the assistance of a trained lawyer or judge, it is difficult for a complainant to actually know what exactly it is that they were owed. Moreover, banks and financial institutions are generally well-resourced, and in most cases for a small client to consult a well-trained lawyer, and certainly to establish in court that such due diligence was not undertaken, may require an arduous process of attempting to obtain evidentiary documentation from the institutions, and continuing to meet court fees should they choose not to cooperate in a timely manner.

4. Bankers' Fiduciary Duty to Customers

A fiduciary relationship on the other hand is distinct from a tortuous duty of care, in that one person must in a position of power and authority vis a vis the other. Whether the relationship of financier/client and banker/customer may be recognized as such will

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[885] See for example, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 475-6
[886] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515
[887] *Essanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241, 252 (Brennan J), 256-7 (Dawson J)
[888] *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, 570 (Barwick CJ)

depend on the circumstances of the case, particularly where there is "a relation of confidence … inequality of bargaining power … the scope for one party unilaterally to exercise a discretion or power which may affect the rights or interests of another … and a dependency or vulnerability on the part of one party that causes that party to rely on another …".[889] For example, a fiduciary duty will be more likely to exist the more direct the relationship (ie the bank was not conducting business with the customer through a string of intermediaries), and the customer did not have independent advice.[890] Where the role of advisor is assumed, there will exist a fiduciary duty of care; and it is likely to be restricted to those issues that the banker was employed to advise on.[891]

5. Bankers' Statutory Duty Not to Mislead

Financial service providers are subject to a statutory obligation not to engage in conduct that is misleading or deceptive or is likely to be misleading of deceptive. These provisions were contained in the *Trade Practices Act 1974* (Cth) at the time that the 1993 code was created, but were later transferred to the *Australian Securities and Investment Commission Act* (Cth).[892] These obligations are much broader than the obligations that common law (see above) imposes upon bankers and financiers. Interestingly, and unusually, the general law has little role to play in interpreting these statutory protections. Rather they set out a:

> "norm of conduct" (*Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348) which should not be interpreted according to established principles of liability under the general

[889] *Breen v Williams* (1996) 186 CLR 71 107 (Gaudron and McHugh JJ) See also *Duke Group Ltd (in liq) v Pilmer* (1999) 31 ACSR 213, 353-9
[890] *Commonwealth Bank of Australia Ltd v Smith* (1991) 102 ALR 453, 476
[891] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 385 (Brennan J)
[892] s 12DA

> law and which, since it may be offended by acts both honest and reasonable (*Yorke v Lucas* (1985) 158 CLR 661 at 666), is "morally neutral".

These statutory duties will be particularly pressing where no contract has yet been created between the banker and its customer. The statutory remedies available for breach of these provisions[893] also give a wider scope for damages to the consumer than under case law.

B. *BANKERS' VOLUNTARY CODE*

The ACCC rated independence in the context of accountability; 'Accountability is an important aspect of any voluntary industry code of conduct … fairness and transparency must be maintained amongst code signatories, consumers and the public at large.'[894]

The ABA agreed that the independence of the Committee from subscribing banks was critical to the credibility of the code however, they argued for some form of overarching governance of the Committee. The ABA objected to the proposal by the Committee that it should be constituted by charter (instead of the constitution) and explained that the proposal 'did not meet the fundamental principles of independence or governance.'[895]

Consumer advocates wanted the governance arrangements for the Committee to establish independence of the CCMC from subscribing banks and the FOS. They recommended that the Committee and FOS remain functionally separate bodies.[896] Though McClelland did not discuss it in her Final Report, submissions like that of the Credit Ombudsman indicated that *the Committee should remain independent of [the] FOS and its*

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[893] s 12GM.
[894] Submission to the Review of the code of Banking Practice 2007-2008, Observation 10 (Australian Competition and Consumer Commission)
[895] Jan McClelland, Final Report (2008) 15-17.
[896] Ibid. Id

membership should not be dependent on the approval of FOS board members (emphasis added).[897] McClelland agreed with the ABA that there is 'no reason why both functions cannot operate within the framework of a single body.'[898] She accepted that the Committee's compliance monitoring function needed to be independent of the banks and of the dispute resolution role of the FOS. However, she disagreed that the CCMC needed to be a separate legal entity.

In McClelland's view, the functional independence of the compliance monitoring function of the CCMC and dispute resolution function of the FOS could be achieved through the establishment of the CCMC as a separate unit within the FOS. It would then report directly to the FOS Board. McClelland believed the benefit that a separate entity would provide the industry and customers in respect of structural and perceived independence was outweighed by the additional costs of meeting legal and administrative requirements for a new entity and potential difficulties in relation to information exchange between the FOS and a separate code compliance monitoring entity.[899]

On the issue of an appropriate range of sanctions, the ACCC proceeded on the premise that 'effective disciplinary measures underpin a successful voluntary industry code by providing an incentive to signatories to comply with their responsibilities under the code.'[900] The ACCC also criticised the lack of sanctions of the code that 'simply provides in some circumstances a [bank] in breach of the code may be named in the report of the

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[897] Submission to the Review of the code of Banking Practice 2007-2008, 14-15 (Credit Union).
[898] Submission to the Review of the code of Banking Practice 2007-2008, 11-13 (ABA)
[899] Ibid. 65-66
[900] Submission to the Review of the code of Banking Practice 2007-2008, Observation 6 (Australian Competition and Consumer Commission)

Committee.'[901] The ACCC wanted stronger sanctions for non-compliance with commercial significance.[902] In the view of the ACCC, sanctions should reflect the nature, seriousness and frequency of the breach.[903]

Thus, the ACCC recommended a wider range of sanctions, such as:

- warnings
- corrective advertising
- *fines* (emphasis added)
- expulsion as a signatory to the code
- expulsion from an industry association (the ABA)[904]

McClelland's Issues Paper made interim recommendations to broaden 'the range of sanctions' available to the Committee, such as a warning, requirement to rectify within a specified time and conduct of a compliance audit so sanctions imposed are commensurate with the severity of the breach.'[905] In her Final Report however, she proposed that any consideration of additional sanctions for the Committee should be deferred until after the establishment of the Committee within the FOS.[906]

This suggested the decision by banks to distance their CEO's from allegations of false and misleading conduct would be averted into a third-party-vehicle. This didn't address allegations of misconduct by various bankers who have relied on the Association's constitution since 20 February 2004.

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[901] Ibid. Id
[902] Ibid. Recommendation 6
[903] Ibid. Id
[904] Ibid. Id
[905] Jan McClelland, Issues Paper (2008), 7
[906] Jan McClelland, Final Report (2008), 65-66

In conclusion, the views of the ABA's independent code reviewer under clause 5 of the code, therefore seem dominated by the bank CEO's ambitions to retain full control.

C. *MISSED OPPORTUNITY FOR CHANGE*

The ACCC recommended the development of performance indicators pertaining to dispute resolution, such as-

- the number of complaints received by banks under the code;
- the level of industry awareness of the code;
- the level of consumer awareness of the code;
- the number of disputes considered by the Committee and FOS which involve breaches of the code; and
- the average time taken to resolve disputes.[907]

McClelland failed to incorporate these performance indicators in either the Issues Paper or her Final Paper. She confined herself to recommending that clauses 35, 36 and 37 relating to internal and external dispute resolution be amended to reflect the most recent complaints handling standard AS ISO 10002-2004.[908] The ABA and consumer advocates supported this recommendation.[909]

Consumer advocates proposed that the code make it clear that access to internal dispute resolution processes was free of charge to consumers, even if banks engage a solicitor or

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[907] Submission to the Review of the code of Banking Practice 2007-2008, Recommendation 11 (Australian Competition and Consumer Commission)
[908] Jan McClelland, Final Report (2008), 89
[909] Ibid. 89-90

other third parties.[910] But the banks pointed out that in the event of external legal or other third-party costs in handling a matter, such costs could be passed on to the customer at the discretion of a bank.[911] In the end, McClelland recommended that additional costs passed on to customers by banks should be reasonable.[912]

D. *BANKERS' RECOMMENDATIONS*

On 10 September 2009, the ABA welcomed the release of McClelland's Final Report and recorded their initial response to the recommendations contained in it.[913] Their responses outlined which recommendations have been accepted, which were not, and particularly to those that had been accepted, reasons and alternative recommendations were made.

It is important to take a closer look at the recommendations made by McClelland that specifically refer to the issues that have been raised in this report, which were also brought to her attention by the Committee since the beginning of her review process in their 11 March and 29 July 2008 submissions.[914]

McClelland's Recommendations: code Compliance Monitoring Committee and the Financial Ombudsman Service — Clause 34

> Recommendation 9
>
> That the CCMC be established as a separate independent unit within the FOS reporting directly to and accountable to the FOS Board for the performance of its

[910] Ibid. Id
[911] Ibid. Id
[912] Ibid. Id
[913] 10 September 2009, The ABA Response to the McClelland Final Report
[914] this refers to the 11 March 2008 CCMC Submission to McClelland.

prescribed functions under the code.

Recommendation 10

That separate terms of reference of the CCMC be developed by the CCMC in consultation with the ABA, the FOS, ASIC and consumer interests. The terms of reference for the CCMC should be consistent with the compliance monitoring, investigation and reporting functions of the CCMC under the code and be published on the CCMC, FOS and ABA websites.

Recommendation 12

That the charter, constitution, terms of reference and operating protocols of the FOS Board and of the CCMC and the code make it clear that individuals and organisations have the right to make complaints about code breaches directly to the CCMC.

Recommendation 13

That the code make it clear that the CCMC retains its powers under the code to conduct investigations in response to complaints of code breaches from any person or organisation, and also to initiate investigations and reviews on its own initiative, and to make determinations in relation to those investigations.

Recommendation 14

That the code also spell out functions of the CCMC as including to -

(a) conduct its own enquiries into banks' compliance with the code;

(b) prepare an annual report on compliance with the code;

(c) contribute to joint publications between the CCMC and FOS on code interpretation and compliance issues; and

(d) promote awareness of the code with banks through the provision of feedback on code issues.

Recommendation 16

> That the FOS and the CCMC ensure that the community is aware of the CCMC's existence, role and separate function in relation to compliance monitoring and establish a Memorandum of Understanding that sets out their respective roles, agreed protocols for handling code matters, and protocols for the sharing of information.
>
> Recommendation 18
>
> That the description in Clause 34(a)(i) of the code of the bank appointed member of the CCMC be amended to make it clear that the appointee is a representative of code subscribing banks[915]

The above key recommendations were made under the understanding that Association's constitution exists and affect the ability and powers of the Committee to perform their duties. Despite this, the evidence shows McClelland failed to properly investigate these matters during the course of her review and also failed to recommend an appropriate remedy in her Final Report. Not one recommendation required the subscribing banks to make good the industry structure and the restrictions of the constitution.

It would seem that McClelland may have been mindful of an outcome that was capable of being adopted by the subscribing banks and the other bank parties. If so, it seems that McClelland was playing it safe and alluded the issues raised by the Committee by recommending that the code should make the powers of the Committee clear and 'spell - out' these functions.[916] It would have been clearer had she specifically outlined the restrictions of the constitution or recommended the Association publish the constitution thereby making it possible for her to provide meaningful recommendations on how to fix

[915] Recommendations 9 until 18, McClelland Final Issue Paper, pages 8-10
[916] Recommendations 13-15

the existing situation where the bank parties have incorporated *dual contracts* (emphasis added) that are inconsistent with clause 2.2 of the code and which requires them to act fairly and reasonably towards their customers in a consistent and ethical manner.

Thus, McClelland's Final Report made it very easy for the ABA to respond and agree to most of her recommendations:

> The ABA supports governance framework set out in Recommendations 9 to 18 in respect of the CCMC and FOS. The ABA considers that an effective governance framework is critical to integrity and accountability of the Committee's long-term viability.
>
> Banks are not accountable under Recommendation 10 for development of Committee Terms of Reference as it is currently worded. The ABA will amend Recommendation 10: "That separate terms of reference for the Committee be developed the subscribing banks in consultation with the CCMC, FOS, ASIC and consumer interests."
>
> The ABA considers Recommendation 15 to be particularly important as customers need to be given sufficiently clear information that outlines different roles of the Committee and FOS so they can determine the body to which it would be address certain issues.
>
> There is a need to consider further the implications of both the CCMC and the FOS considering a potential breach at the same time[917]

The ABA members considered it important to give customers clear information about the role of the Committee and FOS. The ABA seemed to support McClelland's silence on the Committee issues. This ensured ambiguity within the code and the Association's constitution continues while the Committee's limited powers to monitor and investigate all complaints brought to them, as intended by the code (but not fulfilled) continues.

[917] 10 September 2008, ABA Initial Response to the code Review, page 11

The commitment made by the banks to the public and the Parliament to introduce a voluntary self-regulated code, for the banks to commission an independent and transparent review of the code (Clause 5.1) and require the Committee to arrange a regular review of its activities (Clause 34 g) appeared fair and reasonable if it was implemented to continuously work towards improving their standards of practice (Clause 2.1 a). The information contained in this review supports the view that this was not delivered.

The substantive issues raised by FEMAG in 2005 should have allowed the bankers who intended to carry out their commitments to deal with the matters raised. FEMAG also provided an extensive set of recommendations which appear to have been set aside and kept from the subsequent reviewers. The FEMAG review brought to light the existence of the Association's constitution and commented on its competing provisions with the existing code. However, this review suggests that no action was taken by any responsible third-party or banker.

Moreover, the 2008 reviewers would have considered the FEMAG recommendations and they would have formed their own views as to whether they were implemented by the banks, and if not, why not? Likewise, the 2008 reviewers were also provided information by the Committee which reinforced the issues raised by the 2005 review. The nature of the very serious allegations by the Committee should have been carefully investigated and reported on by both later reviews. However, the 2008 reviewers did not make recommendations to address the FEMAG issues and Committee's submissions.

As Jan McClelland and Richard Viney were appointed by the banks and the Committee to review the operations of the self-regulated code, they had considerable experience and knowledge to carry out an audit of the Committee's performance since the revised 2003 code was introduced. As competent reviewers, there assessment would have involved a review of the CCMC's Annual Reports. Had they done so, they would have formed a view of the effectiveness of banks' IDR practices and highlighted how few unresolved complaints were referred to the CCMC.

This report sets out how the protection provided by the subscribing banks to individual and small business customers was inept and the protection under the code and the commitments made by the banks proved insincere. The increasing power of the banks and the extraordinary rewards to shareholders and bonuses to their senior managers has motivated the bank parties to do whatever it takes to retain the status quo that was in place prior to the Martin Committee's report and recommendations were published in 1991. This has continued during the lifetime journey of the codes, which has extended from 1993 through to 2003 and 2004, until now.

Chapter XI

OPTIONS MOVING FORWARD

The decision by Government to deregulate banking commenced with the introduction of foreign banks following the Campbell Review in 1981. The balancing of the banks' requirement to be 'competitive' was reviewed by legislators when the Martin Committee carried out a detailed report in 1991. The past 20 years have seen changes introduced progressively by legislators in a cat-and-mouse struggle by banks to retain control and remain supreme in the face of legislative responses.

Part 1 of this review reports on how the architects of customer protection implemented the 'high-principles of banking' proposed by Martin. It follows the journey from the conception of the 1993 code, designed by the banks and adopted by them in 1996, the initiatives of the Wallis Review in 1997 and recommendations of Richard Viney in 2001 when he carried out the first code review. Viney introduce significant improvements to the 1996 code and continued to pioneer the high-principles and aspirations of the Martin Committee in the revised 2003 code.

Part 2 follows the adoption of the revised code and chronicles how responsibility for the protection of customers was transferred from the legislators and regulators to independent ombudsman and a voluntary self-regulate code supervised independent monitors. This section comments on the first code review commissioned by the Committee in 2005 revealed the existence of the Association's constitution. This was a topic of contention in 2008 when the ABA and the Committee commissioned their second reviews.

A. *ASPIRATIONS FOR EFFECTIVE REGULATION*

It has been an aspiration of the Parliament since 1990 for banks to have a set of high-standards and for them to be monitored 'independently' by the Committee whose duty it is to monitor compliance with the code and to investigate 'any alleged breach of the code'[918] *by any person* (emphasis added).

There were two types of regulators;[919] government and market, responsible for ensuring financial and monetary systems are effective. The banking sector in developed economies has regulators to ensure the financial sector has built-in protection for the public and banks. Following the Wallis Report in 1997, the banking and finance sector has relied on separate government bodies: the Reserve Bank of Australia, the Australian Prudential Regulation Authority, Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.

Each has a different function and is maintained by the Council of Financial Regulators.[920]

- The RBA manages money supply independently of the Australian government
- APRA ensures banks hold adequate cash reserves to maintain banking standards and to protect Australian financial banking systems
- ASIC was established to focus on customer protection and ensure equal balance between customers and banks
- ACCC is responsible for ensuring compliance with the Trade Practices Act 1974.

[918] McCracken and Everett, Part 3, C9, 266 [9.010]
[919] Taken From 1997 Wallis Report: Overview (p26)
[920] McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009), Part 1, 4

Together, the regulators ensure banks comply with statutes intended to protect the public and the stability and efficiency of the financial system.[921] The legislators aspirations are to ensure there is 'fairness, honesty, and professionalism amongst financial-services providers.'[922] Financial-service providers are made up of persons who operate a financial market… and carry out financial-services.[923] These people are required to hold a financial-service license and are responsible for their own conduct as well as the conduct of their associates to promote fairness and equality.[924]

The government regulators were created to protect the interests of those dealing with the financial institutions[925] as well as the interests of the public. The aspirations of market regulators are to monitor the operation of the financial markets and supervise market participants[926]. While the 'government's regulators are independent'[927], they focus on 'customers' protection as well as the interests of depositors…' [928]

1. An effective underlying framework

The regulatory framework is based on a combination of statutes, regulators and the self-regulated banking codes with the *Trade Practices Act 1974* (TPA) being created specifically for consumer protection and to prohibit 'conduct that was misleading, or deceptive, or unconscionable.'[929] The self-regulated voluntary codes, developed during the past decade, are supposed to be binding contracts to 'address any consumer protection

[921] Ibid 7
[922] Ibid 5
[923] Ibid 7
[924] Ibid 6
[925] Ibid C1, 13
[926] Ibid C1, 13
[927] Ibid C1, 16
[928] Ibid C1, 16
[929] Ibid Part 3, C9, 265 [9.001]

issues not dealt with in legislation and to elaborate on consumer protection issues in order to establish a best-practice model'.[930]

2. Aspirations of the Parliamentary Committees

The Australian financial system has evolved with banks having a duty to monitor their own conduct. This followed deregulation which continued through the 1980s following the Campbell Committee's report of 1981.[931] This generational report recommended a more flexible and efficient banking sector which opened the way for new foreign banks to operate in Australia. The Committee held a belief and expressed a recommendation that "…adequate and vigorous competition is an essential requirement for the effective operation of financial markets.[932] The Campbell Committee sought to provide for a balance between customers and banks and to maintain fairness.[933]

The Martin Committee's Report

The Martin Committee hardly left any stone unturned in its search for a way to ensure fair minimum standards are set.[934] The two options that weighed heavily on the minds of the committee members were: the codification of relevant common law on the one hand; and the development of a code of banking practice on the other hand.[935]

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[930] Ibid Part 3, C9, 266 [9.010]
[931] McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009) C11, 1
[932] Committee of Inquiry, *Australian Financial System: Final Report of Committee of Inquiry* September 1981, 436
[933] McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009) C11, 1
[934] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 382, para 20.5.
[935] Ibid 382, 20.6

In relation to the codification of common law, the Committee appreciated how 'banking law continues to play an effective role in mediating the relationship between banker and customer.'[936] The issues it sought to address included ambiguity and lack of transparency and the need for a mechanism to replace the Court ensuring standards of fairness in newer products and areas of uncertainty.[937]

In relation to the code, Martin was drawn to the idea of a code, enforceable as a contract, on account of the viability through retention by the Courts to enforce implied contractual terms.[938] Martin appreciated the importance of fairer terms out of fear that 'contractual terms of the banking relationship could not be effectively dealt with in negotiation between substantially unequal parties.'[939]

The Martin Committee even cited Lord Scarman who had stated in a related decision of the House of Lords that 'the business of banking is the business not of the customer, but of the bank.' The ABA favoured the codification of the common law while the BFSO, Attorney-General's Department, Chairman of the Trade Practices Commission, National Australia Bank, Westpac and Metway Bank favoured the development of the code.[940]

The Attorney-General's Department gave the pre-condition for an effective code that it be very vigorously administered [941](emphasis added). The Committee went through great lengths to study the relevant experiences in other jurisdictions. It looked at the history behind the draft code in England that started with recommendations that a committee be

[936] Ibid, 383, para 20.12
[937] Ibid, Id
[938] Ibid, 382-383, para 20.9
[939] Ibid, Id
[940] Ibid, 384-385
[941] Ibid, 385, para 20.21

appointed jointly by the government and the Bank of England to review banking services law and practice.

The Jack Committee recommended the enactment of a *Banking Services Act* to implement banking law and develop code that an Ombudsman would apply in resolving disputes. According to the Committee, government should issue a formal code with statutory backing if the industry code was unsuccessful. Jack made 26 recommendations of improved standards of bank practice for incorporation into the code. The subsequent UK White Paper and reduction of recommendations to the proposed code led to the UK draft code being subject of much criticism.[942]

The Martin Committee also looked at the draft New Zealand Bankers code that NAB had criticised, ironically for not going far enough. The New Zealand code did however provide a starting point.[943] The Martin Committee also examined the Israeli solution:

> An alternate to achieving the objects of codes - clear and fair contract terms - has been developed in Israel and adopted elsewhere based on legislation that allows unfair contract terms to be dealt with in the abstract rather than in specific disputes between banks and customers. All EC countries now have legislation in force or under consideration. The feature of this *legislation is two tiered whereby provision is made for consumer interests to be represented by consumer bodies in negotiations with banks to achieve fair contractual terms. At the second level is a court or court-like agency with power to order*

[942] Ibid, 387, para 20.36
[943] Ibid, 388, para 20.37

> *a supplier to cease using certain contract terms* (emphasis added). The existence of this second level is essential for effective negotiations at the first level [944]

In the United States, truth-in-lending principles underpin consumer credit legislation 'to achieve fair marketplace through *full disclosure* (emphasis added) so transactions are carried out truthfully.'[945]

…market forces will not ensure services delivered fairly

The Martin Committee gave the development of the first code much thought. It did not believe banks should be left to form their own code. The Committee's words: '*Market forces are not sufficient to ensure bank services are delivered on fair and equitable terms. It is not appropriate for banks to have exclusive responsibility for setting standards of banking practice* [946](emphasis added).

Having drawn up recommendations, the Martin Committee might have hoped the new code drafted by the ABA would do justice to them. The 11 page code however didn't reflect the Committee's thoroughness and sophistication. Martin found it inappropriate 'for banks to have exclusive responsibility for setting standards of banking practice [947] yet the 1993 code was fashioned by the bankers. In late 1992, a taskforce was formed to draft the code in consultation with banks, consumer groups and government agencies in a period of six months.[948]

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[944] Ibid, 388, para 20.38
[945] Ibid, 388, para 20.39
[946] Ibid, 389, para 20.42
[947] Ibid, 389, para 20.42
[948] House of Representatives Standing Committee on Banking, Finance and Public Administration, Review of Certain Recommendations of the Banking Inquiry Report, October 1992, para 5.7.

The Treasury and the TPC jointly chaired the task force and it members included RBA officials, Federal Bureau of Consumer Affairs[949] and Attorney-General's Department.[950] Eventually, in 1993, the code wasn't prepared by the task force but by the ABA.[951] The Committee expressed concern for small business to 'redress disputes with banks[952] and examined litigation difficulties for businesses: *high cost, the powerful position of banks, unnecessarily protracted proceedings, inability to continue legal action and failure to ensure adequate discovery* [953] (emphasis added).

Martin recommended the Australian Law Reform Commission examine the Courts powers to deal with abuse of processes and consider whether legislation can deal with abuse[954] recommended the Senate Committee on Legal and Constitutional Affairs investigate the costs of justice between banks and customers.'[955] The Committee noted that the code ought to be monitored by a Commonwealth regulatory authority[956] and identified the value in having *one agency at Commonwealth level with primary responsibility in relation to consumer banking issues* [957] (emphasis added). Independence from banks was a feature of a Commonwealth agency so Martin looked at how the U.S.

[949] Ibid, Id
[950] See Estimates Committee F, 5 November 1993, Attorney-General's Department, Program 2 - Business and consumer affairs, Subprogram 2.3 - Trade practices and consumer affairs.
[951] Richard Viney, Issues Paper (2001), 1
[952] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 264, para 15.83.
[953] Ibid, 264, para 15.84
[954] Ibid, 266, Recommendation 49
[955] Ibid, Recommendation 50
[956] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 390, para 20.50.
[957] Ibid, 393, para 20.60

Federal Reserve was responsible for regulation and monitoring consumer financial services.[958] The RBA, however, expressed no interest in taking on the role.[959]

Martin recommends TPC oversees consumer banking

Martin preferred the TPC as the monitoring body [960] and while it did not have channels of communication with banks like the RBA, it dealt with them and was experienced in code development and monitoring. The TPC had powers and responsibilities under the Trade Practices Act[961] so he recommended the 'TPC be given responsibility for overseeing consumer banking at the Federal level, including monitoring of the code[962].

Martin believed the code could be manipulated by banks (emphasis added) and therefore highlighted the need for fairness, transparency, affordable dispute resolutions and independent monitoring regulators[963] believing the system needed strengthening and be more transparent[964] with an independent mediator[965]. Martin believed:

> many contracts are long, complex and extremely detailed, ... bank can take advantage of its stronger bargaining position to ensure terms reflect its interests ... the fact that the terms are written means the transaction has become transparent. A code would [written] clearly in plain English [will] express what the customer should expect from the bank.[966]

(b) The Wallis Review and Towards Fair Trading Report

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[958] Ibid, 391, para 20.54
[959] Ibid, 392, para 20.55
[960] Ibid, 390, para 20.50
[961] Ibid, 393, para 20.61
[962] Ibid, Recommendation 77
[963] McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009), C11, 4
[964] Ibid, C11, 4
[965] Ibid, C11, 5
[966] Ibid, C11, 4

The Wallis Review was published in 1997[967] and in many ways supported the Martin recommendations. Following the Wallis review, there was considerable change to the Australian regulatory landscape with the establishment of ASIC and APRA and changes to Corporations Law.[968] With the ascendency of ASIC, there was a shift to greater self-regulation oversighted by regulators that ASIC considered critical.

Jillian Segal, Deputy Chair, ASIC noted:

> *For self-regulation to be effective it needs to be properly integrated into an overall regulatory framework…dovetail with law and regulator's policies…to cover day-to-day complaints and industry issues that [ASIC] would otherwise not have the capacity to deal with…the fundamental purpose to be served by self-regulation may be defeated and the consumer's welfare compromised…[without] vigorous and active accountability mechanisms…There is general recognition that industry self-regulation can be more flexible and less costly for both business and consumers than direct government involvement. ASIC is of a view that self-regulation can play a valuable role with legislation and other regulatory mechanisms. For example, ASIC believes self regulation can and should play an important risk identification role within overall regulatory framework [and] information generated under such a model can help identify problems with industry practice, consumer knowledge and government or regulator policies before they become bigger problems* [969] (emphasis added).

Wallis sought to balance the powers of banks with structures capable of dealing with situations in future, with ASIC established to 'monitor and promote market integrity and

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[967] Ibid, C11, 6
[968] Jillian Segal, 'Institutional self-regulation: what should be the role of the regulator?' (Paper presented to the National Institute for Governance Twilight Seminar, Canberra , 8 November 2001) 1. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/NIGConf_081101.pdf/$file/NIGConf_081101.pdf, 1
[969] Ibid, 3

consumer protection'.[970] ASIC didn't 'take up its role with any real zeal and the evidence suggests it consistently refused to monitor alleged breaches by subscribing banks that were protecting their customers once the banks had introduced self-regulated voluntary codes.'[971]

It seems ASIC relied on bank media PR that the Committee is independent and can investigate any complaint by any person. This message was not reinforced by the Committee in submissions sent to McClelland and ASIC as required in clause 34(g) of the code. The efficacy of self-regulated codes and the bank 'contracted' Committee members failed to provide effective supervision of practices set out in the code.

Whilst the *Trade Practices Act 1974* is similar to the U.S. *False Claims Act*, this is only in the aspiration as legislation. Unlike the *False Claims Act*, the TPA does not focus on reporting serious misconduct or fraud but instead seeks to address misleading conduct by parties providing services. The Wallis Report, therefore, while intending to introduce structures to protect the public from unfair practices,[972] did not achieve its aspiration.

The Association's constitution has been kept from subscribing banks' customers and bank staff when consumers open accounts and sign contracts that are bound by the code and duties of the Committee. These contracts set out banks' commitments to the code and include a copy of the code with the terms of the contract in many cases however there is evidence that the banks remain silent on the existence of a ***dual-contact*** that limits both the Committee's powers and the customers' rights.

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[970] McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009), C11, 7
[971] Chapter 11, 7
[972] *The Fair Trading Act: A Guide For the Fair Trader*, (April 2008), Accessed at http://www.docep.wa.gov.au/consumerprotection/pdf/publications/guidefairtradingact.pdf on 04/06/2010.

In the absence of full-disclosure by banks, the code is of little value to many customers as it promotes the aspirations of honest bankers whilst covering-up the mischievous conduct of less ethical senior banks parties.

B. *APLICATION BY REGULATORS*

1. ASIC

ASIC was established under the *Australian Securities and Investments Commission Act 2001* (Cth) and its role, as stated on its website, is to:

> ...contribute to Australia's economic reputation and wellbeing by ensuring that the Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers…As the *corporate regulator, we are responsible for ensuring that company directors and officers carry out their duties honestly, diligently and in the best interests of their company* (emphasis added). As market regulator, we assess how effectively authorised financial markets are complying with their legal obligations to operate fair, orderly and transparent markets…As financial services regulator, *we license and monitor financial services businesses to ensure they operate efficiently, honestly and fairly* (emphasis added).[973]

Ms Jillian Segal, Deputy Chair, ASIC, in an address to the Institute for Governance[974] set out her effective self-regulation doctrine and the role of ASIC as regulator. Key principles are; clear objectives developed with stakeholders, be properly promoted and

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[973] 'What We Do,' ASIC, Accessed at http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Our%20role on 04/06/2010.

[974] Jillian Segal, 'Institutional self-regulation: what should be the role of the regulator?' (Paper presented to the National Institute for Governance Twilight Seminar, Canberra , 8 November 2001) 1. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/NIGConf_081101.pdf/$file/NIGConf_081101.pdf, 6

regularly and independently reviewed for efficiency and effectiveness. Not to be taken out of context, Ms Segal would also have believed there was a need for high-principles to be set out in a self-regulated, voluntary code. Ms Segal, having previously been a BFSO Director and Deputy Chair,[975] should have been aware of the potential shortcomings that could surface in the banking and finance industry, added -

> it also needs to be recognised that there are significant risks associated with industry self-regulation, including ineffective or inefficient regulation, and inadequate compliance monitoring and enforcement.[976]

Therefore ASIC is responsible to -

1. investigate in a transparent manner and determine whether code is enforceable as an agreement or contract between a subscribing bank and customer;
2. if so, investigate how the Association's constitution came about and find which banks used it to limit powers and authority of the Committee; and
3. if not, find out who were officers of the ABA when its PR promoted Committee's powers and code's enforceability after the constitution being draw up.

Bankers cannot argue both cases. They either misled customers with and unenforceable agreement or acted in bad-faith when taking away the powers of the Committee with an unpublished constitution. ASIC might report which, and whether bank officers failed to *carry out their duties honestly and diligently* (emphasis added).

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[975] Jillian Segal BA LL.B UNSW, LL.M Harvard. July 2002 to February 2003, Commissioner and later Deputy Chair ASIC; 2002 until 2004 Chair, BFSO; presently Director, Australian Securities Exchange and NAB. URL: http://www.cew.org.au/index.cfm?apg=membership&bpg=profilemember&aid=75 Viewed 11 February 2010

[976] Ibid, 5

In hindsight, the Martin Committee presented sound principles to protect bank customers. This report suggests and concludes that self-regulation has failed and the aspirations of ASIC have not been delivered despite its widespread powers to enforce necessary customer protection[977].

2. APRA

APRA seeks to establish and enforce prudential standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by institutions [it] supervises are met within a stable, efficient and competitive financial system.'[978] This might be a motherhood statement however by most assessments APRA has preformed its duties well and seeks to achieve financial wellbeing of the financial institutions that it's funded to oversee.

APRA has wide powers to oversee banking and financial institution.[979] Its objectives and key requirements are to supervise '*the people who are responsible for the management and oversight of authorised deposit-taking institutions*' (emphasis added) and to require they have appropriate skills, experience and knowledge to act with honesty and integrity which strengthens the protection afforded to bank customers. In summary, APRA states that the banking and financial institutions need to prudently manage the risks and ensure that persons in positions of responsibility are fit and proper.

The *APRA Act* 1959 sets out requirements of senior managers under section 5(1) and requires bankers to have 'fit and proper' policies that have been approved by the Board,

[977] Refer to McCracken and Everett, Part 1, Chapter 1, 20 [1.090] (Figure 1.2)
[978] APRA website <http://www.apra.gov.au/aboutAPRA/> as at 29 July 2010
[979] Ibid

as set out under *Prudential Standard APS 510 Governance*. Under prudential standards governance policies, APRA might also have a duty to investigate the problematic code to determine if the parties who designed it, adopted it and promoted it acted in a fit and proper manner. It seems subscribing banks and the FOS appointed the Committee that was bound by the Association's constitution, in place on 20 February 2004, three months prior to the modified 2004 code being published.

The Committee, acting as whistle-blowers, exposed the existence of the Association's constitution in their submissions sent to code reviewer McClelland, on 11 March 2008 and, if found to be correct, the bank parties might extend to and include:

- ABA Board members who published the modified 2004 code;
- Bank CEO's and officers who adopted the modified code when they intended to rely on the constitution to limit the powers of the Committee;
- Association's members whose constitution was intended it to be used by banks;
- Independent code reviewers who knew the constitution limited the Committee's powers;
- Committee members who agreed to be bound by it rather than the code;
- FOS officers who appointed Committee member and failed to disclose a conflict;
- Third parties who failed to investigate dual-contracts after the Committee exposed it;
- External and/or internal Auditors of the above parties who took no action; and
- Any other parties an independent investigation might consider acted improperly.

Under the APRA Act, a person needs not be an employee of the regulated institution to be a responsible person if they are within the definition of a responsible senior manager or director as set out in paragraphs 8 and 9 of the *Prudential Standard Act*.[980] To comply with the Act, and *Prudential Standards*, the criteria senior managers or directors must

[980] Prudential Standard APS 510 para 11

meet to be ‘fit and proper’ requires them to have competence, character, diligence, honesty, integrity and judgement to perform their duties properly. The fit and proper requirements is set out in s18(c)(i) state there can be no conflict of interest.

These criteria also bind auditors of regulated institutions. Auditors also have a duty under the Act to promptly notify APRA in the event that they become aware that bank parties might not have satisfied their duties under the Act. An investigation into the Committee’s concerns in their 11March 2008 submissions may find officers and senior managers of subscribing banks intended to deceive customers by publishing the modified code after they had already introduced controls in their constitution to limit the independence, powers and authority of the Committee.

C. *REGULATION BY STATUTES*

Research has identified two best practice philosophies used throughout the developed economies to encourage competition and innovation in banking whilst providing safeguards to protect the customers. The Australian model relies on a self-regulated code of banking practice which has proved problematic and this report provides evidence of questionable conduct by the major banks and their associated corporations and parties. In the event that the regulators who are charged by the government to ensure the key principles of competition and customer protection work effectively, the two key regulators are the ASIC and APRA as discussed earlier in this chapter.

The second ‘best practice’ philosophy is for governments to provide clear principles of banking practice which are intended to achieve the same ends as the Australian model. The US model is the most wildly regarded banking sector which is governed by statute

and there is compelling evidence that whilst the statutes have been enacted with due care, the regulators are again key parties in ensuring the dual responsibilities of competition and customer care are not compromised for the benefit of senior bank managers and shareholders.

In the US, bank parties are regulated by a governing body known as the Federal Reserve System, or the Fed. The Fed provides the US with a "safer, more flexible, and more stable monetary and financial system."[981] A sector of the US Department of Treasury insures banks and protects their customers up to $250,000. Treasury supervises the banks to ensure customer satisfaction and to prevent cartels, which are criminalised, from forming barriers to restrict trade.[982]

The regulated system in the US is monitored by the Office of the Comptroller of the Currency (OCC) which is a bureau of the US Treasury. In this bureau, the Federal Deposit Insurance Corporation (FDIC) was enacted to require US banks to protect consumers and to operate smoothly. The Federal Reserve System acts as the central banking system and plays a role in bank regulation and compliances.[983]

The US system also protects customer rights but it is said that in many instances these rights are buried under piles of vague codes and banking regulations. It is reported that

[981] Lynn S. Fox, Chair, Scott G. Alvarez, Sandra Braunstein, Marianne M. Emerson, Jennifer J. Johnson, Karen H. Johnson, Stephen R. Malphrus, Vincent R. Reinhart, Louise L. Roseman, Richard Spillenkothen, and David J. Stockton, *The Federal Reserve System: Purposes and Functions*, 9th edition: June 2005, 1
[982] Chapter 11, 20
[983] 'Regulations,' Board Governors of the Federal Reserve System, Accessed at http://www.federalreserve.gov/bankinforeg/reghist.htm on 04/06/2010

"what has happened in many regulatory domains in the US is a process where key political players became critical of broad, vaguely defined standards."[984]

More recently, the US introduced further reforms in the banking sector to enhance consumers' protection. New banking reforms have been introduced by President Obama that will enhance existing legislation and pave the way to greater transparency, enforcement and, as a result, consumer protection in the financial industry with its Consumer Protection Agency.

Imposing the False Claims Act on self regulating institutions has the ability to reduce the amount of fraud found in the banking sector today. The combination of US government regulation and self regulated corporations allow for "insiders" to blow the whistle on the banking corporations to reduce unfair treatment of customers.

1. Dodd-Frank Reform and Consumer Protection Act 2010

Recently, and as a consequence of the Global Financial Crisis, President Obama introduced reforms to better protect consumers against misconducts by financial and banking industry parties. The Act endeavours to *"promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."*[985]

[984] John Braithwaite, Chapter 6, 4
[985] *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.*

The changes introduced by Obama also create a new "Consumer Protection Agency"[986] that "*will have the scope to diagnose abusive lending practice*s."[987] This Agency has a duty to ensure "*dodgy [consumer-based lending]… will not go undetected*"[988] and provides "*a new resolution authority to cover banks or shadow banks that pose "grave risks" to the financial system… to neutralize the power of too-big-to-fail institutions that require bailout*."[989]

The legislation acts to '*protect consumers and to "rein in the abuse and excess*"…'[990]; '*for these rules to be effective, regulators will have to be vigilant [as] no law can force anybody to be responsible. It is still incumbent on those on Wall Street to heed the lessons of this crisis in how they conduct business."*[991] It also seeks to prevent a "*shadow banking system"* where banks "*shifted… business to the shadows where no capital was required to backstop transactions, nor was there any central bank support in the event that risks became real."*[992]

When US housing values collapsed in 2008, the "*entire [banking] system was exposed as a fraud.*"[993] This suggested that the financial regulations offered "*no structural reform to*

[986] *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 s* 989A(a)(1)(C).
[987] David Llewellyn-Smith, 'Obama's stop-gap reforms: until the next crisis,' *Sydney Morning Herald*, 21 July 2010 at <http://www.smh.com.au/business/obamas-stopgap-reforms-until-the-next-crisis-20100720-10jhb.html>
[988] Ibid
[989] Ibid
[990] Brady Dennis, ''Vigilance' the key to success of Wall Street financial reforms', *Sydney morning Herald*, 23 July 2010, at <http://www.smh.com.au/business/vigilance-the-key-to-success-of-wall-street-financial-reforms-20100722-10n33.html>
[991] Ibid.
[992] Above n 2.
[993] Ibid.

separate banks from risky shadow behaviour that caused the crisis… it is seen [more] as a reform of the regulators." [994]

In the words of Senator Chris Dodd (one of the authors of the Bill), changes introduced were unable to "*legislate competency."* Dodd remarked "*All we can do is create the structures and hope that good people will be appointed who will attract other good people."*[995] Thus, while the US may have "*failed to address the causes of the crisis, it has at least had the courage to try, and by doing so, set in place stronger foundations of public awareness…"*[996]

It would seem that the Australian government might consider it appropriate to introduce similar reforms to those in the US so that the regulators and the parties responsible for having self-regulated code monitoring act "vigilantly". Many Australian customers are unaware of their rights as even the banks themselves are unsure about the mostly unenforceable and inconsistent rights of customers and the vague banking standards.[997] Underlying the new US legislation, regulators and legislators have a duty to investigate allegations that bank parties are committing fraud and members of the public can rely on the *False Claims Act*, which is able to punish violators so that systemic misconduct seizes and appropriate actions can be taken.

2. The United States False Claims Act

[994] Ibid.
[995] Ibid.
[996] Ibid.
[997] John Braithwaite, Chapter 6, 4

The *False Claims Act* has proved to be effective in pinpointing fraud and punishing the the parties that breached the Act. Parts of *the False Claims Act* would seem relevant to the Australian legislators to reduce the number of scams and allegations of fraud created by the major banks and this would give Australians the benefits for following 'qui tam' and for whistle-blowers. The proposed duties of the Committee to investigate and report allegations of serious and systemic misconduct by the banks would be extended to the community by allowing the public to name and shame. This would lead to banks striving for a more effective model of self-regulation.

In support of the new reforms, the *False Claims Act,* as legislated in the US, allows members of the public to declare fraud on behalf of the government and to obtain a reward for this. The *False Claims Act* officially,

> "permits a person with knowledge of fraud against the United States Government ("qui tam plaintiff") to file a lawsuit on behalf of the Government against the person or business that committed the fraud (the defendant). If the action is successful the qui tam plaintiff is rewarded with a percentage of the recovery."[998]

Any member of the public is allowed to be a ***qui tam*** plaintiff and obtain benefits for their actions as whistleblowers to identify fraud committed by institution where a qui tam is the plaintiff. In summary, the concept of ***qui tam***:

> Allows persons and entities with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the United States Government ... Any

[998] Kaiser Saurborn & Mair, P.C., *The False Claims Act*. Accessed at http://library.findlaw.com/2000/Nov/1/130252.html on 29/5/2010

> persons or entities with evidence of fraud against federal programs or contracts may file a qui tam lawsuit.[999]

The False Claims Act is a large part of regulation in the US. Reporting cases of fraud to the government, assists with regulation. However, behind this Act are moral issues associated with being a whistle-blower or the "tattle-tale," even though the qui tam plaintiffs "are concealed from the public and the defendant until the government has time to decide if it wants to join the lawsuit."[1000]

> One survey of 90 whistleblowers found 54 per cent said they were harassed at work, 82 per cent claimed harassment from superiors, 80 per cent physical deterioration and 86 per cent 'negative emotional consequences, including feelings of depression, powerlessness, isolation, anxiety and anger' (Bucy 2004c: 314).[1001]

If the ***qui tam*** plaintiff is successful, they (known as relators) being the source of the information[1002] are entitled to up to 30% of the proceeds from the case.[1003] Even after paying court fees, lawyer fees, and other costs, a hefty sum remains.

One of the best known *False Claims Act* cases involved the pharmaceutical company Pfizer for incorrectly labeled drugs. It was ordered to pay a total of $2.3 billion, and of

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[999] *False Claims Act/Qui Tam FAQ,* National Whistleblowers Center (NWC). Accessed at www.whistleblowers.orgindex.phpItemid=64&id=35&option=com_content&task=view on 02/06/2010
[1000] John Braithwaite, Chapter 3, 5
[1001] John Braithwaite, Chapter 3, 5
[1002] Charles Doyle, Qui Tam: The False Claims Act and Related Federal Statutes (August 6, 2009), Congressional Research Service, Summary
[1003] Doyle, 21

that, $1 billion was paid under the *False Claims Act*.[1004] The US regulatory system seems efficient with numerous codes and laws that are specifically designed to identify fraud.

There are several cases, however, which note the failings of the *False Claims Act*, the most famous of these being the widely reported allegations that the US regulators were advised of Bernard Madoff's Ponzi scheme. In this case, the regulators were told about the scheme and failed to act decisively and correctly.

D. *CONSEQUENCES OF FLAWS*

As set out earlier, there would likely be legal ramifications following an inquiry into the problematic code as there is evidence that all of the major banks have breached clause 35 and failed to investigate complaints which might damage the reputation of the banks, their managers and officers. Whilst it can argued that the significant breaches are those of ethics and governance, the appropriate independent reviewers would no doubt have to provide an opinion as to the personal involvement of bank parties who may be found to have acted improperly in designing, publishing and adopting the code and constitution for contracting with their unsuspecting and less powerful individual and small business customers.

The summary set out earlier notes each of the below.

1. Statutory Liability

[1004] *Top 20 Cases*, The False Claims Act Legal Center, Accessed at http://www.taf.org/top20.htm on 02/06/2010

(a) Misleading and Deceptive Conduct as set out in section 52 of the *Trade Practices Act 1974* (Cth) flowing from the decision by the banks and the FOS to employ the services of the CCMC Committee based on dual contracts, one published and one withheld.

(b) Allegations of Cartel Conduct by the CEO's of the major banks who are said to be the CCMCA parties

2. Common Law Liability

Failure by the bank parties to act in Good Faith in their contractual dealings when they knew about the Constitution and its ability to limit the powers, independence and authority of the code and its Committee to fully and fairly apply their dispute resolution service to investigate all complaints other than those which are resolved to the customers satisfaction (clause 35.7).

E. *ENHANCING COMPETITON AND PROTECTING CUSTOMERS*

During the past two decades, there have been a considerable number of government inquiries and amendments to the structure and legislation within the banking and finance industry, and whilst these aspirations have been commendable, the result has been worrisome. The major banks and their senior managers had access to extraordinary wealth with very limited oversight by the 'independent' directors who have demonstrated a willingness to allow their senior and line managers considerable latitude in balancing the relationship between the government's willingness to encourage competition whilst the bankers have been allowed to publish, promote and recommend the bank officers adopt a problematic code. This code at best questions the ethics of all of the senior

managers and CEOs of the code subscribing banks and at worse might be seen to be motivated by the same CEOs which have personal interests in covering up serious misconduct and fraud by their peers.

The decision by subscribing banks to incorporate dual contracts has since been known to a considerable of bank parties who have either benefited directly by the controls imposed over the Committee and their high principles and also bank staff and parties who receive income for work they have carried out for the subscribing banks and have apparently remained silent.

The individuals and small businesses, outlined in this report that were induced by the banks' warranties and pretention when depositing money or borrowing funds form the banks have the right to be angry if they have relied on the code. It seems that the high-principles of banking practice, believe to have resembled the standards set out by the Martin Committee in 1991 were never maintained.

As a result, there is a need for the regulators to investigate allegations by the Committee in 2008 regarding the problematic code due to the CCMCA Constitution. Otherwise, there is no prospect of an individual or small business being able to challenge the financial powers of the 14 major code subscribing banks whose combined annual profits might well exceed $40 billion. In this case, whilst the responsibility to prohibit such conduct might rest with the government, the regulators who have allowed this paradox to exist could hardly now be expected to investigate their own activities in allowing this to continue for such a long time.

Hence, there are three sets of parties who may be seen to have failed in their duties and responsibilities to ensure that customer protection principles has been delivered and maintained effectively:

- The senior managers and officers of major banks, the ABA and the CCMCA
- 'Independent' CCMC Monitors, FOS officers and the code reviewers
- Government-appointed regulators whose duty it is to oversee the banking sector

F. *ENDING THE BIG HAND OF BANKS*

Australia is unique in that its banking practices are self-regulated. It may be that, in some industries, 'self-regulatory schemes tend to promote good practice and target specific problems within industries, impose lower compliance costs on business, and offer quick, low cost dispute resolution procedures… [allow for] greater choice for consumers and to be more responsive to changing consumer expectations.'[1005] However, in the banking sector it has had deleterious effects on consumer protection and customers' rights.

Interest groups have spoken against self-serving practices of bankers. The Australia Institute came out with a report that exposed banks profiteering and misleading practices, however the bankers PR body, the ABA in their denial stated: [1006]

> The Australia Institute alleges banks are profiteering. This is false. The Australia Institute alleges banks are gouging customers on interest rates. This is false. There is no monopoly

[1005] Report prepared by the Taskforce on Industry Self-regulation, Industry Self-Regulation in Consumer Markets, August 2000, p.1.
[1006] Heather Wellard, 'ABA says profitable banks underpin our strong economy', 5 March 2010.

> over the payments system in Australia as asserted by the Australia Institute.... *[N]o single institution controls the banking market* (emphasis added) or payments system.

This report highlights facts, which, taken together, constitute damning evidence about the Banking Industry's inability to regulate itself. Indeed, the notion that a potentially errant body can properly review its own conduct and actions, or be independently reviewed by parties funded, or employed by it, as is the case with the Committee (and potentially the FOS), would now seem reckless, irresponsible and inappropriate.

The facts set out in this report include:

a) The 2004 code was rendered powerless by a constitution that was never made public.

b) The 2004 code was accepted by the subscribing banks, even though they knew it was a document with little protection for consumers, and no power to ensure subscribing banks' compliance with the code.

c) The Committee members since 2004 would or should have known that they were potentially powerless to comply with their code duties, but nevertheless agreed to operate under the banks' authority.

d) McClelland's 2008 report made no mention of submissions received from the Committee which questioned the validity of the code and their power to enforce it.

e) In appointing the customer and small business Committee representative, the FOS would or should have known about the potentially disingenuous code and yet they continued to support a flawed monitoring mechanism.

Four Corners Program on 10 March 1997 sums up this report's findings[1007]:

> It's now more than a decade since the big bang of self-regulation. The cases we've highlighted tonight are dreadful but not exceptional. Four Corners has spoken to many more people who tell equally harrowing stories. Self-regulation is clearly in trouble.

[1007] Australian Broadcasting Corporation, *Banks Behaving Badly*, Four Corners, 10th March 1997, <http://www.abc.net.au/4corners/stories/s72783.htm> at the 12th February.

> Accountability and a transparent system of complaint resolution, particularly for small business is a missing component in the deregulated environment. There have been attempts to reign in the excesses of the banks. But the last effort, the Martin Inquiry's report, a Pocket Full of Change, in fact changed hardly anything.

Another decade has passed since this program went to air, and there has been a new code set up, a number of enquiries run and concluded and a body set up to monitor the banks' compliance with the code. Still, 'hardly-nothing' has changed.

G. *SUMMATION*

This report has established the need for the principles of governance in the banking and financial sector to undergo a thorough review. This review is suggested to be carried out by a senior judicial officer with an understanding of how to apply and build on the laws already in place that are intended to protect the bank individual and small business customers.

The person should be commissioned by the appropriate government body which would set out the wide ranging terms of reference that will satisfy the legislators, regulators, banks, consumer bodies and the public. The independent review may find the need for further legislation and for changes to be made to the current structure. It should comment on the needs for banks to have appropriate internal dispute resolution procedures monitored by an independent body. It should also develop steps that need to be taken to ensure that IDR procedures are audited by banks' internal and external auditors in accordance with existing corporate practice and, ultimately, by an independent third party.

Likewise, the independent review should look into how to revise the modified 2004 code to reinforce the high principles of banking that reflect the guiding principles proposed by the Martin Committee. It should also consider how legislation and the governing structure regulating the industry can be made more effective, possibly by merging the three current regulators ASIC, APRA and ACCC into one senior independent body which will have the responsibility to ensure legislation is effective and supports the balanced needs for banks' and customer's rights to be protected.

In such an amalgamated super regulatory body, the manner of making appointments, the tenure and termination of the senior members of the independent banking representatives needs to be carefully considered so that, as far as possible, the result is a squeaky culture that maintains total robust and enduring independence. The example that comes immediately to mind is the way which the independence of the judiciary is maintained.