

THE AUSTRALIAN BANKERS'

PROBLEMATIC CODE

This paper presents a history of banking regulation in Australia. The author explains how self-regulation has failed to protect customers, allowing banks to introduce practices such as constructive default.

The government has not fully considered the effect of self-regulation, and the damage caused to Australian bank customers has been considerable.

Part 2¹

Report to: The Tasmanian Small Business Council

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MEMORANDUM TO TASMANIAN SMALL BUSINESS COUNCIL

I thank your organisation for commissioning me to present a further report regarding banking practices in Australia between 2004-2014. This paper titled "Banking in Australia: Unregulated and Unprotected" responds to the Federal Parliamentary Joint Committee on Corporations and Financial Services. It also reports on banking practices that are relevant to the Impairment of Customer Loans Inquiry. The two attached papers are:

1. 14 November 2014: Australian Banking Code

This paper is addressed to the Tasmanian Small Business Council (TSBC), and is based on research carried out by the writer on behalf of your Council. It refers to four documents ("four documents paper") and unconscionable banking practices. It is an extension to "The Australian Bankers Problematic Code" paper of 6 December 2010.

2. 14 August 2015: Banking In Australia

This is an historical account of banking in Australia during a period when banks have been unregulated and customers unprotected ("banking history paper"). The writer explains how self-regulation has failed to protect small businesses, farmers and individual customers allowing the banks to introduce practices such as constructive default.

TERMS OF REFERENCE

In relation to the Terms of Reference (TOR) the writer explains in these two papers, to the Parliamentary Joint Committee on Corporations and Financial Services, how intricately the banking practices have been devised in order to disguise unconscionable practices from the public.

TOR 1. (a) *Practices of banks and other financial institutions using a constructive default (security revaluation) process to impair loans, where constructive default/security revaluation means the engineering or the creation of an event of default whereby a financial institution deliberately reduces, through valuation, the value of securities held by that institution, thereby raising the loan-to-value ratio resulting in the loan being impaired.*

I refer to the four documents paper. It notes that the banks engineered an arrangement that allowed them to refer disputes of code breaches from the Code Compliance Monitoring Committee (CCMC) to courts. The subscribing banks' access to resources provides them with a considerable advantage when disputes are heard in the courts.

The Code of Banking Practice (Code) was first published in 1993. It intended to provide both customers and banks with an opportunity to resolve disputes fairly. The banks were reluctant to accept the introduction of this practice in the initial code. The decision by banks and government, with involvement by consumer groups, resulted in the Martin Committee, in 1991, recommending the introduction of a Code.

The banks adopted the first code in 1996. Following Richard Viney's review in 2000, this Code was amended. This is noted in the banking history paper (page 3). The Code was revised in 2003 and modified in 2004. When the 2004 Code was introduced by the Australian Bankers Association (ABA), the CCMC was created and its constitution was introduced. The constitution was, however kept from customers until recently.

TOR (b) *Role of property valuers in any constructive default (security revaluation) process;*

I refer to the four documents paper and in particular 'Undertakings' included in the banks General Standard Terms. It states:

Undertakings

9. Values, Investigators and Consultants

- 9.1 We may obtain a valuation report of any secured property at any time. You must pay us all costs in connection with the valuation.
- 9.2 If we reasonably believe you are or may be in default or we reasonably believe the circumstances exist which could lead to default, we may appoint a person to investigate whether this belief is accurate ... You must pay us all costs in connection with the investigation.
- 9.4 Any valuer, investigator or consultant we use is an independent contractor and not an agent or employee. [We] aren't responsible for any representation, action or in action by them.
- 9.5 Any report we obtain from the valuer, investigator or consultant is for our use only. You cannot sue us, the valuer, investigator or consultant if the report is wrong. You must obtain your own report if you wish to rely on it.

The banks' contracts allow them to use whatever resources they consider necessary to default a loan if, during the period of the loan, the bank makes a decision to withdraw credit. The facts in relation to this are set out in the four documents paper (pages 7-9).

TOR (c) *Practices of banks and other financial institutions in Australia using non-monetary conditions of default to impair the loans of their customers, and the use of punitive clauses such as suspension clauses and offset clauses by these institutions;*

The Code provides an opportunity for banks to argue that many of its clauses are non-specific. However, as individuals and small businesses will appreciate, there

are a number of relevant clauses. The difficulty that customers have experienced is that banks have concealed the constitution of the CCMC from their customers.

The recent decision, *National Australia Bank Ltd v Rice* [2015] VSC 10, affirmed that the Code constitutes a contract between a customer and their bank. Any breaches of the Code are, therefore, contractual breaches. Clause 25.2 of the Code is relevant to this particular term of reference. It states:

“With your agreement, we (the bank) will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan.”

Clause 2.2, which states:

“We (the bank) will act fairly and reasonably towards you in a consistent and ethical manner.”

Clause 2.2 guides other clauses in the Code – including clause 25.2 – which is supported by the 2008 Review of the Code, commissioned by the ABA.

This view is also supported by the judgements in *Sam Management Services (Aust) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWSC 676 at [27], *Seeto v Bank of Western Australia Ltd* [2010] NSWSC 922 at [38], and *ING Bank (Aust) Ltd v Stafford* [2010] QSC 289 at [32].

The terms of clause 2.2 are broad. However, the clause is central to interpreting the Code and clauses that bank customers should have been able to rely on. The clause allows customers to believe that they rights to have complaints in relation to non-monetary conditions investigated by subscribing banks as part of their contract.

Clause 25.2, in the context of clause 2.2, assures bank customers will receive reasonable “help” to overcome financial difficulties. The ABA’s industry guidelines on *Promoting Understanding About Banks’ Financial Hardship Programs*, state:

“Financial hardship” is when a customer is willing and has the intention to pay, but is unable to meet their repayments or existing financial obligations, and with formal hardship assistance, a customer’s financial situation can be restored... Financial hardship can be due to factors, unforeseen circumstances, or unexpected events, for example... emergency event or natural disaster”²

The guidelines state “when restoring a customer’s financial situation is possible”, the bank should work with the customer to come to an arrangement that helps ensure the customer’s ongoing financial viability.

TOR (d) Role of insolvency practitioners as part of this process;

There is a wide held view that insolvency practitioners are agents of the banks, and are indemnified by the banks. As such, their instructions are generally those of the banks. The conduct and practices of insolvency practitioners was the subject of an earlier Senate Inquiry. There is no reason not to believe that while banks are self-regulated, so too are insolvency practitioners.

TOR (e) Implications of relevant recommendations of the Financial System Inquiry, particularly recommendations 34 and 36 relating to non-monetary conditions of default and the external administration regime respectively;

This subject was previously discussed in a paper presented to TSBC. Small businesses, farmers and individual bank customers should be disappointed with the proposed amendments to unfair practices by Treasury that followed the Financial Systems Inquiry. There is no justification for any unfair practices in the banking sector. Legislators or regulators should accept responsibility for the lack of governance oversight in the banking and financial sector.

TOR (f) Extent to which borrowers are given an opportunity to rectify any genuine default event and the time period typically provided for them to do so;

Bank customers are only provided an opportunity to rectify any genuine dispute in circumstances where the financier believes it is in the best interest of the bank. The decision by the bank or financial institution to foreclose on a small business, farmer or individual customer appears to be made by senior bankers attempting to reduce the bank's exposure to unnecessary noise. In many cases it also appears that banks have made a decision to minimise their risk to classes of assets, especially agribusiness loans that have become less attractive as global markets change.

TOR (g) provision of reasonable written notice to a borrower when a loan is required to be repaid;

Refer to the statement made in point (f) above.

TOR (h) appropriateness of the loan to value ratio as a mechanism to default a loan during the period of the loan; and

The decision by banks to rely on loan-to-value mechanisms is often generic and based on assets with a regional or industry risk rating. It is based on a number of factors such as a customer's wealth, diversified assets and history with the bank. The loan-to-value ratio is a general banking decision that takes into account a customer's financial standing. Once the bank has provided credit, the loan-to-value ratio is part of an overall assessment of the bank's risk with each customer.

TOR (i) Conditions and requirements to be met prior to the appointment of an external administrator; and

Refer to the statement made in point (h) above.

TOR 2. In undertaking this inquiry, the Committee take evidence on:

(a) The incidence and history of:

- i. loan impairments; and***
- ii. the forced sale of property;***

(b) The effect of the forced sale of property in depressed market conditions and drought;

These matters have been discussed in part 1. However, the TSBC might be able to give examples of the above at a meeting with the Parliamentary Joint Committee.

TOR (c) Comparisons between valuations and sale price;

The valuations relied on by a bank and its customer will vary considerably. In the event a bank forecloses on a loan, and sells assets, it generally does so in circumstances where the price obtained does not provide an opportunity for the customer to seek redress. In a recent Competition Policy Review paper, published in 2014, the bank sold a farming property in western NSW for \$8.7 million. Recent documents have become available and note that the bank charged the customer penalties in excess of \$3 million, which meant the customer had no funds to defend themselves in the court.

TOR (d) The adequacy of the legal obligations on lenders and external administrators (including s420A of the Corporations Act 2001) to obtain fair market value for the forced sale of property; and

Most customers have limited funds to enforce their rights in the event that their business, farm or property is sold by the credit provider. This limits any access to justice and precludes them from taking further action to recover damages under s420A of the Corporations Act 2001.

TOR (e) any related matters.

Please contact the writer if you require further access to documents in relation to this submission.

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Banking in Australia: Unregulated and Unprotected

Part I

Presents a brief history of recent developments in regulation in the Australian finance industry. Highlights how demands for greater consumer protections with simultaneous pressure for deregulation of the finance sector led to the rise of self-regulation and the *Code of Banking Practice*.

Part II

Focuses on the Financial Ombudsman Service, highlighting the private company's inability to provide an effective external dispute resolution mechanism, as proscribed by the *Code of Banking Practice*.

Part III

Evaluates the Code Compliance Monitoring Committee, the body tasked with monitoring the *Code of Banking Practice*. Describes this organisation's inability to protect consumers from abuse of power by code-subscribing banks.

Part IV

Covers the unfair provisions in standard form contracts. Describes how these contracts entrench the unequal relationship between banks and their small business, farmer, and individual customers.

Part V

Links the weakness of the *Code of Banking Practice*, the Code Compliance Monitoring Committee, and the Financial Ombudsman Service with systemic flaws in the self-regulation regime of Australian banks. It asks whether the practices of leading banks constitute criminal behaviour.

PART I

Roadmap to Deception: The Evolution of the Code of Banking Practice, 1993 to 2015.

Consumer allegations of abuse by the Australian banking sector in the 1980s and 1990s led the Federal Government to implement a system of self-regulation in the Australian financial sector. A product of this system, the Code of Banking Practice was born in 1993. The Code was designed to protect consumers and ensure a competitive but fair banking system in Australia.

However, the Code is today not the mechanism that the government's Campbell and Martin reviews envisioned. Since the Code came into force in 1996, Banks have misled the public, weakened consumer protections, and abused their power over their customers.

This chapter presents the unconscionable evolution of the Code of Banking Practice in Australia from the period 1993 to present.

A Recent History of Banking Regulation

The 1981 *Australian Financial System Inquiry*, titled the 'Campbell Report', found that the Australian government was inappropriately intervening in the financial services industry. The report recommended that the government pull back from intervention in the operation of financial markets, and that it should instead implement high prudential structural standards. This—the report found—would help create a competitive but stable financial system.³

In particular, the Report found that the increasing range and complexity of financial products and growth of more aggressive selling practices required stronger and nationally uniform consumer protection mechanisms. The report emphasised the high cost to consumers of seeking redress for breaches of these protections, also recommended the creation of industry-based alternative dispute resolution schemes. The inquiry found that this would give financial institutions flexibility to operate in a free market whilst protecting individuals and small businesses.⁴

The Martin Committee

The Campbell Report's recommendations on consumer protections were not implemented and as the pace of banking deregulation increased in the following decade, customer allegations of abuse by financial institutions mounted. The Federal Government responded by commissioning the 1991 Martin Committee on Banking and Deregulation. In its report, "*Pocket Full of Change*", the Martin Committee endorsed the findings of the Campbell Review and recommended the creation of "*a code of banking practice*,

contractually enforceable by bank customers and subject to ongoing monitoring".⁵

The Committee also recognised that the cost of holding banks to account for breaches of consumer protections through the court system was prohibitive to bank customers. In response, the committee recommended the creation of alternative dispute resolution schemes that would enable bank customers to have their disputes arbitrated cheaply, quickly, and fairly outside the court system. The result was the creation of the 1993 *Code of Banking Practice*, (the Code), which came into effect in 1996 and has been subsequently revised three times, most recently in 2013.

The Code

The Code is described by the Australian Bankers' Association (ABA) as the "*banking industry's customer charter on best banking practice standards*".⁶ The Code compels banks to create alternative dispute resolution schemes and all disputes, the Code outlines, are to be investigated.

The Code was purported to be based on a set of practices agreed by banks, consumers, and government with the aim to—as outlined in the Preamble to the Code—would:

"Promote good banking practice by formalising standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their customers".⁷

However, through amendments in 2003 and 2004, the Code has become a vehicle for deception, allowing the major banks to mislead their customers while claiming to protect consumer rights.

'Viney Review' 2000

In 1999, then-Minister for Financial Services and Regulation, Joe Hockey, commissioned the Treasury Taskforce on Industry Self-Regulation, to provide feedback to government on what constitutes 'best practice' in industry self-regulation.⁸ The taskforce analysed Codes of Conduct within various sectors, including the financial sector, with the intention of reducing regulatory burdens on businesses and thus ultimately improving market outcomes for consumers.⁹ The Taskforce criticised the Code of Banking Practice as lacking the necessary monitoring and enforcement mechanisms to ensure compliance.

As a result, in May 2000 the Australian Bankers' Association (ABA) appointed Richard Viney to conduct an independent review of the Code.¹⁰ In conducting the process, Mr Viney sought submissions from governmental and industry bodies, as well as consumer representatives, on suggested changes to the Code, before making his final recommendations to the ABA. These recommendations – outlined in the Final Report, released in 2001¹¹ – resulted in the new Code being drafted and launched by the ABA in August 2003.¹²

Revised Code

The code was revised in 2003, with David Bell—the CEO of the ABA—claiming that the ‘second generation code’ would be:

“An effective demonstration to the Government that self-regulation works, and is a real alternative to the heavy hand of legislation”.¹³

This revision introduced the Code Compliance Monitoring Committee (CCMC), which monitor the code compliance of subscribing banks. The ABA intended for the CCMC to 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”.¹⁴

The 2004 Code provided, in clause 34:

(b) “That the CCMC’s functions will be:

- (i) To monitor our [the banks’] compliance under this Code;*
- (ii) To investigate, and to make a determination on, any allegation from any person that we have breached this Code...and*
- (iii) To monitor any other aspects of this Code that are referred to the CCMC by the ABA”.¹⁵*

The Code was again revised in 2013. The Code currently purports to provide the consumer with three regulatory services: a code compliance monitor; an internal dispute resolution mechanism; and an external dispute resolution mechanism.

A Binding Code

The General Standard Terms (Annexure B)—a part of standard banking contracts in Australia—sets out in clause 35:

“The relevant provisions of the Code of Banking Practice apply to this facility agreement if you are an individual or small business”.¹⁶

The Facility Agreement—another part of standard banking contracts—acknowledges that the Code is:

“A legally binding contract is created between you and us”.¹⁷

The original 1993 version of the Code prescribed in clause 1.3 that:

“(banks) will be bound by this Code in respect of any Banking Service that Bank commences to provide to the Customer.”¹⁸

This statement was replaced with a statement of the ‘voluntary’ nature of the Code in 2003.¹⁹ However, ABA director, David Bell, clarified:

“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 customer²⁰

Clause 3 of the 2003 Code itself confirms:

“If this Code imposes an obligation on us, in addition to obligations applying under a relevant law, we will also comply with this Code except where doing so would lead to a breach of a law.”²¹

In interpreting the 2003 Code as a binding contract upon banks, ABA director David Bell cautioned:

“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 between the bank and the customer”.²²

Indeed, although the National Australia Bank (NAB) has appealed its ruling, the Supreme Court of Victoria recent confirmed that the Code is a legally binding contract between banks and their customers in *National Australia Bank Limited v Rice* [2015] VSC 10.²³ While the Code has been accused of using ambiguous and misleading definitions of terms, obscuring the banks’ obligations under the Code, it appears clear that the Code is contractually binding between banks and their customers.²⁴

PART II

The Financial Ombudsman Service: Unable and Unwilling

The Financial Ombudsman Service (FOS), in its role as regulator, has failed to protect consumers from dishonest bank practices.

This section outlines the lack of independence and transparency of the FOS as well the stringent restrictions placed on its arbitration powers.

The Financial Ombudsman Service

As a binding contract upon Australian banks, the Code compels subscribing banks to make *external* dispute resolution schemes available to customers in addition to *internal* dispute resolution schemes. The Financial Ombudsman Service (FOS) was created to provide this external service.

FOS, a private business, is the Australian Securities and Investment Commission-approved independent external dispute resolution scheme tasked with providing a forum to resolve consumer complaints or disputes quicker and cheaper than the formal legal system.²⁵ In many cases the FOS does this acceptably; however, there are continuing issues surrounding the independence of the FOS and its effectiveness in resolving bank customer disputes.

Role of the Financial Institutions

From its inception, the role that Australian banks play in funding, staffing, and setting the Terms of Reference for the FOS have raised serious questions about the private company's independence. The FOS does not disclose to the public that directors can be employed by the very banks it is tasked to regulate and investigate. Indeed, of the nine current FOS board members, four are, or have been, employed by Australian financial institutions. This situation has led to allegations that Australian banks have an unfair influence over the complaints that are put to the FOS. This ultimately compromises the FOS' objectivity and independence.²⁶

The Unaccountable Ombudsman

As a private company, the Financial Ombudsman Service Limited is unaccountable for its decisions. As was ruled in *Mickovski v Financial Ombudsman Service Limited & Anor* [2012] VSCA 185, FOS decisions cannot be subjected to judicial review.²⁷ As a result, a complainant is left with no avenue for redress even if the FOS rules incorrectly or unfairly in its' arbitration of a dispute. The FOS is an unaccountable private company funded by Australian financial institutions, lacking transparency and

independence. ASIC, which refers bank complaints to the FOS, has abrogated its regulatory role to a private company funded and staffed by the Australian financial institutions.

Financial Limitations

As outlined in its *Terms of Reference*, the FOS is restricted to assessing disputes in which the applicant's claim is \$500,000 or less, although this amount is increased for a credit facility of up to \$2,000,000. As a result, the loans of many small businesses, farmers, and individual customers—especially concerning real estate mortgages and leases—are prevented from accessing the services of the FOS.

In addition, where the FOS does handle a dispute, it is limited to awarding compensation of \$309,000 or less.²⁸ As reflected in the 2014 *Economics References Committee's* review of ASIC, the monetary limits placed on cases that can be considered and compensation that can be awarded is insufficient.²⁹ Through the limitations placed on it by the banks, FOS is unable to ensure consumer protections in Australia.

The FOS is prevented from ruling on all but the smallest of cases and its decisions, regardless of their accuracy or fairness, cannot be challenged. The Financial Ombudsman Service Limited fails to protect consumers against the abuse of power by Australian banks. It is regulation of the banks, by the banks, for the banks.

PART III

The Code Compliance Monitors: Toothless Tigers

The CCMC, the second pillar of Australia's financial regulatory system, is severely restricted by a hidden constitution, which both limits its authority to investigate complaints, and ultimately deceives and misleads bank customers.

This section highlights that even in the limited cases in which the CCMC has the authority to act, its authority is so restricted as to be largely ineffectual.

The Code Compliance Monitoring Committee

In 1999, the Treasury-commissioned *Self-Regulation Task Force* found that the Code of Banking Practice lacked the monitoring and enforcement mechanisms that made give force to other industry Codes—such as those in the health and broadcasting sectors. This concern was further explored during submissions by both government and industry bodies to the *Viney Review* in 2000.

In its submission to the *Viney Review*, the Joint Consumer Submission suggested that an independent external body be tasked with undertaking compliance monitoring. ASIC stated in a similar vein that:

"This review should consider establishing an independent regime for investigating contraventions and imposing appropriate sanctions".³⁰

The Australian Bankers' Association expressed their preference for:

"An independent, well-resourced code-monitoring agency with a capacity to impose a range of effective sanctions for code breaches".³¹

The NSW Government agreed, submitting that:

"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. ASIC is one such agency. Compliance with the Code should be able to be independently double-checked, and not rely entirely on the bank's self-assessment".³²

The Australian Consumers' Association criticised the 1993 version of the Code, stating:

"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... A range of sanctions,

*underpinned by regulatory mechanisms, is essential for Code credibility”.*³³

In the face of this criticism, the CCMC was formed, appointed and funded by subscribing banks and the banking industry body, the Australian Bankers' Association. The CCMC was intended to investigate and 'name and shame' banks that breached the Code.³⁴ However, despite promises otherwise, the CCMC does not protect consumers as its ability to investigate and impose sanctions on banks for code breaches is severely limited

A Dismal Record

In 2012, *The Australian* reported that 2.5 million complaints had been made under the Code of Banking Practice between 2004 and 2012. Of these, only 200 complaints were fully investigated.³⁵ While it is unlikely that all 2.5 million complaints would have involved legitimate instances of bank breaches, a regulatory system that investigates such a minute fraction of complaints has clearly failed.

The CCMC, in its 2014 annual report, states that in the 2013-2014 financial year, the 18 banks that adopted the Code investigated 1,099,272 disputes, under their internal dispute resolution schemes. Of these disputes, the banks reported to have found that they had breached the Code only 5,762 times.³⁶ This number is simply too low to warrant the view that the banking regulatory system in Australia adequately protects its customers.

The lack of protection afforded to small businesses and individuals can be further blamed on two main factors; firstly, bank customers are not adequately informed of their right to take complaints to the CCMC, and secondly, the constitution of the CCMC, hidden from the public, seriously restricts the cases which the CCMC can investigate.

An Unknown Monitor

The CCMC, in its 2014 Annual Report, stated:

“The small number of allegations received from consumers and small businesses for investigation each year remains a concern”.

Of the 1,093,510 disputes lodged with code-subscribing banks, only 42 were referred to the CCMC. Meanwhile, the CCMC reports that there were only 4,854 visitors to its website in 2013-14. With regard to these figures, it is clear that the CCMC and its compliance functions lack public awareness.³⁷

One of the major causes of this is that the Code does *not* require banks to inform customers of the CCMC's existence, or of their right to lodge breaches of the Code and complaints with the CCMC. As a result, the major banks in Australia only publicise customers' right to lodge complaints with the CCMC in an extremely minimal way.³⁸ It is of no surprise, then, that the CCMC does not receive more complaints.

The CCMC's Wicked Constitution

Clause 34(b)(ii) of the Code notes that CCMC's functions are:

*"To investigate, and to make a determination on, any allegation from any person that we have breached this Code."*³⁹

Although this clause seems to require the CCMC to investigate *any and all* allegations that a bank has breached the Code, the CCMC is also bound by a 'wicked' constitution placed upon it by the ABA in 2004.

This constitution was first made available to the public in until July 2012, and then it was only to a group calling itself the JMA Parties. The constitution is still not readily provided to consumers.⁴⁰ Under it, the CCMC's powers to investigate are seriously restricted.

Clause 8.1 of the Constitution restricts the CCMC from investigating a dispute, if:

(b) (the CCMC) is, or becomes, aware that the complaint:

*(i) is being, or will be, heard...by another forum.*⁴¹

Thus, where a dispute is, or will be, heard in another 'forum', the CCMC no longer has the power—or the responsibility—to consider the complaint.

For the purposes of Clause 8.1, a 'forum' is classified as:

*"Any court, tribunal, arbitrator, mediator, independent conciliation body, dispute resolution body, complaint resolution scheme (including, for the avoidance of doubt, the BFSO scheme) or statutory Ombudsman, in any jurisdiction."*⁴²

This means, that where a bank chooses to escalate a complaint to another 'forum', the consumer is stripped of the right to have the matter referred to the CCMC. Further, as the constitution is not disclosed to the customer, they are stripped of this right without being informed that this is the case.

Complainants are not given any explanation as to why the CCMC will not investigate a complaint, other than that it has a 'conflict of interest'.

Further Restrictions

Further restrictions placed on the CCMC by its constitution were highlighted in its submission to the independent review of the Code in 2007-08.

Specifically, the CCMC members revealed that its ability to "name and shame" banks who breach the Code is limited, since it must receive approval from the ABA Chair before making any public statements, other than in its annual report.⁴³ The CCMC also noted it can *only* name banks which have repeatedly breached the Code and failed to rectify issues raised by the

CCMC. This significantly undermines the core role of the CCMC as envisioned by the Martin Review.⁴⁴

The CCMC has also questioned the authority the ABA Chair has over its funding, and the fact that – due to budget constraints – its annual reports have very limited circulation.

In its submission, the CCMC ultimately calls its constitution “problematic” and the governance arrangements “inadequate”.⁴⁵ However, following publication of the 2007-08 review these opinions outlined in its submission were not addressed, causing the three members of the CCMC to resign shortly after its release.⁴⁶

A Constitution Becomes a Mandate

In 2013, the ‘CCMC Mandate’ replaced the constitution. Unlike the constitution, the mandate has been made publically available. Little appears to have changed however, and the CCMC is still restricted in investigating complaints.

In fact, as outlined in the CCMC’s 2014 annual report, the mandate further restricts the CCMC by denying it the authority to investigate those complaints involving initial clauses of the Code.⁴⁷ The current version of the Code appears to be an attempt at ‘cleaning up’ the dishonest period of banking in the light of sustained criticism.

Regulatory Failure

The major Australian banks claim that they are bound by a ‘world class’ Code, monitored by the CCMC, supported by the FOS, and approved by ASIC. It is evident, however, that the Code of Banking Practices is unclear and ambiguous. The Code Compliance Monitoring Committee is unknown, unused, and ineffective, severely restricted by a hidden constitution and damningly criticised by its own staff. The Financial Ombudsman Service Limited is an unaccountable, bank-reliant, private company that is limited by its *Terms of Reference* to the detriment of small businesses, farmers, and individual customers.

That ASIC has approved of this arrangement is indicative of the degree to which banking regulation in Australia is a bank-run affair. Banks set the rules of their own game and have the financial resources to outgun any legal efforts made by consumers to bring the banks to account for their abuse of power.

Both the Campbell Review and Martin Committee endorsed deregulation of financial markets on the precondition that consumer protections were put in place to protect individuals and small business.

The Martin Committee stated that government must ensure:

“Adequacy of redress available to [consumers] in cases of dispute with their bank”.⁴⁸

However, this has clearly not been the case.

As the now-Federal Attorney-General, the Hon. George Brandis MP, stated:

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

By limiting alternative dispute resolution mechanisms and the power of compliance monitors, the Australian banks have denied individuals, farmers, and small businesses necessary consumer protections. Banking regulation in Australia has failed, despite recommendations made in both the Campbell Review and Martin Committee. Both reviews endorsed stronger alternatives to court action for breaches of the Code. However, under the present self-regulation system, there is no alternative for the majority of bank customers than to go to court to bring banks to account.

PART IV

Unfair Contracts

Standard form contracts in Australia are unfair: with them banks abuse their disproportionate power with small businesses, farmers, and individual customers unable to seek redress.

This chapter outlines these unfair contract terms.

Retaining Unfair Contracts

Beyond the issues raised by the restrictions placed on the FOS and the CCMC, significant problems exist in the terms set out by standard form banking contracts. These contracts contain numerous areas of concern, outlined in the submissions received by the 2014 *Competition Policy Review*, commissioned by Treasury.⁴⁹ In particular – as has received significant coverage by the media – serious issues exist with regards to ‘constructive default’, which banks can use to deliberately engineer a customer’s default. Banks do this by lowering their assessed value of a security, thereby raising the loan-to-value ratio and impairing the loan.

This concern arises due to the definition of ‘default’ and the banks’ ability to conduct their own property valuations under the General Standard Terms (Annexure B).⁵⁰

Section 9.1 of the General Standard Terms (Annexure B) states that:

“We [the bank] may obtain a valuation report of any secured property at any time. You must pay us all costs in connection with the valuation.”⁵¹

Section 9.4 states:

“Any report we obtain from the valuer, investigator or consultant is for our use only... You cannot sue us, the valuer, investigator or consultant if the report is wrong.”⁵²

In regards to ‘default’, the General Standard Terms (Annexure B) states in section 10:

“You are in default if: (k) in our opinion, the value of the secured property materially decreases from its value at the date of this facility agreement or it becomes less saleable than its saleability at the date of this facility agreement.”⁵³

Where a customer is in default, the General Standard Terms (Annexure B) provides in section 11.1:

“(a) we [the bank] no longer need to provide any facility; and

(b) the sum of the total amount owing for all facilities is payable on demand.”⁵⁴

As a result, Australian banks are legally allowed to re-value a secured property at the customer's expense. If the valuation shows that the secured property has fallen in value since the loan was agreed, then the bank has the right to default the customer and demand full payment of all amounts owing. This is known as a 'non-monetary default'. As a result, even if a customer has made all repayments on time and in full, a bank has the right to call in its loan if the "saleability" of the held security falls at any time below its initial level. The consumer cannot challenge the default, nor has the right to challenge the valuation on which the bank has relied. This is the case even where the valuation is wrong, as outlined in section 9.4.

Furthermore, where a bank defaults a loan, leading to the forced sale of secured property, numerous cases report property being sold at values far below the valuations. In particular, Australian banks have been accused of selling farms in default during periods of drought, resulting in sale prices that do not reflect the true value of the property.

The 2014 *Financial System Inquiry*, the Murray Review, raised these issues. Recommendation 34 of the review called on government to extend unfair contract term protections to small businesses, and also "*encourages the banking industry to adjust its code of practice to address non-monetary default covenants*".⁵⁵ The review suggests that the Code be expanded to require banks to give borrowers "reasonable time" to obtain alternative financing if the bank intends to enforce a non-monetary default.

Even with these changes, it is clear that with their standard form contracts, the major Australian banks are abusing their power against customers. Small businesses, farmers, and individual customers are disadvantaged by their unequal relationship with the banks, and do are not protected by contracts with such unfair terms.

PART V – A Complicit Government

Despite the various independent reviews both conducted on behalf of, and submitted to, government on the self-regulated system of banking in Australia, state and federal governments have failed to act on the recommendations made.

This section describes how in failing to address the key problems with self-regulated banking in Australia, the government has been complicit in a range of unconscionable practices.

Failure of Self-Regulation

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

The Murray Review

In 2014, the *Financial Systems Inquiry* (the Murray Review) outlined severe problems with the current banking system in Australia. Many of the review's subsequent recommendations concerned inadequacies in the self-regulatory system, recommending the government act to strengthen consumer protections. In particular, 'non-disclosure' and regulatory weakness were key themes of Recommendations 21 and 22.

Non-Disclosure and Banking Regulation

'Non-disclosure'—so states the Murray Review—and the danger arising from consumers committing to contracts "*they do not fully understand*" are critical issues in Australian banking.⁵⁶ Recommendation 21 criticised the existing regulatory framework for relying too heavily on disclosure by banks and banks providing adequate financial advice to consumers.

The major Australian banks clearly did not fully disclose the nature of the self-regulatory system to customers. The CCMC largely unknown by consumers and is severely restricted in its investigations and censoring powers by a constitution only recently made public after a decade of secrecy. The FOS is purported to be an independent company when it is, in fact, a private company run, staffed, and funded by the major Australian banks. The Code is filled with ambiguous and unclear terms and definitions despite its commitment to 'plain language'. Consumers falsely believe they are protected from banks abusing their power.

In order to increase this accountability, Recommendation 22 of the review suggested the introduction of ‘product intervention power’, by amending the law to enhance ASIC’s ‘regulatory toolkit’ where there is risk of significant consumer detriment.⁵⁷ According to the Murray Review, ASIC lacks the ‘intervention power’ needed *“to reduce significant detriment arising from consumers buying financial products they do not understand”*.⁵⁸ To counter this, the inquiry recommended:

“Reducing the risk of significant detriment to consumers with a new power to allow for more timely and targeted intervention [by regulators]”.⁵⁹

The inquiry further suggested that government amend the law in order to ensure that regulators can *“enforce action against conduct causing consumer detriment” before a “demonstrated or suspected breach of the law”* has occurred.⁶⁰ Such amendments would give regulators preventive powers under government legislation, as opposed to this intervention power merely being afforded to ASIC following suspected breaches of the Code.⁶¹

The Murray Review further noted that while the conduct of financial institutions that causes ‘significant consumer detriment’ may be systemic, ASIC is only able to assess cases on a ‘firm-by-firm basis’. This significantly limits the powers of ASIC, as one of the major industry regulators.

The Review further encouraged increased regulator accountability through the creation of a new ‘Financial Regulator Assessment Board’, designed:

“To advise Government annually on how financial regulators have implemented their mandates”.⁶²

This formal mechanism would allow government:

“To receive annual independent advice on regulator performance, and strengthen the accountability framework governing Australia’s financial sector regulators”.⁶³

In turn, the Review’s recommendations would increase the accountability of both the financial institutions *and* their regulators, thus insuring accountability at a more systemic level.

Government Inaction

These recommendations clearly resonate with the current self-regulatory system of the finance sector. However, despite these recommendations, the government and regulators are yet to adequately require banks to protect the rights of their customers in the manner recommended more than 30 years ago with the Campbell Report. Governments, both federal and state, have failed to protect Australian bank customers.

Indeed, despite the apparent inadequacy of ASIC, the Australian state governments agreed to reduce regulatory powers against banks by

transferring the responsibilities of state-based regulators to federal regulators. In NSW this result in the NSW Fair Trading regulator having its authority over the finance industry passed on to ASIC. Whether through a lack of understanding or concern, the Australian State Governments have been complicit in creation of the regulatory system so strongly criticised by the Murray Review.

Extending Unfair Contract Term Provisions

In accordance with the 2014 Murray Review, Federal Treasury recently released its proposed extension to existing unfair contract term provisions to include small businesses as well as individual consumers.

However, the Tasmanian Small Business Council (TSBC), in its submission in relation to the proposed extension, writes:

“The proposed changes, in the view of the Small Business Council and TSBC, are insufficient to address the issues that have arisen from the misuse of market power by large businesses”⁶⁴, i.e. banks.

Despite “such misuses by large business and financial institutions” being widely reported in the media, the proposed changes are simply not adequate:

“The proposed amendments leave small businesses and farmers at the mercy of the courts, which, according to the 2001 Martin Committee Review, favour large financial institutions due to their vastly superior resources.”⁶⁵

Thus, while appearing to act on the recommendations made in the

Murray review by amending the legislation, there are two major limitations placed on the definition of “small businesses”, which mean that government still fails to protect small businesses.

Firstly is the fact that the proposed legislation:

“Restricts the definition of a small business to such an extent that the unfair contract term protections will cover only the smallest contracts of the smallest businesses.”⁶⁶

This is done by introducing financial limits on the *ASIC Act*’s definition of small business contracts, to include only those contracts of \$100,000 to \$250,000.⁶⁷ This means that mortgages, most leases and the vast majority of farming contracts in Australia will not be given the necessary protection by the proposed legislation changes, as recommended in the Murray Review.

Secondly, is the limitation placed on the definition of small businesses to mean those businesses with less than 20 employees. This, the TSBC believes, “fails to take account of the nature of small businesses in Australia”, and therefore does not protect the majority of small businesses many of which employ more than this amount on a casual basis.⁶⁸

By significantly narrowing the definition of “small businesses”, the proposed extension of unfair contract term protections to small businesses in fact does very little in actually providing much-needed protection for small businesses and individuals. Instead, the changes are an attempt by the government to appear as though addressing those problems identified in the review, without actually providing the protection recommended by the Murray Review

Wilkie Bill 2012

Despite widespread government inaction in the face of banking abuses, there have been some attempts at reforming the bank regulatory system. The Wilkie Bill, formally the *Banking Amendment (Banking Code of Conduct) Bill 2012*, proposed a number of legislative changes to the *Banking Act 1959*, aiming to change the nature of banking self-regulation in Australia. The Bill, if it had been passed, would enshrine into legislation the promises made under the Code, formally holding banks to account for breaches. Among the most important clauses in the Bill is section 36A(1), which would insert into the *Banking Act* the stipulation:

- (1) *“The Minister must, by legislative instrument, make the Banking Code of Conduct (the Code).”*⁶⁹

Further, section 36B would compel the Australian Prudential Regulation Authority to handle customer complaints, where a bank *“has failed to comply with the Code in dealing with their customers”*.⁷⁰ This responsibility was outline in section 36B(3):

- (1) *“APRA **must** accept the complaint if APRA is satisfied, on evidence provided by the customer:*
- (a) that the ADI could have failed to comply with the Code; and*
 - (b) that the customer has taken reasonable steps to:*
 - (i) bring the failure to the attention of the ADI; and*
 - (ii) resolve with the ADI any matters arising from the failure;*
 - and*
 - (c) that one or more matters arising from the failure might not have been properly resolved.”*⁷¹

Once APRA accepted the complaint, it would be further bound to investigate the matter under section 36C. Section 36D of the Bill would provide APRA with ‘name and shame’ powers far beyond those currently held by the CCMC. It would allow APRA to publically name a bank that has failed to comply with the Code, by publishing the business name of the bank:

- (a) “on a website managed by APRA; and*
- (b) so that the publication is available throughout Australia in a newspaper”.*⁷²

The Bill would further protect the Code from amendments and alterations by banks in pursuing their interests, as section 36F would prevent the Minister by law from amending the Code:

“Without consulting persons or bodies that the Minister is satisfied represent the majority of:

- (a) Australian customers of ADIs [banks], other than business customers;*
- (b) Australian small business customers of ADIs;*
- (c) ADIs.”⁷³*

The Code would have to be reviewed “at least every 3 years”.⁷⁴ In doing so, this would put the onus of enforcement on an independent statutory body, rather than the FOS—a private company—or the CCMC—an ineffective tool severely restricted the Australian Bankers’ Association.

Both state and federal governments have accepted—particularly following the Financial Systems Inquiry in 2014—that the self-regulatory system in Australia does not sufficiently protect consumers and provide avenues for redress for breaches under the Code. However, successive governments continue to fail to introduce the necessary legislative amendments, such as the Wilkie Bill, that would protect the rights of individuals and small business.

In light of these facts, it is clear that the state and federal governments, the banking regulators, as well as the FOS and CCMC, have all played a part in the misleading and deceptive conduct of the major banks against their customers.

By failing to provide adequate protection either under legislation or by the state and federal regulatory bodies, and by failing to address issues regarding penalties and avenues for redress for breaches of the Code, the government has assisted in creating a code of practice that provides merely the facade of consumer protection. All the while, the leading banks continue to profit at the expense of their small business, farmers, and individual consumers from dishonest and unconscionable practices.

Conclusions

The Criminal Nature of Self-Regulation:

This paper has explained the need for reforms required to ensure a more fair and just banking system in Australia.

Reforms

There is a range of essential reforms that are vital to ensuring that the self-regulated banking system in Australia digresses from the dishonest period of banking practices that has plagued the last decade.

Firstly, it is essential that legislation like the Wilkie Bill (2012) be re-submitted to parliament and enacted into law, to ensure individuals, small businesses and farmers are afforded protection under Australian law.

Secondly, effective regulation needs to be introduced by the current industry regulators, including ASIC, APRA, and Treasury, to ensure that there are appropriate checks and balances in place to monitor the conduct of banks towards their customers.

Thirdly, in implementing effective legislation and regulation, banks that act dishonestly must face punishment, by way of enforceable penalties for breaches of the Code. As stated by Minister for Environment Greg Hunt, Australians should have the right to bring those abusing their power to some government authority.⁷⁵

Fourthly, the internal and external dispute resolution mechanisms of the Australian banks should be reformed so that small businesses, farmers, and individual customers can have complaints arbitrated quickly, cheaply, and fairly. The concerns outlined by the Martin Committee that the judicial system is unfairly weighted towards leading banks—whose resources far outweigh small businesses, farmers, and individuals—is as true today as in 1991,

Lastly, it is essential that the Code of Banking Practice be endorsed and agreed upon not just by the major banks and the CCMC and FOS, but also the community, to restore the balance between banks and customers

Deceptive Behaviour or Fraud

The definition of “fraud” is provided under section 192E of the *Crimes Act 1900* (NSW):

(1) *A person who, by any deception, dishonestly:*

(a) *Obtains property belonging to another, or*

(b) *Obtains any financial advantage or causes any financial disadvantage,*

*is guilty of the offence of fraud.*⁷⁶

For the purposes of this definition:

*"Dishonest" means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.*⁷⁷

In light of the continued abuse of power by the leading Australian banks and the Australian Bankers' Association directors, it would appear that its conduct is in line with the definition provided in the *Crimes Act*.⁷⁸ There is, on the facts, evidence that the leading Australian banks have misled the public when promoting a Code as a binding contract intended to protect individuals, farmers, and small business customers. The Code has been, since 2003, ambiguous, unclear, and deceptive. The banks' CCMC is made powerless by a constitution hidden for a decade and the FOS is run, staffed, and principally funded by the banks it seeks to hold to account.

In 1991, the Martin Committee issued a general recommendation on banks, to:

*"Provide opportunity for customers to report suspicions of fraud and corruption".*⁷⁹

Not only have the state and federal governments, regulators—both public and bank-funded—and the banks failed to take stock of the Martin Committee, but, indeed, all have been party to the deceptive and unconscionable banking system that fails to protect small businesses, farmers, and individuals.

It would seem only a matter of time before there is a shift away from banks that rely on Unfair Contract Term provisions.

ENDS

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