

Rob Lomdahl | Head of Government & Regulatory Affairs | Group Corporate Affairs

29 April 2016

Ms Toni Matulick
Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
Canberra
ACT 2600

Dear Ms Matulick,

**Re: Parliamentary Joint Committee on Corporations and Financial Services
inquiry into the impairment of customer loans – questions on notice**

I refer to the questions taken on notice during ANZ's appearance before the Committee on 4 April 2016.

Please find attached ANZ's responses to those questions and matters arising from the 4 April hearing.

If you have any questions or require clarification, please do not hesitate to contact me on

Yours sincerely

Rob Lomdahl
Group Head of Government and Regulatory Affairs

1. ANZ'S APPROACH TO LANDMARK CUSTOMERS

ANZ was asked about how its approach to customers has changed, in particularly about an apparent "renewed focus within the bank upon culture and fair and reasonable engagement with consumers". We were also asked whether ANZ had refunded millions of dollars since the start of 2015 where internal processes have broken down or been fraudulently conducted.

Following the acquisition of the Landmark portfolio in March 2010, there have been a number of factors that have adversely affected agribusiness throughout Australia including drought, the live export ban, the Queensland floods, overall decline in rural land prices and softening of certain commodity prices.

It became increasingly evident that some customers in the Landmark book were experiencing difficulty. In response, ANZ set up a specialist agribusiness unit in our Lending Services team in August 2014 to work closely with these customers.

The public and political focus on these issues helped highlight instances where ANZ should have managed customer issues differently. This (and the continued difficult conditions affecting farmers) led us to review our practices and to introduce from early 2015 the following changes:

- Measures to ensure that an individual farmer's circumstances are more carefully considered with key decisions requiring senior executive approval;
- Ensuring we have more staff with agribusiness or restructuring/turnaround experience in the specialist team managing customers in difficulty;
- Giving staff greater flexibility to help good farmers manage their way through tough times; and
- Improving engagement with agribusiness customers in difficulty including a greater emphasis on face-to-face farm visits to understand their individual circumstances, build rapport and improve communications.

In relation to the suggestion of substantial refunds or compensation, ANZ has provided information to the Committee on a confidential basis on its negotiations in a small number of long standing disputes. ANZ has negotiated agreements where we have restructured debt, and, in a small number of cases, provided assistance to ensure customers have had access to legal advice or other support.

In some situations where otherwise viable agribusinesses are suffering through long term adverse climatic conditions, we have sought to restructure debt levels to sustainable amounts. Such restructuring is commercially based and is not compensation. The suggestion that ANZ is making significant compensation payments ("millions of dollars") to customers is not correct.

Decisions to restructure debts in this way are approved at Senior Executive levels in the Bank.

2. MALADMINISTRATION AND 'LENDER MORTGAGE FRAUD'

At the 4 April hearing, ANZ undertook to clarify our response to questions on notice received on 17 November 2015 in relation to 'lender mortgage fraud' and how this relates to 'maladministration in lending'.

In our 29 December 2015 answer to questions on notice, we provided data on cases of lender fraud and maladministration.

'Maladministration in lending' is a term that encompasses any complaints about whether funds should have been provided to a customer.

A claim that a loan should not have been provided can be made in relation to any loan facilities including credit cards, personal loans, home loans, consumer leases and business loans. In reviewing these claims, consideration is given as to whether:

- the bank has complied with its obligations in relation to the loan application process, and
- the funds have been provided in accordance with the care and skill of a diligent and prudent lender, or, where the loan is regulated, in accordance with legislative obligations.

Maladministration can include claims that a customer did not sign a form. Customers can also claim that they could not afford the loan and, for various possible reasons, the bank should not have provided it to them. For example:

- The customer's financial position was not as it was documented in the application form. The customer might claim that they (or a third party) provided inaccurate information, but the bank should have made reasonable enquiries to verify the information.
- In assessing information provided, the bank should have realised that the customer did not meet serviceability requirements. For example, FOS has found maladministration where a bank does not verify information in accordance with its own policy (e.g. miscalculation of a customer's monthly income from information about weekly or fortnightly salary).
- Failure to take appropriate account of the customer's other financial commitments with the bank, such as income receipts and expenses in the consumer's transaction account.
- The bank provided a regulated loan to a customer that was 'not unsuitable' and did not meet the customer's requirements and objectives and the loan cannot be repaid without substantial hardship.

There are other 'red flags' that can lead to a conclusion that funds should not have been provided, for example:

- If the loan application contains information which appears to be inconsistent, incomplete or wrong.
- If the bank has other information or knowledge about the customer which shows that the information in their application is not accurate or complete.

- The customer declares income which bears no relationship to their asset position. For example, if a customer declares annual income of \$200,000 but has no savings or assets, the bank should enquire why they have no savings or investments.

Other examples relating to Lo Doc loans for a self-employed customer:

- A transaction account statement may show regular deposits for the same or similar amounts, suggesting the customer may be employed. If the customer has declared they are self-employed, the bank should make further enquiries about the deposits.
- The customer's loan application discloses that they have been self-employed for five years, but an ABN search shows they have only been registered for 12 months. The bank should make further enquiries to determine whether the business name has changed or if there is another explanation.

As a matter of practice, ANZ will report significant issues to ASIC.

Where we detect conduct that gives rise to a suspicion of fraud or actual fraud, we are required by legislation to lodge a Suspicious Matter Report (SMR) with AUSTRAC. We understand that ASIC has access to the AUSTRAC SMR database and 'fraud by a representative' will often come to ASIC's attention via these means.

In contrast to 'maladministration in lending', 'fraud' is an intentional act by one or more individuals, involving the use of deception to obtain an unjust or illegal advantage.

Examples of what ANZ classifies as internal fraud include false accounting, including deliberate misstatement of financial information for personal or financial gain, or assisting a customer or other third party to obtain a payment or financial advantage from ANZ to which they are not entitled.

'Lending fraud' would entail obtaining credit by the use of false or misleading information to obtain an advantage. It may include applications for credit using fictitious or assumed identities or misrepresentation of income, employment and other details.

ANZ's approach to fraud is governed by ANZ's fraud policy which is part of the ANZ Code of conduct and ethics. The fraud policy defines what ANZ considered to be fraud and outlines the responsibilities for all employees and contractors (including authorised representatives of ANZ) for fraud risk management.

3. VALUERS PANEL

ANZ was asked to provide details of its valuers panel.

ANZ's credit risk function appoints property valuers to a panel. The ANZ panel is divided into two groups:

- For residential home loan valuations, ANZ has 31 firms and 1,950 valuers accredited to conduct residential valuations around Australia.

- For non-residential (commercial and rural) property, ANZ has approximately 832 valuers from 88 valuation firms around Australia. The largest firms are Opteon, CBRE, HTW and Knight Frank.
- Panel valuers are practicing property valuers and are most likely to also be on other bank panels.

Valuations must meet the requirements set out in APRA's Prudential Standard APS 220, Attachment B on Impairment, Provisioning and the General Reserve for Credit Losses. This states:

... the ADI must require valuers and appraisers in preparing their valuation reports to adopt the valuation standards and practice of any relevant professional bodies ... in the case of property valuations, the standards and practices of the Australian Property Institute (API) or equivalent ... must be used.

"Or equivalent" includes the Royal Institution of Chartered Surveyors (RICS) red book. Both the Australian Property Institute (API) standards and the RICS red book standards are reflected in ANZ's Professional Services Brief requirements for valuers.

The API is the professional body for property valuers. The API maintains property valuer registration, provides accreditation in conjunction with local tertiary education bodies, and maintains professional standards.

ANZ requires valuers to be accredited members of the API. A valuer's firm must have an appropriate level of professional indemnity insurance. The API administers the Limited Liability Professional Indemnity Insurance scheme for property valuers. RICS property valuer members are also API members so they can participate in that scheme.

4. HOW ARE VALUATION PROCESSES MANAGED AT ANZ?

ANZ was asked about our processes to manage valuers.

Our Credit Risk function is accountable for instructions and approval of valuations. This means that valuation processes and decisions are at arm's length from lending. Credit Risk valuation framework is underpinned by prudential requirements and in line with international standards and practices.

There are two areas undertaking the relevant work. ANZ Property Risk – Technical Services (PRTS) has 11 property valuers with a mortgage valuation background. PRTS provide ANZ with a single point of ownership for property valuation requirements and standards. They also provide a quality assurance process which includes a checklist to ensure valuations meet ANZ requirements such as verifying whether the valuer has read associated leases, searched for property titles and has properly inspected the property.

A small Agribusiness Property Risk (APR) area oversees rural property valuations and agribusiness. The two rural property valuation staff are members of API with extensive backgrounds in rural property valuations.

5. REQUIREMENT FOR ROYAL INSTITUTION OF CHARTERED SURVEYORS (RICS) MEMBERSHIP

ANZ was asked if it requires its property valuers to be members of the Royal Institution of Chartered Surveyors (RICS).

ANZ does not specifically require property valuers to be RICS members. Property valuers are obliged to act in accordance with the Professional Standards of the Australian Property Institute (API) and/or RICS.

ANZ's Professional Services Brief is attached to each property valuation instruction, supplementing the API or RICS property valuation requirements.

6. LANDMARK – PROVISION OF VALUATION REPORTS

ANZ was asked about whether Landmark as a matter of course, provided copies of valuations to clients.

Because we do not have access to relevant information, ANZ is not in a position to confirm Landmark standard practice.

7. VALUATION ASSUMPTIONS

ANZ was asked about the information provided to the borrower about valuation assumptions and the changes in assumptions over time. We were asked about how a valuation might change over a period, for example from 2010 to 2016, and the how changes are communicated to customers.

ANZ's general practice is to request valuations be conducted on a 'current market value' basis. Valuations can be sought for a range of purposes such as for insurance, mortgage lending, sale, or 'on completion' value. This may result in different valuations on the same property. Externally prepared valuations ordinarily set out the basis upon which the valuation has been conducted.

Having specified the purpose of the valuation, ANZ does not provide instructions about any assumptions to be used (such as the climate or commodity outlook). Any assumptions used are the responsibility of the appointed valuer.

It is ANZ's practice to provide the customer name as the contact point for the valuer arrange inspection of the property/security. This gives the customer the opportunity to talk directly to the valuer, to promote the positive aspects of the property and to influence any assumptions that the valuer may use.. In most cases, particular property-related assumptions (such as vacancy rates or rental income) are supplied by the customer.

Where a period of time has elapsed, for example five years, between valuations, it is generally the case that the 'current market value' will have changed. Usually, there will be observable changes such as changes to buildings, lease agreements and market demand for the particular property; or in the case of agricultural properties, changes to

prices or outlook. Reflecting this, the valuer's assumptions or information provided by a customer will also change.

ANZ was asked if it seeks a valuation for sale in a distressed situation at origination and if so, whether it would make a customer aware of that valuation so that they can adequately evaluate their risk. ANZ was also asked what the unintended consequences would be if that was a requirement of lending.

The API has a qualified guidance note on "forced sale" property valuations. The note describes this type of assessment as "undesirable" and this is mirrored in ANZ's standing instructions for valuations.

It is not ANZ's practice to seek a valuation on this basis when it writes a loan. ANZ always seeks a valuation based on current market value in accordance with the International Valuation Standards Council definition:

The estimated amount for which an asset or liability should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.

A requirement to seek a valuation for both a 'forced sale' and 'market value' at origination would increase the valuation costs borne by customers. As we have highlighted in previous submissions, ANZ had a total of 116 commercial customers in some form of ANZ enforcement action in March 2015, representing 0.08% of all commercial customer accounts. This proposal would increase costs to all commercial customers and would appear unnecessary given that the vast majority of businesses will never face this situation.

In all likelihood customers in enforcement would have been managed by our lending services area for some time before enforcement action is taken (approximately one and a half years for non-Agribusiness customers and approximately two and a half years for Agribusiness customers) and would likely have been managed by front line staff for many years before transferring to Lending Services.

8. CONDUCT AND CULTURE AND ENGAGEMENT WITH APRA

ANZ was asked what processes and procedures it has in place regarding a renewed focus on 'conduct and culture' and what communications it has had on this issue with APRA.

It is a requirement that all ANZ employees comply with our Code of Conduct and Ethics. This applies equally to employees who are permanent or temporary, contractors and consultants. Our Code of Conduct and Ethics comprises eight guiding principles:

1. Act in ANZ's best interests and value ANZ's reputation
2. Act with honesty and integrity
3. Treat others with respect, value difference and maintain a safe working environment

4. Identify conflicts of interest and manage them responsibly
5. Respect and maintain privacy and confidentiality
6. Do not make or receive improper payments, benefits or gains
7. Comply with the Code, the law and ANZ policies and procedures
8. Immediately report any breach of the Code, the law or ANZ policies and procedures

ANZ has a suite of policies that detail expectations of all our employees regarding their behaviour, both internally and externally. They are regularly reviewed to ensure they reflect any changes in legislative requirements, and include:

- ANZ Anti-Money Laundering and Counter-Terrorism
- Financing Policy
- ANZ Use of Systems, Equipment and Information Policy
- ANZ Fraud Policy
- ANZ Expense Policy
- ANZ Equal Opportunity, Bullying and Harassment Policy
- ANZ Health and Safety Policy
- Conflict of Interest Policy
- Trading in ANZ Securities Policy
- Trading in Non-ANZ Securities Policy
- ANZ Anti-Bribery and Anti-Corruption Policy
- ANZ Whistle-blower Protection Policy

All ANZ employees and contractors are required to complete the ANZ Essentials training course. The course is divided into: 1) Living the Code, 2) Equal Opportunity Essentials, 3) Compliance (Compliance Essentials, Anti-Money Laundering, Operational Risk Essentials) and 4) Preventing Fraud, Bribery and Corruption.

The Living the Code course reinforces the importance of our values and ethics and seeks a declaration of compliance with our Code of Conduct and Ethics. By completing Living the Code, participants are confirming they understand the Code's principles and have complied with them over the previous 12 months.

Section 12 below further discusses potential consequences when an employee fails to meet expected standards set out in ANZ's Code of Conduct and Ethics.

Like other financial services organisations, ANZ has been focussed on conduct and culture post-GFC at the senior management and Board level. ANZ has implemented a number of streams of work in relation to ANZ's Values, Risk/Compliance, Leadership, People, Performance and Remuneration, and Discipline and Internal Controls.

ANZ maintains an open dialogue on culture and conduct-related matters with APRA and has kept APRA informed of progress in respect of the banks work on these matters. The most recent culture-specific discussion with APRA was in December 2015. Following that, APRA recommended ANZ continue to progress:

- defining the target ANZ risk culture, areas of priority, and formally socialising ANZ's risk culture principles;
- identifying areas of strong culture and cultural weakness;
- formalising the use of outside expertise; and
- a process for socialisation of the results of risk culture work across the bank.

9. CCMC REPORTING – PRE-GFC

ANZ was asked if we reported any breaches of the Banking Code of Practice in relation to responsible lending that occurred prior to the GFC.

The responsible lending provisions of the *National Consumer Credit Protection Act* are not mirrored in the Code of Banking Practice. The Code has a broad obligation that we will “exercise the care and skill of a diligent and prudent banker” when assessing conducting a credit assessment. This has some similarities to the responsible lending obligation. The Code Compliance Monitoring Committee may have regard to, amongst other things, the responsible lending obligation in assessing whether a bank has complied with its Code of Banking Practice obligation.

The table below outlines ANZ’s reporting of breaches of this clause to the CCMC.

| Year | No. of reported breaches to CCMC |
|---------|----------------------------------|
| 2005-06 | 40 ¹ |
| 2006-07 | 5 ¹ |
| 2007-08 | 0 |
| 2008-09 | 19 |
| 2009-10 | 17 |
| 2010-11 | 8 |
| 2011-12 | 6 |
| 2012-13 | 5 |
| 2013-14 | 24 ² |
| 2014-15 | 34 |

Notes: 1. Reported breaches for 2005-06 and 2006-07 include both the credit assessment and the financial difficulty obligations under clause 25. We are unable to isolate data for credit assessment only. Equally, the breaches reported were based on an analysis of complaints data and were not necessarily confirmed as breaches. As such, the data is not directly comparable to later years.

2. These breaches were recorded under the 2004 version of the Code of Banking Practice. No breaches were recorded under the revised 2013 version of the Code.

None of the above breaches were defined as a ‘significant breach’. A breach is determined to be significant by reference to:

- a. similar breaches;

- b. the number of customers affected;
- c. the adequacy of arrangements to ensure compliance with this Code;
- d. the extent of any consumer detriment;
- e. the rectification and other costs incurred; and
- f. the duration over which the breach occurred.

10. ACCOUNTING STANDARD AASB 139

ANZ was asked to confirm that it complies with AASB 139.

ANZ complies with AASB 139 and this is stated as such in our Annual Report and Results Announcement. This is audited by KPMG.

11. ANZ'S APPROACH TO UNFAIR TERMS AND CONDITIONS LEGISLATION

ANZ was asked to update the Committee about the implementation of unfair terms and conditions applying to small business, including in relation to ASIC guidance and whether ANZ will provide an 'exit option' for a small business.

The *Small Business and Unfair Contract Terms Act 2015* voids standard form small business contracts that contain unfair terms and conditions from November 2016.

ANZ is conducting a review of all small business contracts captured by this legislation to identify clauses that, on their face, may be regarded as 'unfair' under the new legislation. This encompasses clauses that give ANZ the right to vary clauses in the relevant contract unilaterally.

ASIC's Guidance paper, 'Unfair contract term protections for small businesses', refers to a unilateral variation right as an example of a clause that may raise to concerns. In this example, ASIC states that where such a clause allows a lender to unilaterally increase the price, an additional term providing the small business with the right to cancel the contract without consequence would reduce its potential unfairness.

ANZ agrees with ASIC's guidance that providing customers with a right to terminate a contract in these circumstances can reduce the potential unfair impact of such a clause.

Several treatments may be available to reduce the risk that a clause will appear to, or may operate, unfairly under the new legislation. Some of these treatments are explained in worked examples contained in ASIC's Guidance. In relation to the example raised by the Committee, ANZ is considering the option of immediate termination right clauses in favour of customers, as well as other potential measures.

As the ANZ review is continuing, we are not able to respond definitively about our approach to issues raised in the ASIC examples.

12. RESPONSIBLE LENDING COMPLIANCE

ANZ was asked what processes it has in place to ensure compliance with responsible lending obligations.

All ANZ lending must conform to internal policies and procedures that ensure that the bank's responsible lending and other obligations are met.

These standards are built into ANZ systems which assess a borrower's capacity to repay. This ensures automated credit decisions comply with internal policy, and responsible lending obligations.

Manual credit assessment processes must also reflect the bank's internal policies. This varies across the bank according to the type of product, however some examples of these processes include:

- Statement of position templates to ensure the consistent collection of financial information which is then fed into a credit assessment; and
- Rules governing the type of customer documentation or other proof that is required to verify an applicant's income.

All staff must complete regular training and accreditation before they can discuss lending needs with customers. Customer feedback and complaints are reviewed and concerns about staff adherence to requirements are investigated and action taken.

ANZ's compliance division conducts a file compliance program which includes reviewing approximately 30 per cent of branch lending files each month to ensure compliance with ANZ's policy and processes. Examples of non-compliance include not having the correct documentation, missing financial information in a statement of financial position and insufficient document verification on file.

These compliance reviews directly impact staff performance outcomes and remuneration. They are also used in ongoing training and development.

In addition, more targeted reviews are conducted on some files where reviews by compliance highlight that extra assurance of compliance is required. For example, where there has been a significant increase in lending volumes or persistent errors in a given area.

ANZ's Code of Conduct and Ethics is supported by more detailed policies including ANZ's Performance Improvement and Unacceptable Behaviour Policy (the Policy). The Policy outlines the range of consequences ANZ may apply when an employee has not met the required standards of performance, behaviour, risk or compliance and aims to promote a culture that protects whistle-blowers and supports escalation by employees.

The Policy sets the foundation of all performance improvement, behaviour and disciplinary related matters arising at ANZ. The Policy uses the concept of 'unacceptable behaviour', defined as behaviour that is inconsistent with the principles and standards expressed in ANZ's Code, values or policies.

The adverse consequences arising from a finding of unacceptable behaviour send a message to all employees that failure to meet expected standards will not be tolerated. These consequences include:

- a verbal warning
- a written warning for unacceptable behaviour
- a written warning for poor performance
- limiting or removing privileges (such as being taken off a leadership development course)
- reduction in performance rating
- business consequences
- mandatory training
- termination of employment/dismissal – with or without notice
- financial consequences (such as no fixed remuneration increase, reduction/loss of bonus, forfeiture of share allocation)
- referral to relevant external bodies (such as the Police or licensing authorities or professional bodies such as an applicable regulatory body or law society).

13. BEST INTEREST OF A CUSTOMER AND THE DUTIES OF A BANKER

The Chair sought ANZ's views on the suggestion that a banker providing a business loan should sign off on "the equivalent of a statement of advice that says 'this loan is in the best interests of the person and does not expose them to undue risk which they have not been made aware of?'"

A banker providing credit to a commercial customer is subject to legal obligations designed to protect the interests of the customer. These arise under the Code of Banking Practice, at common law and under statute, including currently under sections 12CB and 12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) as well as the extension of unfair contract terms laws to small business under Part 2 Division 2 Sub-division BA of the ASIC Act. Significant penalties arise for breaches of these protections (See further information on "Protections for commercial borrowers" below).

Unless specifically requested by the customer, a banker providing credit to a commercial customer is generally not being engaged to provide advice to that customer on their business interests or financial strategy. Businesses will often engage and pay for advice from accountants or consultants for that purpose.

The best interest duty noted by the Chair has arisen in certain circumstances where a consumer seeks advice on financial products regulated by the *Corporations Act*. Reflecting the significance of financial advice and clear failures in the provision of advice

in this area, Parliament established the obligation of a financial adviser to act in the best interest of the customer.

The best interest duty and related obligations are contained in Division 2 of Part 7.7A of the *Corporations Act*. The expression 'best interests' is not defined in the *Corporations Act*. However, the legislation provides that financial advisers can satisfy the duty if certain prescribed 'safe harbour' steps are followed. These steps require a financial adviser to take instructions from the client to identify the client's objectives, financial situation, needs and subject matter of advice sought by the client and to determine which of these factors are relevant and reasonably require consideration in the provision of advice.

The adviser is obligated to make reasonable inquiries to ensure that information is accurate and complete and, where relevant, conduct a reasonable investigation into a range of products to meet the client's needs before providing advice. Finally, the financial adviser must also take any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client.

We do not believe that it is appropriate that a banker providing credit to a commercial customer should be subject to such a best interest duty. It would mean that the banker would need to undertake a comprehensive review of a commercial borrower's business, strategy, goals and potential options. Such a duty would essentially change the normal role of a banker into that of a financial adviser or business consultant.

Reforms announced by the Government on 20 April and by the Australian Bankers' Association on 21 April will increase protections for business. The Government's announcement included increasing ASIC funding for surveillance and enforcement, giving ASIC a product intervention power and the power to impose product distribution obligations and reviewing the jurisdiction of the Financial Ombudsman Service (FOS). The ABA announcement included a review of product sales commissions (including small business), strengthening whistle-blower protections, support for a review of FOS with a view to extending its jurisdiction, and bringing forward the review of the Banking Code of Practice.

Protections for commercial borrowers

- Section 12DA of the *ASIC Act* places financiers under an obligation not to engage in **misleading and deceptive conduct**. Courts have found against financial institutions that did not provide an adequate disclosure of the nature and magnitude of risks faced by the customer.
- Section 12CB of the *ASIC Act* places bankers under an obligation (applying to persons and unlisted corporations) not to engage in **unconscionable conduct**. Business behaviour may be deemed unconscionable if it is particularly harsh or oppressive, and is beyond hard commercial bargaining.

Factors that courts may take into account in determining this include the relative bargaining strength of the parties, whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party, whether the weaker party could understand the documentation used, the use of undue influence, pressure or unfair tactics by the stronger party, the requirements of applicable industry codes, the willingness of

the stronger party to negotiate, and the extent to which the parties acted in good faith.

Breaches under the *ASIC Act* may result in a financial institution being subject to pecuniary penalties, injunctive relief, fines, payment of damages, punitive and non-punitive orders, adverse publicity notices, public warning notices, and other orders as courts see fit. Courts may also impose penalties.

- Under **unfair contract terms** legislation effective from November 2016, terms and conditions contained in small business standard form contracts relating to financial services which are found to be an **unfair term** will be void. A term may be unfair if:
 - it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
 - is not reasonably necessary to protect the legitimate interests of the party that would benefit from its inclusion; and
 - the term would cause financial or other detriment to a small business if it were to be applied or relied on.
- ANZ is a signatory to the **Code of Banking Practice** which is incorporated as a matter of contract between the bank and its customer. The Code of Banking Practice covers small businesses of up to 100 persons in the case of a manufacturing business, and up to 20 full time employees for other businesses.¹ Under clause 27 of the Code, there is the obligation:

"Before we offer, give you or increase an existing, credit facility, we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay the credit facility."

The Code also contains a range of other commitments including the obligations to act fairly and reasonably towards a customer in a consistent and ethical manner, to provide effective disclosure of information, and to recommend customers seek legal or financial advice in appropriate circumstances.

- **Common law** gives rise to obligations for bankers to act with reasonable care and skill.
- **Unconscionability and undue influence** claims in common law may arise where one party to a transaction is at a special disadvantage because of illness, ignorance, inexperience, impairment, financial or special circumstances and where the other party takes advantage.

¹ Australian Bankers Association, Revised Code of Banking Practice – 2013.