THE HISTORY OF AUSTRALIAN BANKING

1991 - 2016

Presentation to:

Mr Phil Khoury, ABA Reviewer

Code of Banking Practice

Extracts: *The Australian Bankers' Problematic Code Paper dated* 6 December 2010

EXECUTIVE SUMMARY

History of Australian Banking 1991-2016

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 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. It stressed the importance of an effective, low cost, complaints resolution procedure.

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 earlier government principles and suggestions.

2. The key body that implements the codes application and rules is the Code Compliance Monitoring Committee (CCMC). However, an undisclosed body exists called the Code Compliance Monitoring Committee Association (CCMC Association) (comprising of CEO's of the major banks) which drafted its own constitution that has the effect of limiting the activities of the CCMC 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 [that sits under the CCMC] defines narrowly the circumstances in which the CCMC reviews the banks compliance with the code. As a result, very few unsatisfied complaints come to the attention of the CCMC or are investigated.

5. Several reviews by independent or semi-independent persons have recommended change to impose greater transparency and / or increased government regulation. However, these recommendations were not implemented, and the incorporation of original principles of a voluntary self-regulated code with low cost dispute resolution procedures was not seriously considered.

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

Recommendations

There is evidence suggesting that the ABA and hence the bank CEO's have acted to retain control over the compliance procedures that would require the banks to deal fairly and openly with customers, including small businesses and farmers.

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

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FORWARD

Fairness of Bank / Customer Relationships in Australia

This report has its genesis in submissions sent to Jan McClelland on 11 March 2008 by the CCMC members. The CCMC its members noted in their submissions 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 CCMC's unpublished constitution. This imposed qualifications and restrictions on the CCMC members. The CCMC members, stated that their '*firm view is that the constitution is problematic*'.

The CCMC expressed views that their powers were inappropriate and inconsistent with their advertised role and did not reflect the unworkable practices. The McClelland Report was published following these submissions and the CCMC's previous years' Annual Report, which 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, the CCMC stated they had '*yet to receive a complaint from a small business*'.

1981- Campbell Committee

In 2009, the Council of Small Business Organisation of Australia (small business councils), which represented 2.4 million small businesses accepted that the code was *problematic*. The small businesses saw deregulation introduced following the 1981 Campbell Committee and the improved standards of customer protection recommended in the Martin Committee's Report in 1991.

Banks '*HI-JACK*' Code

This report looks at the Richard Viney 2001 review which provided the first sign of the banks imposing lopsided principles. In his report, Viney, without regard to community

interests, defines 'dispute' narrowly to mean '*a complaint by [customers] in relation to a banking service'*.

Despite Richard Viney's initial recommendations to the contrary, the 2003 Code constricted the definition of '*banking service*' as a '*financial service or product'*. The recommendations are later used by banks to limit their dispute resolution responsibilities in the code, and to only investigate complaints in relation to a '*financial service or product*'.

Banks 2004 Constitution

The 2003 ambiguous wording of dispute didn't go far enough with the appointment of the CCMC in 2004. The 2004 Code was varied slightly to incorporate the unpublished constitution, so it could be used by bank CEO's to impose restrictions on the newly appointed CCMC members. In this one step, banks overturned the CCMC's powers, independence and authority and highlighted the need for banking ethics.

Whistle-blowers: 'In-The-Know'

This reports sets out how Jan McClelland was commissioned to review the modified 2004 Code as required under clause 5.

On 11 March 2008, the CCMC, in their role as compliance monitors, acted as whistle-blowers. They noted the inconsistencies between the bank's CEO's unpublished constitution and their code duties. Also in 2008, Viney was appointed by the CCMC to review its activities as set out in clause 34.

Throughout this period, the bank CEO's continued to administer and fund the ABA, and it continued to publish PR media statements promoting the code's high-standards. An audit of the ABA's media goes beyond the purpose of this report. However, there are many instances post February 2004 when the banks used media to perpetuate myths. These include statements that the code is a binding agreement; it protects individuals and small businesses; the CCMC is independent, and subscribing banks must comply with

high-standards, and so on. The constitution, drafted twelve years ago, and known to few others than the banks and the Financial Ombudsman Service (FOS), suggests that Don Argus' statements in 1993 were reflective of a banking culture and, in hindsight, prophetic.

Re-Inventing Martin Principles

This report suggests a need for legislation to be reviewed, so 'fit and proper' governance is applied to self-regulated voluntary codes to ensure they are properly administered. In banking, this affects 24 million Australians and 2.4 million small businesses. Under these circumstances, the modified code should not have been weakened by a constitution that meant the CCMC cannot '*investigate and make a determination on any allegation by any person that a bank has breached the code'* as noted in clause 34(b)(ii).

In 1991, the Martin Committee Review recommended banks appoint independent monitors to ensure that complaints handling is a '*cheap, speedy, fair and accessible alternative to traditional Courts'.* These principles were undermined by banks in 2003, and disbanded by the banks CEO's from 20 February 2004 with the constitution.

It is unclear whether the banks' ever intended the CCMC to be independent or for the code to be a contract. If they did, then the constitution that sits under the CCMC suggests banks acted in bad-faith by inviting customers to sign unfair-contracts. If they did not, then the bank's contract was misleading, and the ABA's promotion of high principals was untruthful and false.

The Banks Have Options

This report, published in December 2012, allowed subscribing banks to reconsider their practices and introduce fair banking practises. If the Martin Committee's principles were adopted, and the independent code reviews effective, then the defects caused to the code by the constitution would have been addressed in recommendations provided to the ABA in 2005.

The current review should determine whether banks:

> Misled the public by publishing, adopting and promoting principles in the 2004 Code that were potentially misleading;
>
> Withdrew the CCMC's powers to investigate and report on banks duties to have appropriate internal dispute resolution procedures.
>
> Appointed the CCMC members without limiting their powers to investigate 'any' complaint by 'any' person regarding code compliance.
>
> Undermined, in 2004, the CCMC's independence, transparency and fairness, in carrying out code duties.
>
> Allowed bank CEO's to act as a 'cartel-like' body to vary code principles and withdraw warranty-like consumer protection; and
>
> Breached 'fit and proper' duties of banks, by failing to rectify concerns noted in the CCMC's 11 March 2008 submission.

This report is designed to be a catalyst for legislators to revisit the Martin Committee's principles and to reconsider the banks motives. The motives include whether the banks sought to obtain financial advantage by requiring their individual and small business to use the courts, at their discretion. The report also sets out the importance of the code as being a legally binding agreement between banks and customers, to determine whether banks had breached their contract.

The report sets out the significant differences between statements made by the subscribing banks and those made by the ABA in its PR, which relate to the contractual basis of the code. It concludes that:

> '***If the code <u>is</u> a contract***' then the overriding powers of the constitution that sits under the CCMC would seem to have been introduced by the bank CEO's in 2004 for the purpose of obtaining a financial advantage. On the other hand,
>
> ***'If the code <u>is not</u> a contract'*** then statements made by the ABA on behalf of the subscribing bank CEO's should be investigated by Federal regulators as they appear misleading and deceptive.

This report suggests that ***one way or another*** customers' have been disadvantaged.

AUSTRALIAN BANKERS'

PROBLEMATIC CODE OF PRACTICE[1]

INTRODUCTION

The Code of Banking Practice (the code) which has evolved during the past 20 years was intended to balance an unequal playing field between highly resourced banks and the banks customers, but has somehow become the exclusive tool of the banks.

This first part of the review charts the historical development of the code. The review examines relevant documents, including the Campbell Report of 1981, Martin Report of 1991, the first code published in 1993, Wallis Report of 1997, Richard Viney's Report of 2001, the revised 2003 and modified 2004 Codes, the 2005 ANU FEMAG Report and Jan McClelland's ABA Report and the CCMC's Richard Viney's Review in 2008. These reports navigated the unchartered waters since 1991 and allowed banking codes to impair the relationship between banks and customers.

Purpose of Report

This report demonstrates the inability of community groups and consumer advocates to protect the public, due to lack of controls by regulators, which include fragmented and underfunded consumer bodies, and banks that seem addicted to increasing their powers and financial rewards.

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

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

Part 2: Explains how banks wrestled for control of consumer protection from legislators and regulators, taking advantage of decisions by governments since 2001 that have not addressed the problems associated with self-regulation.

Customer protection is less important to banks than profits. The banks convinced the legislators and regulators to allow them to 'self-regulate' codes, which did not include effective dispute resolution mechanisms. The introduction and prominence of voluntary self-regulated codes opened the door, in 2003, to problematic banking practices.

The body charged with authority for determining the application of the code was the bank CEO's that acted in a '*cartel-like*' way to further their own interests. This has been possible due to the less than independent CCMC members, co-appointed by banks and the FOS, both with access to the unpublished constitution.[2] This allowed banks to promote standards of practice that were problematic and misleading.

This report suggests that high-principles in the 2004 Code, intended to protect customers from mischievous banks, and included 250 clauses and sub-clauses that were meaningless.

The regulators would have been briefed on the revised code when it was published by the ABA in 2003. John McFarlene, ANZ's Chief Executives the ABA's Chair[3] and Gail Kelly St George Bank's, CEO, was the ABA's Deputy Chair.[4] It is difficult to determine who masterminded the codes published by the ABA in 2003 and 2004. However, it seems bank CEO's remained confident, as to the practices introduced by the codes, which remain substantially unchanged today.

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

[3] 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.

[4] 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

PART 1

ARCHITECTS OF THE CODES

When the Campbell Committee Report was published in 1981 Malcolm Fraser[5] was Prime Minister and John Howard[6] was Treasurer.

It was a seismic shift in Australian banking, and the sector went through rapid expansion during the following decade. With this expansion 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'[7]. The recommendations of the report made a case for the adoption of a Code of Banking Practice.

Members of the Martin Committee (1991)

- Stephen Martin (Chairman)[8]
- J.N. Andrew
- R.A. Braithwaite
- R.I. Charlesworth

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[5] 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

[6] 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/

[7] Inquiry into banking and deregulation, House of Representatives www.aph.gov.au/house/CCMC/reports/1991, accessed on 29 December 2009

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

- 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.[9]

In 1990, when the Martin Committee was appointed to investigate banking practices, Bob Hawke[10] was Prime Minister. When the report was considered by the parliament, Paul Keating[11] was Prime Minister. During that period, Paul Keating, and later John Dawkins[12] were Federal Treasurer's.

In late 1991, a government task force was set up to draft a code, with input from the banks, consumer groups and government agencies. However the final version of the code was undertaken by the ABA. There were glaring differences between the task force's recommendations published 27 November 1991[13] and the ABA's 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 banks, government should introduce co-regulation through a national

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[9] Ibid, xiii
[10] Mr Bob Hawke was Prime Minister of Australia between 11 March 1983 and 20 December 1991
[11] Mr Paul Keating was Federal Treasurer of Australia between 11 March 1983 and 3 June 1991 and Prime Minister of Australia between 20 December 1991 and 23 April 1996.
[12] Mr John Dawkins was Federal Treasurer of Australia between 27 December 1991 and 22 December 1993.
[13] Standing Committee on Finance and Public Administration tabled '*A Pocket Full of Change Report'.*

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

Members of the Wallis Committee (1997)

- Stan Wallis (Chairman)[14]
- Bill Beerworth[15]
- Prof. Jeffrey Carmichael[16]
- Ian Harper[17]
- Linda Nicholls[18]

Following the Wallis Inquiry, the government introduced a series of statutes establishing key industry regulators, the ASIC, APRA, and later, the ACCC. Each had responsibilities to enforce provisions of the banks self-regulated codes, and other regimes that were supposed to result in superior consumer protection for individuals and small businesses.

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[14] 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.
[15] Mr Beerworth is a solicitor and merchant banker and is Principal Partner of the corporate and financial advisory firm, Beerworth & Partners Limited.
[16] 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.
[17] 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.
[18] 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 Parties

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…[19] It was formed in 1959 by virtue of the Reserve Bank Act 1959.[20] 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.'[21]

The RBA Board Members 1995 to 2003

1. Mr Frank Lowy (member since 1995; re-appointed 2000)[22]
2. Ms Jillian Broadbent (since 7 May 1998 and until 2003)[23]
3. Mr Donald McGauchie (appointed March 2001)[24]
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)[25]

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[19] Reserve Bank of Australia, Our Role <http://www.rba.gov.au/about-rba/our-role.html>, accessed on 2 March 2010
[20] Reserve Bank of Australia, A Brief History <http://www.rba.gov.au/about-rba/history/index.html>, accessed on 2 March 2010
[21] Reserve bank of Australia, Accountability <http://www.rba.gov.au/about-rba/accountability.html> at 2 March, 2010
[22] 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
[23] Media release: "Reserve Bank Board Appointment", 28 April 1998; Treasury portal press releases; www.ministers.treasury.gov.au, accessed on 27 February 2010
[24] 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
[25] 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

8. Mr R F E Warburton
9. Prof. Warwick McKibbin (Appointed July 2001)[26], and
10. Dr Ken Henry (Noted as being part of the 2001 board).[27]

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 have included:

1. Mr David Knott (Chairman from 18 November 2000[28]; Deputy Chairman 1 July 1999[29])
2. Ms Jillian Segal (Member since October 1997, Deputy Chairman from 18 November 2000[30] until 30 June 2002) [31]
3. Mr Alan Cameron
4. Mr Peter Day (Deputy Chairman until January 1999)[32]
5. Prof. Berna Collier (5 November 2001 – 2004)[33]

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[26] 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
[27] Ibid
[28] 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
[29] 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
[30] Ibid
[31] Ms Segal is resigning from this position in order to take up a position as a member of the Dawson CCMC; 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
[32] 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
[33] 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

Prior to 2001, this body was called the Australian Corporations and Financial Services Commission[34], 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.'[35]

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.[36]

Australian Prudential Regulation Authority (APRA)

The APRA was established and currently oversees the prudential regulation of authorised deposit-taking institutions, insurance companies, and superannuation funds.[37] It was created as a statutory authority on 1 July 1998.[38]

Board members (since May 2000) have included:

1. Dr Jeff Carmichael (Chair) (appointed 17 March 2008 [39] confirmed 29 June 1998[40])
2. Mr Graeme Thompson (CEO) (appointed 17 March 2008[41] confirmed 29 June 1998[42])
3. Mr Alan Cameron (representative of ASIC)[43]

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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)

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

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

[36] 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

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

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

[39] Ibid

[40] Media release: "Appointments to the Australian Prudential Regulation Authority"; Treasury portal press releases; www.ministers.treasury.gov.au, accessed on 27 February 2010

[41] Ibid

[42] Ibid

[43] Ibid

4. Mr Ian Macfarlene (representative of the RBA)[44]
5. Dr John Laker (representative of the RBA)[45]
6. Mr Donald Mercer (appointed June 1998 for a 5-year term)[46]
7. Prof. David Knox (appointed June 1998)[47]
8. Ms Marian Micalizzi (appointed on 10 May 2000)[48]
9. Dr Robert Austin (appointed June 1998[49] until before May 2000)
10. Mr Rod Atfield (appointed August 2001 until 2006)[50]

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.'[51]

ACCC Commissioners (from 1997 to 2002)

1. Prof. Allan Fels (Chairman July 1999 until 30 June 2003)[52]
2. Mr Allan Asher (Deputy Chairman July 1999)
3. Mr Sitesh Bhojani (from 10 November 1999)[53]
4. Dr Tom Parry (November 2000 until 6 June 2005)[54]

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[44] Ibid
[45] Ibid
[46] Ibid
[47] Ibid
[48] 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
[49] Ibid
[50] 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
[51] ACCC, What we do <http://www.accc.gov.au/content/index.phtml/itemId/54137> at 2nd March 2010
[52] 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
[53] 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
[54] 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

5. Mr Alan Tregilgas (November 2000 until 31 March 2004)[55]
6. Mr Ross Jones (From 4 June 1999 until June 2004)[56]
7. Mr John Martin (From 4 June 1999 until June 2004)[57]
8. Ms Teresa Handicott (From 4 June 1999 until June 2002)[58]
9. Ms Rhonda Smith (From 4 June 1999 until June 2002)[59]
10. Mr Don Watt (From 4 June 1999 until June 2002)[60]
11. Mr Warwick Wilkinson AM (From 4 June 1999 until June 2002)[61]
12. Prof. Doug Williamson (From 4 June 1999 until June 2002)
13. Mr Graham Scott (From 4 June 199 until 1 April 2001)[62]
14. Mr Andrew Reeves (From 4 June 1999 until 31 December 2001)[63]
15. Mr Paul Bexter (from 4 June 1999 until 30 June 1999)
16. Dr David Cousins (from 14 July 1999[64] until 14 June 2002[65])

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[55] Ibid
[56] 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
[57] Ibid
[58] 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
[59] Ibid
[60] Ibid
[61] Ibid
[62] 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
[63] Ibid
[64] 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
[65] Media Release: "ACCC Appointment", 12 June 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010

17. Ms Yasmin King (From 27 October 1998 until 2001)[66]
18. Ms Jennifer McNeill (22 July 2002 – 2007)[67]
19. Mr Rod Shogren (May 1997 until 29 April 2002)[68]
20. Mr Graeme Samuel (Dep Chair 10 October 2002[69] however majority vetoed it[70])
21. Mr Ed Willett (nominated 10 October 2002 and later confirmed)[71]

The Bank People

Australian Bankers Association (ABA)

From 1997-2002, the NAB's CEO was Frank Cicutto[72]. The ABA Chief Executive, Jeff Oughton[73] had replaced Tony Aveling on April 2000[74] Shortly after, on 12 May 2000, the ABA appointed Richard Viney to conduct a review of the first code. [75]

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[66] 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
[67] 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
[68] Ibid
[69] 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
[70] Media Release: "ACCC Appointments", 12 November 2002, Treasury Portal: Press Releases www.ministers.treasury.gov.au, accessed on 23 February 2010
[71] 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
[72] 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*
[73] 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
[74] Media Release: "Tony Aveling to Retire" , 11 April 2000, ABA Press Releases, http://www.bankers.asn.au/Tony-Aveling-to-Retire/default.aspx
[75] Richard Viney, Issues Paper (2001) 1. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010

Senior ABA Board Members during this period

1. Mr Frank Cicutto, CEO and Managing Director NAB (1999-2001)[76]
2. Mr David Murray, Managing Director CBA (Chairman elected on 23 May 2001)[77]
3. John McFarlene, Managing Director ANZ (Chairman elected 17 June 2003)[78]
4. Mr Ed O'Neal, Managing Director St George Bank (Deputy Chairman under Cicutto and re-elected under Murray)[79], and,
5. Ms Gail Kelly, CEO and Managing Director St George Bank was Deputy Chair from 20 February 2002[80]

ABA Chief Executive Officers 1997-2002

1. Mr Tony Aveling until 2000
2. Mr Jeff Oughton, acting CEO from April 2000 until January 2001
3. David Bell

ABA Banks Members of 2002 included

1. Adelaide Bank
2. ANZ
3. Bank of Western Australia
4. Bank of Queensland
5. Bendigo Bank
6. Citibank Limited

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[76] Frank Cicutto retired, thus an new Chairperson needed to be elected
[77] Media Release: "David Murray elected as new ABA Chairman", 23 May 2001, www.bankers.asn.au accessed on 15 February 2010
[78] 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.
[79] 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.
[80] 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

7. Commonwealth Bank
8. HSBC Bank
9. National Australia Bank
10. St George Bank
11. Suncorp - Metway Limited
12. Westpac Banking Corporation

Review 1993 code: Issues and Promises

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

CHAPTER I

DEREGULATION

The Campbell Committee made an inquiry into the Australian financial system and detailed its findings and recommendations in September 1981.[81] This report is significant for the strong argument that the CCMC made for various forms of banking regulation.[82] In the report, the Campbell Committee outlined the advantages of a protective scheme of co-regulation. This was 'self-regulation but with limited government involvement to ensure that the desired prudential objectives are achieved effectively and equitably.'[83]

Definitions and Background

Deregulation meant the absence or a low level of government involvement with little or no formal supervision. Self-regulation meant the industry to police its own ranks. The hybrid of co-regulation takes features of both government regulation and self-regulation.

Self-Regulation and Co-Regulation

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 regulation government intervention.'[84] Due to shortcomings of self-regulation, the Campbell Committee expressed its preference for co-regulation[85] and more direct government participation. Among the signals was the enactment of the Securities Industry Acts. The shift increased regulation of takeovers and other market practices, where the

[81] CCMC of Inquiry, Australian Financial System: Final Report of the CCMC of Inquiry. (September 1981)
[82] Ibid, 1
[83] Ibid, 290
[84] Ibid, 1
[85] Ibid

industry became responsible for ensuring the enforcement of requirements, set under legislation or by the industry itself.[86]

[86]Ibid, 366

CHAPTER II

A POCKET FULL OF CHANGE

Ten years after the Campbell Committee 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 the Campbell Committee recommendations.[87] 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.[88] The Martin Committee's intentions for the introduction of a code of banking practice 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[89]

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[87] 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

[88] 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

[89] 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

Fairness an Over Arching Principle

The idea of fairness in banking for consumers struck a chord with the Martin Committee in its 1991 report and formed the overarching principles to its recommendations. According to the Martin Committee, the introduction of a code of banking practice in Australia was 'a way of remedying many of the unfair practices prevalent in banking.'[90]

Specifically, transparency would be fostered as a 'code would provide a single source of information for a customer to refer to. More significantly, any code will include provisions designed to ensure customers' are adequately informed of the full details of the products they are about to use.[91] Also, 'negotiating a code between the banking industry, government and consumer organisations will provide an opportunity to ensure that all its provisions are fair.'[92]

High Cost Litigation / Delaying Tactics - Abuse of Process

There were 'significant power imbalances' between customers and 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 banks may be reluctant to admit failures in those systems;

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[90] Ibid, 354
[91] House of Representatives Standing Committee on Finance and Public Administration, *A pocket full of change: banking and deregulation,* (November 1991), lvi.
[92] Ibid

> 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.[93]

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.'[94]

Banking Code as Contract, 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.[95]

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;
>
> Take into account the need for a workable and efficient payments system;

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[93] Ibid, 393-394, para 20.64
[94] House of Representatives Standing Committee on Finance and Public Administration, *A pocket full of change: banking and deregulation*, (November 1991), 264, para 15.83.
[95] Ibid, 382-383, para 20.9

Encourage product development; to encourage fair market competition;

Ensure bank customers are aware of their rights and responsibilities;

Ensure that banking contracts are not one-sided.[96]

Disclosure Requirements

The Martin Committee observed how the banks went about disclosing information 'when it suits and denying access when it does not.'[97]

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.[98]

Dispute Resolution

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.[99]

The ABIO believed that internal systems were inadequate and/or consumers lacked confidence in them or knowledge about them.[100]

The Martin Committee agreed with the Ombudsman's recommendation that 'improving communications between banks and their customers will help to avoid potential disputes.'[101]

This also furthered the argument for contracts to be written in 'plain language.'[102]

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[96] para 20.13 at 383 - 384
[97] Ibid, 441, para 21.108
[98] Ibid
[99] Ibid, 403-404, para 20.119
[100] Ibid
[101] (20.68) at 395
[102] (20.69) at 395

Monitoring: Reserve Bank of Australia (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.[103] It recognised 'the value in having one agency at the Commonwealth level with the primary responsibility in relation to consumer banking issues.'[104] 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 TPC[105] was the Martin Committee's choice for the monitoring body.[106] 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[107]

The TPC was not, however, asked to monitor compliance with the 1993 Code. That job went to the APSC[108], a non-statutory government agency chaired by the RBA.[109] 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.[110]

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[103] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 390, para 20.50.
[104] Ibid, 393, para 20.60
[105] Add info about the first TPC (members), what the TPC's role is
[106] 390, 20.50
[107] Ibid, 393, para 20.61
[108] Add info about the APSC
[109] code of Banking Practice (1993), Preamble
[110] Ibid

Overarching Regulation

The Martin 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 role in ensuring standards of fairness in newer products and areas of uncertainty.[111] 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 banks and customers.'[112]

Self-Regulation: Not Appropriate

The Martin Committee did not believe the banks should be left alone to form their own code. In the committee's words, '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.'[113] 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.[114]

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[111] Ibid
[112] Ibid, 383, para 20.12
[113] Ibid, 389, para 20.42
[114] Ibid

Code Sketched Out

On 26 June 1992, the government endorsed the development of the Code of Banking Practice that the Martin Committee recommended.[115] 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.[116] There needs to be an acceptable balance of interests, and an appropriate code would help to achieve this.[117]

Global Banking Code Reviews

The 1991 Martin Committee stated that a voluntary code of conduct for banking institutions was required to protect customers in disputes with banks[118]. 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[119].

Martin's Committee 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[120].

The CCMC Initiated

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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[115] 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.
[116] Ibid, para 5.5
[117] Ibid, para 5.5
[118] Ibid, 388, para 20.40
[119] Ibid, 394, para 20.65
[120] Ibid, 509-544

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

CHAPTER III

IMPROVING REATIONSHIPS

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 CCMC whose duty it is to monitor compliance with the code and to investigate 'any alleged breach of the code'*[121] *by any person.*

National Australia Bank's CEO, Mr Don Argus, however expressed disappointment with the *lack of a better understanding of the principles of commercial and prudential law already in place.*[122] 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.* [123]

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,[124] this

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[121] McCracken and Everett, Part 3, C9, 266 [9.010]
[122] Ibid.
[123] Ibid.
[124] 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

relationship will be governed by general principles of contract law. These assume 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.

Banks Contractual Duty to Customers

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 prohibiting misleading and deceptive conduct and unconscionable conduct in both the *Trade Practices Act 1974* (Cth)[125] and the *Australian Securities and Investments Commissions Act 2001* (Cth)[126] have increasingly been litigated in recent years.

In addition, many terms and conditions have been implied into such contracts by courts,[127] with reference to the common law and general legal principle, and on the basis of business efficacy[128] or necessity.[129] The courts will approach such cases with differing presumptions depending on the nature of the transaction.

'Duty of Care'

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

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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).

[125] ('TPA'). Pts IVA, V

[126] ('ASIC Act'). Pt 2, Div 2.

[127] 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).

[128] See *Joachimson*, 121, 129 relying on *The Moorcock* (1889) 14 PD 64.

[129] 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

requested to advise, a duty to do so with due care and skill will likely arise,[130] but the less vulnerable the client,[131] and the more tenuous the relationship with financier, the more difficult it will be to establish a duty.[132]

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 the difficulty of complainants being dealt with by the banks is the fact that, for them to establish a legal claim for breach of duty of care against banks, they must go through an arduous process. This requires customers to obtain 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 handle.

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. 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 …".[133]

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[130] See for example, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 475-6.
[131] Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515
[132] Essanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg) (1997) 188 CLR 241, 252 (Brennan J), 256-7 (Dawson J)
[133] *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

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 *TPA 1974* (Cth) at the time that the 1993 code was created, but were later transferred to the *ASIC Act* (Cth).[134] These obligations are much broader than the obligations that common law imposes upon banks and financiers. Interestingly, and unusually, the general law has little role to play in interpreting these statutory protections.

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[135] also give a wider scope for damages to the consumer than under case law.

Response: Code of Banking Practice

The code is also a legally binding document, as it becomes an implied contractual provision in the relationship between the bank and its customer.[136] 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.

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[134] s 12DA
[135] s 12GM.
[136] According to the ABA media statements, 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>.

Institutional Integrity

The 1993 Code was based on the following principles[137]:

(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;

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

With these principles the 1993 Code was intended to:[138]

(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 is achieved, promote informed and effective relationships between banks and customers;

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.[139] This clause is still in existence today.

The code imposed the following terms and conditions in regards disclosure:

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[137] Ibid, Principles
[138] Ibid, Objectives
[139] Ibid, Cl 1.3

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;

Unstable Foundations: Revised 2003 Code

(a) Consultation Process

The Martin Committee report deemed it highly inappropriate for banks to have 'exclusive responsibility for setting standards of banking practice.'[140] While a government task force drafted the code in consultation with banks, consumer groups and government agencies,[141] the final draft was 'one whose carriage had been undertaken by ABA itself.'[142] 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

The report recommended an increase in the monetary threshold of the ABIO Scheme.[143] While this scheme provided a free dispute resolution service that operated on the basis of 'fairness and good banking practice in all the circumstances'[144] rather than exclusively

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[140] Ibid, Martin Report, para 20.42
[141] Ibid, para 5.7
[142] Ibid, R Viney, Issues Paper (2001), 1.
[143] Ibid, Recommendation 79
[144] Ibid 396, para 20.79

legal criteria, the ABIO limited its own jurisdiction to hear disputes[145] by imposing a low financial benchmark that severely restricted its capacity to resolve disputes between banking and financial institutions and their clients.

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,[146] the reasons for the outcome of the internal process and possible further action that could be taken by the customer if it failed to resolve the issue:[147]

> 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.

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[145] For example, they would only process disputes regarding property and financial transactions below $250,000 and will not only process disputes below $280,000.
[146] Ibid, cl 20.2
[147] Ibid, cl 20.3

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 are unable to expend resources litigating contractual disputes in the courts 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.[148]

Through this process banks could choose which complaints they refuse to resolve. At the same time, external and impartial processes provided for by the code upon failure of the IDR mechanism[149] was severely restricted.[150] The duty to monitor compliance with the code at this stage was given to the Australian Payments System Council (APSC).[151]

(c) Public Disclosure

Finally, though the 1993 code also embodied the principle of disclosure of terms and conditions.[152] It did not recognise any right to information beyond that.

Weak Regulatory Model

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

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[148] 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
[149] Ibid, Cl 20.4
[150] Now the Financial Ombudsman Service (FOS)
[151] code of Banking Practice (1993), Preamble
[152] code of Banking Practice (1993), Cll 2.1,2.2

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;

iv. Adequate dispute resolution and complaint handling;

v. Disclosure and the right to information; and

vi. Ongoing dialogue and review.

It was acknowledged that this was too narrow in application.[153]

[153] Ibid, 23

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.[154]

Inquiries and Recommendations

Wallis Committee Report

The Wallis Committee 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,[155] so that a limited number of *government* regulatory institutions were needed to monitor the market regulators themselves.[156]

Finding Balance: Towards Fair Trading

In the report, several serious business conduct issues specifically related to small business finance focused entirely on the conduct of banking and finance institutions.[157]

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[154] 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

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

[156] 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.

[157] Ibid, page 138

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.[158] 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 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.

Government Response

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, 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 consumer protection and prudential law. Due to the

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[158] Finding Balance: Towards Fair Trading in Australia, May 1997, page 137

fundamental flaws with establishing Acts, and a lack of resources and political will, they have been left, with no real enforcement powers within their own jurisdiction.

Financial Sector Reform Act 1998 (Cth)

ASIC was designed to oversee the enforcement of the system of market regulators,[159] 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):[160]

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.

APRA Act 1998 and Amendment Act 2003

In the APRA 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.[161] While members are required to disclose any interests that could conflict with the proper performance of the functions of their office,[162] 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.[163]

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[159]Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 (Cth), Section 1
[160]Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 (Cth), Section 10
[161] Ibid, s 17(3)
[162] Ibid, s 48A
[163] Ibid, s 48B(1)

ASIC Acts 1998 and 2001

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[164] discussed how ASIC sees itself as a regulator at a time of industry self-regulation:

ASIC then announced that it had stopped monitoring industry compliance as a result of the later 2003 Code[165] and later the establishment of an independent monitoring body, the CCMC.[166] 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.[167]

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,[168] ASIC clarified its role as being limited to working with the industry to develop or update codes, approving independent external dispute-resolution schemes

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[164] 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

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

[166] Ibid

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

[168] '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

and regularly liaising on a formal and informal basis with stakeholders who represent consumers' interests through a Consumer Advisory Panel[169] that met quarterly.

Amendments to Trade Practice Act 1974

The objectives of the taskforce were to reduce the regulatory burden on business, identify best practice and improve market outcomes for consumers.[170] 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 handling schemes'[171] and that the government recognised that there would be situations where 'industry self-regulatory schemes may need to be underpinned in legislation...'[172]

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 businesses are commonly unable to match 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".

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[169] 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

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

[171] Ibid

[172] Ibid,1

‘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 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.

The principal body responsible for ensuring the effective operation of the various codes is ASIC.[173] It can approve codes, sets standards for Internal Dispute Resolution (IDR), sets standards for and approve External Dispute Resolution (EDR) processes and bodies. These practices could 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 its powers

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.[174] With regard to these provisions, Federal Member for New England Tony Windsor asked the Minister answerable for ASIC:[175]

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[173] Ibid, 8

[174] ss 12AC-13HD.

[175] 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

CHAPTER V

UNBLEMISHED RECOMMENDATIONS

On 12 May 2000, the ABA appointed Richard Viney[176] to conduct a review of the 1993 code.[177] The Chairman of the ABA at this time was Frank Cicutto[178].

The newly-appointed Australian 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."[179]

Submissions were accepted from government agencies, consumer groups and banks. An Issues Paper with interim recommendations was then published, once submissions on the Issues Paper had been received, a Final Report with final recommendations was published.[180] Although there were differing views about what should be the appropriate monitoring body, its powers and the sanctions it could impose, the final recommendations of the report were adopted by ABA.

Inclusion: Small Business Customers

The 1993 Code applied only to individuals,[181] however in light of the extension of the coverage of the ABIO in July 1998, the review process considered the code. ASIC favoured

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[176] 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

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

[178] 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*

[179] 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

[180] R Viney, Final Report (2001), 17-18. http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.

[181] 1993 code, clause 1.1

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.[182] The Joint Consumer Submission (JCS) and the NSW Government also likewise favoured the extension of the coverage.[183]

Principle of Fairness

The 1993 Code did not contain a provision on fairness. The ABA initially resisted the idea on the grounds that it 'is a subjective concept that will vary from circumstance to circumstance.'[184]

Later, however, the ABA no longer objected to the provision on fairness[185] and Viney, recommended the provision 'We will act fairly and reasonably towards [our customers] 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.[186]

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 this process.[187] The Joint Consumer Submission (JCS), the Australian Consumers' Association (ACA), ASIC and the NSW Government objected to the lack of

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[182] R Viney, Issues Paper (2001), 20-21. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.
[183] Ibid, 21-22.
[184] R Viney, Issues Paper (2001) 16. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.
[185] R Viney, Final Report (2001) 25 http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.
[186] Ibid, 3
[187] R Viney, Issues Paper (2001), 25-27. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.

transparency and independence of the monitoring process under the 1993 Code.[188] For their part, the ABA acknowledged the necessity for change while 'avoiding inefficiency and disproportionate cost.'[189]

The regime complemented the internal and external dispute-resolution procedures for resolving individual disputes. ASIC stated:

> 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).[190]

The Australian Consumers Association (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. It 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

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[188] Ibid
[189] Ibid
[190] Ibid

> following customers' instructions in relation to account cancellation. A range of sanctions, underpinned by regulatory mechanisms, is essential for code credibility.[191]

The Joint Consumer Services (JCS) argued for sanctions, citing comparable codes such as the AAMI Customer Charter, which had a penalty provision. It stated:

> 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[174].

Code Compliance 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.'[192] Code reviewer Viney similarly wanted 'effective monitoring and sanctions.'[193]

In its final response, the ABA recommendations led to the establishment of the CCMC. It was the monitoring body however it only had a 'naming sanction for repeat offenders.'[194]

Dispute Resolution Procedures

The 1993 Code dealt with both internal dispute resolution (IDR) and external dispute resolution, also called alternative dispute resolution (ADR).[195] ASIC, the JCS and the ACA were however highly critical.[196] ASIC stated:

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[191] Ibid
[192] R Viney Final Report (2001) 27 http://reviewbankcode.com/pdfs/FinalReport.pdf viewed on 29 January 2010.
[193] Ibid, 28
[194] Ibid, 28-29
[195] 1993 code, clause 20
[196] R Viney, Issues Paper (2001), 105-107. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.

> 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.* [197]

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 with the obligation to make information on bank IDR processes available.[198] Richard Viney found wide variances in levels of compliance with the obligation to disclose information on bank IDR processes.[201]

It was further suggested by ASIC that internal dispute resolution processes be consistent with Australian Standard AS 4269-95[202] and that the code lay specific time periods for the completion of investigations and more detailed requirements for keeping complainants informed should disputes not be resolved within standard deadlines.[203]

Periodic Review: Forum for Exchange

The 1993 Code provided for a review every three years 'having regard to the views of interested parties,'[199] 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.[200]

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[197] Ibid
[198] Ibid
[199] 1993 code preamble
[200] R Viney, Issues Paper (2001), 30-31. http://reviewbankcode.com/pdfs/issues.pdf viewed on 29 January 2010.

Self-Regulation: Consumer Protection

Minister Hockey discussed the government's philosophy relating to consumers and reinforced policies stating that "Protection is the cornerstone of our philosophy"[201]. Hockey specified the four key elements of the government's thrust towards consumer sovereignty being[202]:

> Protection – consumers must feel sure the Government has in place a legal system able to protect them
>
> Choice – availability of a wide range of products and services
>
> 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
>
> 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 believed in the effectiveness of self-regulation, wherein it was the government's view that it would "deliver cheap and reliable ways to solve disputes and, above all, it is better for consumers..."[203]

After undertaking the review, the principles that underpinned the view that self-regulation works best were identified:[204]

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[201] Ibid
[202] Ibid
[203] 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
[204] 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

There has to be consultation between industry, consumers and government,

There is broader coverage within an industry,

There is effective procedure for resolving disputes with proper sanctions for, businesses that breached the scheme, and

The scheme needs to be regularly reviewed by an independent body.

The 2003 Code provided for the CCMC's function to monitor subscribing banks' compliance with the practices set out in the code and investigated breaches. The code stated the CCMC would 'monitor subscribing banks' compliance' and 'investigate and to make a determination on ***any*** allegation from any person that a code subscribing bank breached the code…'[205] This was however not possible due to the use of wriggle-words which limited the subscribing banks' duties and the CCMC's powers.

The bank CEO's and ABA were silent on drafting the ambiguous words in the revised code. It was also likely that the banks' constitution was also underway at this time. A few months later the banks CEO's introduced a private manuscript, the CCMC Association's Constitution. This new document would in time distance the bank customer relationship.[206]

Declarations: 2003 - 2004

During 2003 and 2004, the bank CEO's and ABA wanted consumers to believe that the revised codes published during this period represented high standards. They did this by stating:

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[205] code of Banking Practice 2003 cl 34(b)
[206] The CCMC provided evidence relied on for this review that the 'CCMCA' Constitution was already published by 20 February 2004

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."[207]

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.* [208]

The revised code builds significantly (higher standards than) the earlier edition (1993) and among the new provisions: small business is included for the first time.[209]

This [new] 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."[210]

Banks will submit to independent monitoring of compliance and if a bank has systemically or seriously breached the code it is liable to be publicly named."[211]

Each bank will lodge an annual report with the CCMC on its compliance with the code in much the same way as banks have done under the original 1993 code in reporting annually on compliance to ASIC.[212]

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

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[207] 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
[208] Ibid
[209] Ibid
[210] Ibid
[211] Ibid
[212] 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.

> Chairman of the independent CCMC for monitoring banks' compliance with the code. [213]
>
> The CCMC 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*.[214]
>
> The CCMC will be able to receive complaints from anyone who thinks that a bank has breached the code. The CCMC will have the power to investigate that complaint and decide whether a breach has occurred.[215]
>
> *Mr Blunn emphasised the independence of the CCMC which he believed had an important role in the broader structure of the governance arrangements of the banking sector*.[216]

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

All worthy principles - assuming the CCMC was in fact independent and the code was an enforceable contract - which later appears not to be the case.

On 14 May 2004, the bank CEO's and the ABA, published an amended code in 2004. At that time, the bank CEO's congratulated themselves on having a world-class, voluntary, self-regulated code. 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 CCMC was provided for in the code:

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[213] Ibid
[214] Ibid
[215] Ibid
[216] Ibid

> *The code makes provisions for an independent Code Compliance Monitoring CCMC* to investigate and monitor complaints about code breaches. All the ABA members who subscribe to the code have agreed that the CCMC may be empowered to conduct its own enquiries into a bank's compliance with the code. Any person may make a complaint to the CCMC about a breach of the code…[217]

The bank CEO's guaranteed the public that the 2004 Code grants and confirms existing rights to customers including: disclosure of fees and charges as well as changes to terms, fees and charges; privacy and confidentiality; and *complaints handling,* among others.[218] In fact, the bank CEO's and the ABA were at pains to promote a new modified contract bound by ethics, good faith, high-principles and honesty.

The banks 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*.'[219] Again, the ABA and the bank CEO's, were the architects of the modified 2004 Code, and doubled their declarations to the further improved principles.

Promises, Promises

In response, the ABA stated that '[it] 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.'[220]

The Chief Executive of the ABA repeated bank support, stating: '[W]e note and support the government's view that there needs to be greater consultation by the regulators within

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[217] 'code of Banking Practice Finetuned for Guarantors', 14 May 2004
[218] 'Frequently Asked Questions on the modified code of Banking Practice 2004', 18 October 2004

[219] Ibid
[220] Heather Wellard. 'ABA Welcomes Roundtable Consultations on Financial Services Reform Red Tape Reductions', 14 August 2006

the industry. The ABA supports... recommendation[s] that regulators should develop a wider range of performance indicators for annual reporting.'[221]

The ABA stated that: 'the code is a strong charter as *its provisions have contractual effect,* independent compliance monitoring is an important feature of a code if it is to be credible and seen as a value by bank customers.'[222]

Associates of Subscribing Banks

CCMC, Ombudsmen and Independent Code Reviewers

During recent years there have been several parties associated with the banks in their capacity as experts. These people include the CCMC members, the FOS, which appointed or co-appointed the CCMC and the independent industry experts who carried out important reviews of the code. These experts were generally either directly or indirectly funded by subscribing banks when assisting the banks to carry out statutory and contractual responsibilities.

Code Compliance Monitoring Committee

The CCMC's revelations appear later in this report however the monitors' submissions sent to McClelland on 11 March 2008 should not, under any circumstances, have been dismissed lightly. In fact, they may be the turning point that brought to light problems that the bank CEO's and the ABA had been covering-up since the modified 2004 Code was published.

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[221] Heather Wellard, 'Australian Bankers' Association Welcomes the Federal Government's Rethinking about Regulation', 13 April 2006

[222] Heather Wellard, 'Review of the code of Banking Practice', 21 December 2007.

From 1 April 2004 when the CCMC 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 its 31 March 2005 Annual Report, the CCMC noted:

> Whilst the code does not explicitly use the word 'independent' in describing the role of the CCMC, *its independence is implicit*. *The CCMC must act independently in discharging its role because it is essential if the code is to be taken seriously* and therefore be effective in achieving its purpose.[223]

The establishment of the CCMC was therefore alleged to be consistent with the industry's promise to provide a better service to customers. This was reiterated by the ABA Chairman and NAB's 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....'[224]

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

1. Anthony Blunn AO[225] was the CCMC Chairman from 17 November 2003 until January 2009[226]. He was *appointed jointly by the FOS and subscribing banks*.
2. Ian Gilbert[227] was the member with senior level banking experience and was replaced by Russell Rechner on 14 September 2004. Both were *appointed by the subscribing banks*[228].

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[223] CCMC 2005 Annual Report
[224] Heather Wellard, 'Federal Government and ABA Committed to Enhancing Australia as a Financial Services Centre', 22 July 2008.

[225] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on Tony Blunn AO
[226] Refer to the CCMC 2009 Annual Report
[227] 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
[228] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on Russell Rechner

3. David Tennant[229] was said to have relevant experience and knowledge to represent the banks' consumers and *appointed by consumer and small business members of FOS*.

[229] Refer to the CCMC 2004/2005 Annual Report (page 2) for further information on David Tennant

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.

When the revised code was published and adopted, ABA noted that John McFarlane (CEO, ANZ Bank) had replaced David Murray as its Chair[230] on 17 June 2003 and that Gail Kelly[231] (CEO, St George Bank) was Deputy Chair[232]. 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*** allegation from any person that a code subscribing bank breached the code…'[233] This was however not possible due to the use of wriggle-words which limited the subscribing banks' duties and the Committee's powers.

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[230] <http://www.bankers.asn.au/John-McFarlane-Elected-as-Australian-Bankers-Associations-New-Chairman/default.aspx> on 20 January 2010

[231] <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

[232] <http://www.bankers.asn.au/Citibank-MD-Les-Matheson-Elected-as-Australian-Bankers-Associations-New-Deputy-Chairman/default.aspx> on 20 January 2010

[233] code of Banking Practice 2003 cl 34(b)

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 CCMC's Association (the Association), a new body of the code subscribing bankers,[234] was intending to further vary the high-principles and practices in the code.

Revised Code Declarations

In 2003, the bank CEO's wanted it to be widely known by the public that after the revised code was published in 2003, the high standards 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* between the bank and the customer."[235]

> 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."[236]

> 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 [237].

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[234] The CCMC provided evidence relied on for this review that the 'CCMCA' Constitution was already published by 20 February 2004
[235] 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
[236] 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
[237] Ibid

The revised code builds significantly on the earlier edition (1993) and among the new provisions: small business is included for the first time.[238]

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."[239]

Banks will submit to independent monitoring of compliance and if a bank has systemically or seriously breached the code it is liable to be publicly named."[240]

Each bank will lodge an annual report with the Committee on its compliance with the code in much the same way as banks have done under the original 1993 code in reporting annually on compliance to ASIC.[241]

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 CCMC for monitoring banks' compliance with the code. [242]

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* [243].

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[238] Ibid
[239] Ibid
[240] Ibid
[241] 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.
[242] Ibid
[243] Ibid

> 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.[244]
>
> 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 [245].
>
> 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 independent and the code was an enforceable contract - which later appears not to be the case.

Modified Code (2004)

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 CCMC* 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

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[244] Ibid
[245] Ibid

> into a bank's compliance with the code. Any person may make a complaint to the Committee about a breach of the code…[246]

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.'[247]

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 to terms, fees and charges; privacy and confidentiality; and *complaints handling*, among others.[248] 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.*'[249] 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 Modified Code (2004)

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

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[246] 'code of Banking Practice Finetuned for Guarantors', 14 May 2004
[247] Ibid
[248] 'Frequently Asked Questions on the modified code of Banking Practice 2004', 18 October 2004

[249] Ibid

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.

The ABA's Board comprising the subscribing bank's CEO's on 20 June 2005 were:[250]

- 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)[251]
- Mr John McFarlene – ANZ[252] (appointed 20 June 2005)
- Mr Barry Fitzpatrick – Adelaide Bank (appointed 20 June 2005)[253]
- Mr David Liddy –Bank of Queensland (appointed 20 June 2005)[254]
- Mr John Mulcahy – Suncorp Metway Limited (appointed 20 June 2005)[255]
- 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[256]:

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[250] ASIC Historical Company Extract: Australian Bankers' Association Incorporated, on 1 September 2009
[251] CBA, Annual Report 2004
[252] Australia and New Zealand Banking Group, 2004 Annual Report
[253] Adelaide Bank Limited, Annual Report 2005
[254] Bank of Queensland Limited, Annual Report 2004
[255] Suncorp Metway Limited Group, Annual Report 30 June 2004
[256] ASIC Historical Company Extract: Australian Bankers' Association Incorporated, on 4 February 2010

- 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)
- 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.'[257]

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.'[258] 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.'[259]

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[257] Heather Wellard, 'Corporate Responsibility Should be Voluntary Not Mandated', 14 October 2005

[258] 'Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Responsibility', 11 October 2005

[259] Heather Wellard, 'Financial Services Reform Proposed Refinements to Benefit Customers', 2 May 2005

Modified Declarations (2004)

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.[260] It was a courageous declaration because the same Bankers had prior-knowledge of the CCMC 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*** complaint by any person[261].

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

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[260] 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

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

If this was the case, why did John McFarlene, ABA Chair and Les Matheson, Deputy Chair [262](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."[263] 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.[264] [It] establishes the banking industry's key commitments and obligations to its individual and small business customers on standards of practice.[265]
>
> 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.[266]

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 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.

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[262] 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
[263] 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.
[264] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010
[265] Ibid
[266] 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.

The code also provides for *high standards of disclosure for prospective guarantors before they agree to guarantee someone else's debt to the bank*… banks will provide important and relevant information for prospective guarantors before they commit to guaranteeing someone else's debt.[267] The modifications will fine tune the code to ensure that prospective guarantors receive appropriate and relevant disclosure. [268]

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 [269]. 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*. The final decision on a breach of the code is made by the committee in a written determination to the complainant and the bank. [270]

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* [271]. The code gives customers rights that the bank must observe. These rights cover ... complaints handling [272] [and]… makes provision for an

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[267] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010
[268] 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.
[269] 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.
[270] Ibid
[271] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010
[272] Ibid

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.[273]

Each bank will lodge an Annual Report with the Committee on its compliance with the code.[274]

d) Bankers' practice corporate responsibility:

Banks are going on record with major public commitments to improve reporting and consultation about their social obligations … 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. [275]

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

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[273]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.
[274] 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.
[275] 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.

discharge their authorised functions to help the customer choose banking products and services. [276]

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.[277]

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.278 Your bank will give terms and conditions to you either before or as soon as practicable after, you take up an ongoing banking service[279].

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.[280]

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[276] 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.
[277] 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
[278] 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.
[279] September 2004, Code of Banking Practice Fact Sheets: www.bankers.asn.au/Default.aspx?ArticleID=906, accessed on 6 November 2010
[280] 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.

> 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.[281]

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'[282] as set out in the duties of ADI directors.

The bank parties and their senior managers[283] 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'[284] 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[285].

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 managers, 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

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[281] 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.
[282] Prudential Standard APS 510 Governance, section11AF of the Banking Act 1959
[283] Prudential Standard specifies senior management responsibilities ss5(1) of the Banking Act 1959
[284] Prudential Standard APS 520 Fit and Proper, section11AF(1)(a)(b) of the Banking Act 1959
[285] Prudential Standard APS 530 Fit and Proper Auditors section 17(2)9B) of the Banking Act 1959

code. The bank CEO's also made a commitment to ensure that their staffs were trained so that they could 'competently and efficiently discharge their functions under the code[286], first having 'adequate knowledge of the provision of the code'.[287]

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; DISCLOSURES: THE PRINCIPLES OF CONDUCT: DISPUTE RESOLUTION AND MONITORING AND APPLICATIONS AND DEFINITIONS."[288]

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.

BANK DECLARATIONS

1. National Australia Bank (31 May 2004) [289]

The NAB was transformed in 2004 with events that year being the catalyst for renewal of its Board[290]. Since 2004, a total of eight new directors have been appointed and the bank published is commitment to meeting high standards of corporate governance.

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[286] code of Banking Practice 2004 cl 7(a)
[287] Ibid cl 7(b)
[288] This is a summary only set out in the contents page of the 2004 code of Banking Practice
[289] '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
[290] 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.

Its Corporate Social Responsibility Report[291] 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* and will provide high quality, relevant and credible information that contains a complete picture of the bank's 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[292]:

- 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)

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[291] National Australia Bank's Corporate Social Responsibility Report 2005
[292] 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. Westpac Bank (1 June 2004) [293]

Westpac 2004 Annual Report[294] 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*. 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.

WBC 2004 Directors:[295]

- Leon Davis (Chairman since 2000)

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[293] Above n 22, 'Dates of Adoption'
[294] Westpac's 2004 Concise Annual Report
[295] Westpac Banking Corporation, Annual Financial Report 2004

- Gordon Cairns
- David Crawford
- Hon. Sir Llewellyn Edwards AC
- Ted Evans AC
- Carolyn Hewson
- Helen Lynch AM
- Peter Wilson

3. St George Bank (1 June 2004) [296]

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*.

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.

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.[297]

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[296] Above n 22, 'Dates of Adoption'
[297] St George Bank's 2004 Annual Report and Corporate Governance Statement

St George 2004 Directors[298]

- 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. Commonwealth Bank (22 July 2004) [299]

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 and integrity"* 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

[298] St George Bank, 'Formula for Success' Annual Report 2004
[299] Ibid

and ethical responsibilities and reporting instances of fraud, corrupt conduct and mal-administration or substantial waste.

Commonwealth Bank 2004 Directors:[300]

- 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
- Frank Swan
- Barbara Ward

5. ANZ Bank (16 August 2004)[301]

ANZ's 2004 Annual Report[302] 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.

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[300] Commonwealth Bank, Concise Report 2004, 12-15
[301] Above n 22, 'Dates of Adoption'
[302] Australia and New Zealand Banking Group, Annual Report 2004 http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzQzNDAyfENoaWxkSUQ9MzMwMDE4fFR5cGU9MQ==&t=1

The report notes the directors and employees overriding responsibility is to *act honestly, fairly, diligently and progressively, and in accordance with the law*. 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

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

RESULTS DRIVEN

Given the high-principles in the code, published by the ABA for subscribing banks, there is little evidence that the CCMC was working effectively.

CCMC and FOS Results 2004 – 2005:[303]

In 2004-05, the CCMC closed 10 cases with 1 determination.[304]

By contrast, FOS closed 3,949 cases referred by customers of subscribing banks in 2004.[305] 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.[306]

The banks paying for complaint services in 2004 were faced with having 3,949 closed FOS cases compared with 10 closed CCMC cases.

This sent a message to the CCMC that banks[307] and their CEO's were not enthusiastic about using the CCMC. Given the high-principles set out in modified code, the banks do not appear to have been concerned about the customers' rights to have code breaches and customer complaints to be investigated. If they had promoted the code and investigated *any complaint by any person*[308] *in good faith* it might be ruinous for the subscribing banks.

After the 2003 Code was published, banks would have weighed up the utility of failing to provide full disclosure to their customers in loan contracts. To put this in context, banks needed to trim the CCMC's powers and required the FOS support. The banks' devised a constitution in 2004, seizing control of the CCMC.

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[303] Details of BFSO directors in Historical Company Extract from ASIC database on 24/02/10
[304] CCMC Annual Report 2004
[305] Banking and Financial Service Ombudsman's 2004, p21
[306] Banking and Financial Service Ombudsman's 2004 < www.fos.org.au/public/download.jsp?id3310 >
[307] Major subscribing banks claiming they had several million customers, and ANZ bank stating it received more than 40,000 complaints per year at about this time
[308] Modified 2004 code of Banking Practice, clause 34(b)(ii)

When the modified code was published, the CCMC Association's apparently solved the banks problems by integrating the CCMC's powers and duties with the constitution that enhanced the rights of the bank CEO's.

FEMAG Review (2005)

The FEMAG Review exposed the constitution, but did not question the banks aspirations in failing to provide full disclosure in customers' loan contracts. The CCMC's constitution was customer 'unfriendly' and provided banks to have the pre-Martin ***opt-out*** litigation practices returned to them. The ***opt-out*** provision was not detectable by lawyers, as details of it were not included in the subscribing banks Facility Offers and General Standard Terms. Whilst the banks, in 2004, included statements that the relevant provisions of the code applied to the contract, there was no mention of the constitution of the CCMC.

The CEO's knew or should have known that customers would have no joy relying on clause 35.7 of the code, when they filed a complaint. The ***opt-out*** provision meant that banks could avoid activating their IDR process, as the constitution stifles the CCMC's powers to investigate complaints and name banks for systemic code breaches. The IDR process was flawed, which meant that banks could benefit by failing to provide full disclosure to their customers in loan contracts.

Jan McClelland Review (2008)

Jan McClelland was appointed by the ABA on 29 November 2007 as the independent code reviewer. McClelland had a long list of credentials and experience working in government agencies and privately-owned companies.

The independent reviewer received submissions from interested groups including: The Financial Sector Union of Australia, CARE, COSBOA and the ABA. From these submissions, and from her own research, McClelland distilled issues that she believed relevant. These issues raised many concerns regarding poor communication between

banks and customers, inadequate use of the dispute resolution procedures and the need to strengthen CCMC independence.

McClelland would have audited the FEMEG recommendations of 2005 and made certain that, as an expert, she would have considered the 'hot' issues such as the constitution, dual contacts, use of the ***opt-out*** provision and KPI's in their recent CCMC Annual Reports.

CCMC Questions Independence

McClelland identified CCMC's independence as a hot issue and gave a detailed response. In her summary, McClelland explained that the CCMCA, through its constitution, hinders the CCMC's ability to independently monitor constraining its monitoring and sanctioning powers. 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.

The CCMC's 11 March 2008 submission 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.

CHAPTER VI

FIRST GLIMPSE TROJAN HORSES

Despite this initial hoopla, the 1993 Code failed to define dispute resolution procedures whilst, at the same time, the banks could later broaden the scope of 'banking services' in 2003. This failure provided the banks discretion in interpreting the meaning of the word 'complaints' for breaches of the high standards set out in the code. It allowed banks to hand-pick complaints that they were willing to investigate rather than being obliged to investigate all complaints relating to code breaches.

Revised Code (1 August 2003)

The revised code, adopted on 1 August 2003[309], 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.[310] His reluctance to narrow the scope of complaints led to the changed ethics and practices set out in subsequent codes. However, the CCMC was established on the principals set out by subscribing banks in the code.

Clause 34 (b) [states] that the CCMC's functions will be:

to monitor [subscribing banks'] compliance under this code;

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;

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[309] code of Banking Practice 2003
[310] Ibid.

to make any other aspects of this code that are referred to the CCMC by the ABA.[311]

… Just Following Orders

The views set out by the CCMC in the earlier reports appear confused, given the information made public by them in their 2008 submission to Jan McClelland. The CCMC remarks of 15 November 2004 by Executive Director, CCMC, Barbara Schade, suggests that the CCMC members were attempting to direct customers with complaints to their organisation. The Executive Director, in 2004, states:[312]

> 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 FOS's definition of disputes in light of the differences between the CCMC's compliance role and the FOS'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...

Both the 2003 and 2004 codes were inadequate, as they did not have independent compliance or enforcement systems, which resulted in significant conflicts of interest. It seems the relationships between the banks, the ABA and the FOS, meant that the CCMC was not independent. The fact that banks substantially funded all of these institutions meant that the bank CEO's believed it was their right to determine how the code and the powers of the constitution were applied.

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[311] Ibid.
[312] 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.

CHAPTER VII

ALARM BELLS RING

Shortly after the 2003 Code was published, the CCMC was established and its CCMC 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.

Aspirations of CCMC During 2004

The aspirations of the CCMC have already been set out in the internal memorandum sent to the code subscribing banks on 15 November 2004 by the CCMC Executive Director, Barbara Schade.[313]

The CCMC's Constitution

In hindsight, it seems difficult to appreciate how the aspirations of the CCMC might be compromised by the constitution in their early days. FEMAG were mindful of the contradictions between the principles of the code and the CCMCA's constitution, however it seems neither the CCMA nor FEMAG anticipated problems that undermined the 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.[314]

This was supported in an interview which FEMAG reported that suggested:

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[313] See above note in Chapter 6 of this Report.
[314] Martin Committee Report.

> 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.[315]

CCMC's objective – 'to achieve highest compliance by banks'

The CCMC'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*.[316]

The muddled organisational structure that was in place following the establishment of the CCMC required the code subscribing banks, with the support of the FOS, to appoint the first CCMC. This paradox could undermine the principle of independence as the bank parties and the FOS were privy to the CCMCA's constitution. It seems possible, if not probable, that the CCMC and FEMAG failed to fully consider the potential limitations that the constitution might impose on the CCMC.[317] 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]

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[315] Ibid 14
[316] Ibid 15
[317] CCMC Submissions to Jan McClelland dated 11 March 2008

> 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.[318]

In essence, the subscribing banks CEO's controlled the publishing of the' code and its promotion through the administration and funding of the ABA, the CCMC's high standards and CCMC practices CCMCA's constitution and, with the support of the FOS appointed preferred CCMC members. Throughout this process, it seems that all these parties had access to the CCMCA's unpublished constitution.

CCMC and Stakeholder Relationships

FEMAG invitations for submissions and/or interviews sent to the following:[319]

Tony Blunn AO, CCMC Chair

Russell Rechner, CCMC Member.

David Tennant, CCMC Member

Barbara Schade, Executive Officer, CCMC

Ian Gilbert, ABA

Colin Neave, Ombudsman and senior staff of the BFSO

Peter Kell, CEO, Australian Consumers' Association

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[318] Ibid 27-28
[319] Ibid 12

Jan Pentland, President Australian Financial Counselling and Credit Reform Association (AFCCRA)

Roger Knight, Former Head of Compliance, British Banking Standards Board

Carolyn Bond, Consumer Credit Legal Service

Karen Cox and Katherine Lane, Consumer Credit Legal Centre

Australia and New Zealand Banking Group Limited (ANZ)

Westpac Bank

The St George Bank

National Australia Bank (NAB)

The above groups may have had some knowledge of the CCMC's constitution. From meetings with these stakeholders and from its own research, FEMAG produced its October 2005 report.

The review acknowledged that there are instances when the CCMC may be constrained from performing its duties due to provisions in the CCMCA's constitution. As Clause 34 of the code makes it clear that the stakeholders have a right to believe that the CCMC has the power to investigate all complaints other than those that are resolved by the subscribing banks to the satisfaction of customers.[320]

The FEMAG concludes:

> These conditions are *largely* satisfied… however we think there are some issues that could very usefully be considered when the constitution of the [CCMCA]… [and] the code [are] reviewed.[321]

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[320] code of Banking Practice 2003, Cl 34 Available at http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172 on 19/03/2010

[321] Ibid 16

CHAPTER VIII

BELLS RING LOUDER

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* 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*.[322]

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[322] H Wellard, 'Review of the code of Banking Practice' 21 December 2007 <http://www.bankers.asn.au/default.aspx?ArticleID=1145>

There were a series of 'Key Considerations' that the ABA required McClelland to review and these included:[323]

- 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*;
- 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*;
- *The requirement of banks to act in accordance with prudential standards necessary to preserve the stability and integrity of the Australian banking system*.

McClelland's scope of review required her to report with recommendations on:[324]

- 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;
- The structural, organisational and operational aspects of the relationship between internal complaints handling, external dispute resolution and monitoring of banks' compliance with the code.

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[323] Ibid
[324] Ibid

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.

Obstacles Implementing 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.[325]

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.[326] 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

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[325] code Compliance Monitoring Committee '*Submission to the review of the code of Banking Practice*' (2007 – 2008), Annexure D See <http://www.reviewbankcode2.com.au/ArticleDocuments/215/code%20sub%20Ax%20D-%20substantive.pdf>

[326] Ibid. Annexure A, 2

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.[327]

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

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'[328] when resolving disputes through either IDR or EDR mechanisms, even when customers are awarded compensation. During the McClelland Review, Nicola Howell noted:[329]

> *there is no requirement for the bank to acknowledge that a problem occurred; or to implement systems to rectify the problem.*

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.

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[327] Ibid. Annexure C, 10
[328] Nicola Howell, 'Joint submission to the review of the code of Banking Practice and the Review Issues Paper' (31 July 2008), 29
[329] Ibid

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.[330] The Association is understood to have approved the constitution and agreed on the appointment of its Chair.[331]

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 the Committee. The Committee described the inconsistencies between the code and constitution as rendering their duties set out in the code '*unworkable*'.

The Committee insisted that current arrangements were inadequate and claimed that the review was long overdue.[332] 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

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[330] Australian Bankers' Association, 'Submission to the Review of the code of Banking Practice' (2007-2008), Letter to Jan McClelland (30 April 2008), 2
[331] Ibid. 1
[332] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure A

was funded by the subscribing banks,[333] 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,[334] parties responsible for drafting and/ or relying on the constitution, to have oversight powers with regard to the Committee that included:[335]

- The obligation to seek prior approval of any public statements by the Committee and its members from the BFSO and CCMCA Chairs;[336] and
- The power for the BFSO and CCMCA Chairs to determine the funding, budget and remuneration for the Committee.[337]

According to the Committee itself, *this is inappropriate and inconsistent with its role as an independent monitor*.[338] 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.[339]

> 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.

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[333] Ibid. Annexure C, 5
[334] Now the Financial Ombudsman Service (FOS).
[335] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure B, 1
[336] The code Compliance Monitoring Committee Association Constitution, Cl 10.7; See FEMAG-ANU 2005 Report page 39
[337] The code Compliance Monitoring Committee Association Constitution; Cl 13 See FEMAG-ANU 2005 Report page 36
[338] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure B
[339] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure A

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. These restrictions concerned the Committee members that they may not be independent of either subscribing banks or the BFSO.[340]

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.[341] 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:[342]

- 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.

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:

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[340] Ibid.
[341] Ibid. Annexure A and C
[342] CCMCA Constitution dated 20 February 2004.

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.[343]

Clause 11 of the constitution however limits the Committee's enforcement powers to name banks in the CCMC Annual Report.[344] The Committee makes the point that:[345]

> 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.[346] Clause 35.1 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.'[347]

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[343] The code of Banking Practice, Clause 34 Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172> on 19/03/2010
[344] Ibid
[345] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure G
[346] code of Banking Practice 2004
[347] Ibid.

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'[348]

> In order to satisfy ASIC's IDR requirements, subscribing banks must comply with the *Corporations Regulations 2001* (Cth) reg.7.6.02,[349] namely, the complaints handling standard developed by the International Organisation for Standardisation, the *AS ISO 10002-2006*.[350]

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* 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* until the relevant Forum has determined, or declined to 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

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[348] Ibid.
[349] *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.
[350] Available at <http://www.saiglobal.com/PDFTemp/Previews/OSH/AS/AS10000/10000/10002-2006.pdf> on 19/03/2010

> 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'.[351] 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 CCMC. 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.'[352]

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.[353] Further, it is apparent that subscribing banks' legal

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[351] FEMAG-ANU 2005 Report, page 37
[352] code of Banking Practice 2004
[353] See for example the CCMCA Constitution - Para 8.1 'Considerations of Complaints About code Breaches'

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.[354] 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.

The Committee's website[355] is restricted to listing the code and procedures.[356] 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*.' [357] The lack of transparency starkly contrasts with principles of 'effective disclosure of information' under clause 2.1(b) of the code.[358]

The constitution is especially mischievous as it is intended to constrain the operation of the code[359], 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'

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[354] Ibid
[355] www.codecompliance.org
[356] See <http://www.codecompliance.org/pdf/CCMCprocedures.pdf viewed> on 19/03/2010.
[357] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure G
[358] Available at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=209&ArticleID=1172> on 19/03/2010
[359] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure B, 1

which states in clause 39.1 that on or after the commencement date of banks adopting the code, subscribing banks[360]

> 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*

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 bank parties who withheld information regarding the constitution could potentially be guilty of misleading and deceptive conduct.[361]

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*[362]. 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.

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[360] 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.
[361] 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.
[362] code Compliance Monitoring Committee, 'Submission to the review of the code of Banking Practice' (2007 – 2008), Annexure A

CHAPTER IX

REFLECTIONS

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[363]. Richard Viney's Review in 2008, whilst it was the second CCMC review, was carried out simultaneously with the McClelland Review.

Compliance Monitoring Activities and Techniques

From the CCMC's files, Richard 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 CCMC's compliance-monitoring activities and stated that they were being performed diligently and effectively.[364]

Given the amount of detail that Viney must have considered when filing his Final Report, it seems difficult to understand how an independent reviewer failed to deal with the concerns raised by the CCMC in their 11 March and 29 July 2008 submissions to McClelland.

This questions Viney's terms of reference, which must have confirmed the existence of the constitution. Otherwise, it seems that Viney would have questioned the legality of the constitution, which was not known to bank customers.

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[363] 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

[364] Ibid. 10

Viney concluded that 'while some existing sanctions mandated by the code and the constitution, consideration should be given to providing more flexibility [to the CCMC] in the imposition of sanctions.'[365]

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 CCMC 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.* [366]

CCMC Public Profile

The Viney review in 2008 invited submissions from the following organisations 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

Federal Minister for Superannuation & Corporate Law

Federal Shadow Treasurer

Chief Executive Officer, Council of Small Business Organisations of Australia

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[365] Ibid. above at 12

[366] Commonwealth, Budget Estimates 3-5 June 2008, Senate Standing Committee on Economics, Treasury Portfolio, Senator Andrew Murray, 5 June 2008, E117-E118

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[367]

Viney concluded in his 2008 Review that he only received two formal submissions and did not state which of the above partiers provided the submission. Again, it is difficult to appreciate how much community acceptance he would have received had the above organisations been briefed on the constitution that sits under the CCMC since 2004.

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[367] Ibid. above n. 1 at Appendix Two: Persons and organisations notified about the review, p 27

CHAPTER X

BANKERS RETAIN CONTROL

The circumstances which followed the GFC and Australia's role in Asia are relevant in the report. What is evident is that on 16 October 2010, the ABS reported Australia's population was (about) 22,491,330[368] and that the ATO reported the number of small businesses in Australia totalled 2.4 million. [369]

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.'[370]

During 2008-09 despite the large number of bank customers and businesses, there were only 6,731 new disputes lodged with the FOS[371]. During the same period there were 11 determinations only carried out by the CCMC[372] 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 that allow banks to compete successfully whilst protecting the rights of individuals and small business customers is flawed. Later in this report there will be a discussion on

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[368] Australian Bureau of Statistics, accessed on 16 October 2010, http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument

[369] Consultative Forum, Department of Innovation, Industry, Science and Research Address presented by Geoff Fader COSBOA on 18 June 2010

[370] Submission to the Review of the code of Banking Practice 2007-2008, Observation 10 (Australian Competition and Consumer Commission)

[371] REGULATION IMPACT STATEMENT: ENHANCEMENTS TO THE NATIONAL CONSUMER CREDIT PROTECTION REGIME

[372] CCMC 2008-2009 Annual Report, page 14

how the 12 major banks orchestrated their lopsided approach to monitoring customer complaints and providing effective dispute resolution.

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.'[373]

The ABA agreed that the independence of the CCMC from subscribing banks was critical to the credibility of the code however, they argued for some form of overarching governance of the CCMC. The ABA objected to the proposal by the CCMC 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.'[374]

Consumer advocates wanted the governance arrangements for the CCMC to establish independence of the CCMC from subscribing banks and the FOS. They recommended that the CCMC and FOS remain functionally separate bodies.[375]

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 CCMC.'[376] The ACCC wanted stronger sanctions for non-compliance with commercial significance.[377] In the view of the ACCC, sanctions should reflect the nature, seriousness and frequency of the breach.[378]

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[373] Submission to the Review of the code of Banking Practice 2007-2008, Observation 10 (Australian Competition and Consumer Commission)
[374] Jan McClelland, Final Report (2008) 15-17.
[375] Ibid. Id
[376] Ibid. Id
[377] Ibid. Recommendation 6
[378] Ibid. Id

CHAPTER XI

MOVING FORWARD

The government's decision to self-regulate banking may have been initiated by 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.

Report in Two Parts

Part 1 of this review reports on how the architects of customer protection implemented the 'high-principles of banking' proposed by Martin.

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 a voluntary self-regulate code supervised independent by the CCMC.

> *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 CCMC whose duty it is to monitor compliance with the code and to investigate 'any alleged breach of the code'*[379] *by any person*.

Prior to the introduction of self-regulation in 2001 government regulators protected the interests of those dealing with the financial institutions[380] While the 'government's regulators are independent'[381], they focus on 'customers' protection as well as the interests of depositors…' [382]

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[379] McCracken and Everett, Part 3, C9, 266 [9.010]
[380] Ibid C1, 13
[381] Ibid C1, 16
[382] Ibid C1, 16

The Martin Committee hardly left any stone unturned in its search for a way to ensure fair minimum standards are set.[383]

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.[384] 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.'[385]

The Attorney-General's Department gave the pre-condition for an effective code that it be very vigorously administered [386]

The Martin Committee 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.[387] 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 a supplier to cease using certain contract terms*.

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[383] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 382, para 20.5.
[384] Ibid, 382-383, para 20.9
[385] Ibid, Id
[386] Ibid, 385, para 20.21
[387] Ibid, 388, para 20.37

In the United States, truth-in-lending principles underpin consumer credit legislation 'to achieve fair marketplace through *full disclosure* so transactions are carried out truthfully.'[388]

…market forces will not ensure services delivered fairly

The Pocket Full of Change Report in 1991 provided for the development of the first code, which required much thought. It did not believe banks should be left to form their own code. The CCMC'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.* [389]

Martin found it inappropriate 'for banks to have exclusive responsibility for setting standards of banking practice. [390] 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.[391]

In 1993, the code wasn't prepared by the task force but by the ABA.[392] The Martin CCMC expressed concern for small business to 'redress disputes with banks[393] 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.* [394]

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[388] Ibid, 388, para 20.39
[389] Ibid, 389, para 20.42
[390] Ibid, 389, para 20.42
[391] 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.
[392] Richard Viney, Issues Paper (2001), 1
[393] House of Representatives Standing Committee on Finance and Public Administration, A pocket full of change: banking and deregulation, November 1991, 264, para 15.83.
[394] Ibid, 264, para 15.84

Martin believed the code could be manipulated by banks and therefore highlighted the need for fairness, transparency, affordable dispute resolutions and independent monitoring regulators[395] believing the system needed strengthening and be more transparent[396] with an independent mediator[397].

Wallis Review and Towards Fair Trading Report

The Wallis Review was published in 1997[398] 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. 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… …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.*[399]

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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[395]McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009), C11, 4
[396] Ibid, C11, 4
[397] Ibid, C11, 5
[398] Ibid, C11, 6
[399] Ibid, 3

consumer protection'.[400] 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.'[401]

It seems ASIC relied on bank media PR that the CCMC is independent and can investigate any complaint by any person. 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.

Dodd-Frank Reform and Consumer Protection Act 2010

This 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."*[402]

The changes introduced by Obama also create a new "Consumer Protection Agency"[403] that "*will have the scope to diagnose abusive lending practice*s."[404] This Agency has a duty to ensure "*dodgy [consumer-based lending]… will not go undetected*"[405] 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*."[406]

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[400] McCracken and Everett, *Banking and Financial Institutions Law*, 7th edition, (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2009), C11, 7
[401] Chapter 11, 7
[402] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.
[403] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 s 989A(a)(1)(C).
[404] 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>
[405] Ibid
[406] Ibid

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… 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.

This report highlights facts, which, taken together, constitute damning evidence about the Banking Industry's inability to regulate itself. The notion that a potentially errant body can properly review its own conduct, or be independently reviewed by parties funded, or employed by it, as is the case with the CCMC would now seem reckless, irresponsible and inappropriate.

Four Corners Program on 10 March 1997 sums up this report's findings[407]:

> 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. 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.

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[407] Australian Broadcasting Corporation, *Banks Behaving Badly*, Four Corners, 10th March 1997, <http://www.abc.net.au/4corners/stories/s72783.htm> at the 12th February.

SUMMATION

Another decade has passed since the ABC program went to air.

There has been a new code, a number of inquiries run and concluded by parliament and the ABA, and several new code compliance members appointed by the banks and the FOS to monitor adherence.

And still, ‘hardly-nothing’ has changed.

ENDS