



## OPEN LETTER TO GOVERNMENT

### *The Priestley Case (2004-2017)*

#### ***'Fake Contracts, Codes and Commitments...'***

Claire Priestley and her brother Chris signed a National Australian Bank's Farmers Choice loan contract in 2004.<sup>1</sup> The contract included details of their rights under the 2004 Code of Banking Practice (the Code).<sup>2</sup> However, the contract failed to provide NAB's agribusiness customers with full disclosure.

Over the next six years, the Priestley's farm suffered from unprecedented natural disasters.<sup>3, 4, 5, 6</sup> As a result, in April 2010, the Priestleys were, for the first time, in breach of their contract. Without regard to its responsibilities under the contract, the bank breached its duties to the Priestleys by failing to advise their rights for assistance under Clause 25.2 of the Code.<sup>7</sup> The bank failed to ensure its staff had adequate knowledge of the code, in particular Clause 7.<sup>8</sup>

Without regard to the Code, NAB required its clients to repay their loan. The bank's position was unreasonable, as it meant the Priestleys would have to sell their farm at a discount due to the adverse seasons.

#### ***Q&A 1: Was NAB Farmers Choice Contract Fake?***

The NAB provided the Priestleys with its Farmers Choice loan contract which included a Facility Offer, Standard Terms and 2004 Code. It is alleged NAB concealed a fourth document, the 2004 Constitution of the CCMC.

Between 2004 and 2017, NAB had four Chief Executives (NAB CEOs):

- Mr John Stewart (2004),
- Mr Ahmed Fahour (2004-2009),
- Mr Cameron Clyne (2009-2014), and
- Mr Andrew Thorburn (since 2014).

These CEOs were also ABA directors and knew the limitations imposed by the 2004 CCMC Constitution. Of greater concern, four NAB Chairman could have rectified these practices.

This review alleges the NAB Farmers Choice Contract signed by the Priestleys in 2004 is fake.

On 19 May 2010, the Priestleys, concerned about their financial situation and with no support from the local NAB branch, filed a complaint with the bank's Chief Executive, Mr Cameron Clyne.<sup>9</sup> Responding on his behalf, Mr James Stafford, Manager, Office of the Customer Advocate, National Australia Bank, stated:

*"I understand that NAB has recently offered you Farm Debt Mediation with respect to this issue. I have been instructed that you have accepted this offer and NAB is now awaiting your choice of mediator. This is the proper forum for the resolution of these matters and I trust it will bring about the right outcome for all involved."*<sup>10</sup>

The banks' advice to the Priestleys was inapt, as their contract did not include the Code Compliance Monitoring Committee Association's (CCMCA) Constitution.<sup>11</sup> When later discovering this, Chris and Claire Priestley noted the Constitution was governed by bank Chief Executives, including, in 2010, Mr Clyne.<sup>12</sup> Concealed from them, the Constitution allowed NAB to void the Priestleys' rights by directing them to another forum,<sup>13</sup> Farm Debt Mediation (FDM).<sup>14</sup>

Having lost their rights to have complaints and code breaches heard by the Code Compliance Monitoring Committee (CCMC), the Priestleys were disadvantaged, as code breaches would have been dealt with free of charge.<sup>15</sup> The Priestleys later discovered the bank cheated them by directing them to another forum, despite its publicity describing NAB as being '*the leading Agri-Business bank*'.<sup>16</sup>

In 2012, the bank, whilst retaining authority under the Constitution,<sup>17</sup> required the Priestleys to attend another forum, the Supreme Court.<sup>18</sup> The court case continued throughout the year and required the under-resourced Priestleys to defend the bank's action. It was only on the last day of this case, that the Priestleys were able to provide a copy of the Constitution to the court, to which the bank's lawyers, DibbsBarker, could have accessed from their client.<sup>19</sup>

Whilst penniless, the Priestleys drafted and submitted their own defence to the Court in December 2012. It included the Constitution and argued problematic practices of the National Australia Bank.

Garling J, in his judgment, stated:

*"What they have put before the Court is certainly deserving of close attention by the senior management of NAB, because if the Priestleys are correct, and their complaints have not been listened to and dealt with appropriately, then the NAB may well be exposed to both, damage to its reputation and as well, suggestions that its publicity campaign which describes itself as "the leading Agri-Business bank" may not have any substance.*

*Nevertheless, the matters which the Priestley's now seek to raise do not, in the form in which they are advanced, constitute an arguable defence against the NAB's legal claim for... possession of the farming properties."*<sup>20</sup>

Garling said "*whilst the evidence provided set out these concerns and allegations, the Priestleys did not provide to the Court any further draft defence or cross-claim.*"<sup>21</sup> The Court found in favour of the bank, while its lawyers failed to admit NAB benefited by directing the Priestleys to other forums.

Garling made no comment on whether the bank breached any of the provisions under the 2004 Code.

### **Q&A 2: Was ABA 2004 Code Fake?**

It is alleged the ABA directors, which included NAB Chief Executives, knew the CCMC Constitution meant banks could avoid having to comply with the Code, thereby, not having to investigate complaints.

Between 2004 and 2017, ABA had three Chief Executives (ABA CEOs),

Mr David Bell (2004-2010),

Mr Steven Munchenburg (2010-2017), and

Ms Anna Bligh AC (since April 2017).

It is alleged ABA Chief Executives knew about the CCMC Constitution. It is also alleged the new CEO, Anna Bligh, when reviewing the Priestley case, will acknowledge the financial costs to farmers and the reputational damage to the ABA, of the secret Constitution.

This review suggests the ABA's 2004 Code of Banking Practice, included with NAB's loan contract the Priestley's signed, was fake.

Following Garling's judgement, the Priestleys gained a better understanding of the Constitution. Having accessed the CCMC's 2008 submission to Jan McClelland, NAB could have rectified its practices.<sup>22</sup> However, for almost six years, NAB and the ABA failed to do so.<sup>23</sup> The Priestleys filed complaints with the CCMC in 2012 (case #234) and 2014 (case #CX1589). Neither was investigated.

In 2016, the Priestleys resubmitted complaints to the CCMC, noting provisions in the Code they alleged NAB breached.<sup>24</sup>

These included:

*Clause 2.1(d): the bank will provide information to you in plain language.*

*Clause 2.2: the bank will act fairly and reasonably toward you in a consistent and ethical manner.*

*Clause 25.2: with your consent the bank will help you overcome your financial difficulties with any credit facility you have with us.*

*Clause 35.7: Our dispute resolution process is available for all complaints other than those that are resolved to your satisfaction at the time they are drawn to our attention.*

*Clause 35.8: We will provide you with the above information in writing unless it has been mutually agreed that it can be given verbally.*

In subsequent correspondence, they provided the CCMC with a copy of ‘*The impairment of customer loans Submission 61- Attachment 2*’.<sup>25</sup> This November 2014 submission noted, for ten years, bank loan contracts were provided to agribusiness bank customers without disclosing the Constitution.

The Priestleys relied on Clause 34, requesting the CCMC make a determination on whether NAB breached the Code.<sup>26</sup> The CCMC replied “*such concerns were already considered in court, the Australian Securities and Investment Commission (ASIC) and the Senate Economics References Committee*”.<sup>27</sup>

The Priestleys previously requested these reports in correspondence to the CCMC’s Chief Executive, Ms Sally Davis, on 26 September 2016, stating:

*“In relation to the five allegations set out in our clients’ 29 August response, we require copies of documents the bank refers to in which it alleges the court, ASIC and Senate Economics References Committee investigated these five points.”*<sup>28</sup>

Commitments made by NAB in the 2004 Code that, “*the CCMC’s functions will be to investigate and make a determination on any allegation from any person that [NAB] breached the code*”. The Priestleys believed this was misleading.

### **Q&A 3: Is Bankers’ Oath Fake?**

On 15 June 2012, St James Ethics Centre published Banking and Finance Oath Limited (BFO). It had eight directors.

Steven Harker (15 June 2012 until now)

Stephen Tucker (15 June 2012 until now)

Trevor Rowe (15 June 2012 until now)

Clare Payne (15 June 2012 until now)

Amanda McCluskey (15 June 2012 – 4 November 2015)

David Bell (15 June 2012 – 4 November 2015)

Stephen Dunne (15 June 2012 – 4 November 2015)

Stephen Fitzgerald (26 September 2012 – 8 December 2014)

The Priestley’s case may find BFO directors were directly involved in setting up the CCMC Constitution in 2004. There is no evidence they required NAB to rectify any damages caused to farmers by the secret Constitution, despite being signatories of the Oath.<sup>29</sup>

This review alleges St James Ethics Centre's Banking and Finance Oath is fake, as for five years, it has not required NAB signatories to honour the Oath.

For ten years, prior to taking the Bankers' Oath, NAB could redirect complaints and code breaches to other forums rather than requiring the bank, and if necessary, the CCMC to investigate them free of charge.

The Bankers Oath states:

*"Trust is the foundation of my profession.*

*I will serve all interests in good faith.*

*I will compete with honour.*

*I will pursue my ends with ethical restraint.*

*I will help create a sustainable future.*

*I will help create a more just society.*

*I will speak out against wrongdoing and support others who do the same.*

*I will accept responsibility for my actions.*

*In these and all other matters;*

*My word is my bond."<sup>30</sup>*

In 2016, Priestleys' allegations were filed with the bank's Secretary, Chief Executive and Chair.<sup>31</sup> They are signatories of the Oath.<sup>32, 33, 34</sup> However, the Banking and Finance Oath directors' splendid ideals,<sup>35</sup> as outlined above, have fallen short of the morals and ethics underlined by the Oath.

The Priestley's case suggests bank signatories have, to date, failed to demonstrate a positive commitment to the Banking Oath.<sup>36</sup> The NAB's Chief Executive and directors are all signatories of the Oath.<sup>37</sup>

### ***Moving Forward***

Priestley's case demonstrates how NAB, without its customers' knowledge, varied the terms of Farmers Choice contracts, Australia wide.

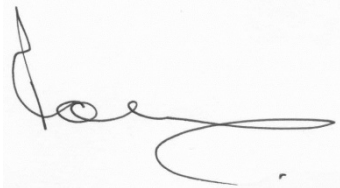
Andrew Wilkie's Banking Amendment Bill 2012 noted "*Since 2004, for example, there has been something like 2.5 million complaints against Australian banks*".<sup>38</sup>

The CCMC claims it only investigated a total of 11 small business cases since 2013,<sup>39</sup> despite an estimated 2,294,607 small businesses and farmers.<sup>40</sup> It is inconceivable ASIC, ACCC and the Treasury failed to require the ABA to explain how, on average, the CCMC only investigated 3 small business cases per year.

The Impairment of Customer Loans Submission of 2014, states, "*the relationship between the subscribing banks and their customers is unconscionable and unfair.*"<sup>41</sup> It concludes, "*the decision by legislators to allow banks to be self-regulated has no justification based on the research in this paper.*"<sup>42</sup>

Bank Victims has reviewed the Priestleys' case prior to drafting this review. It only deals with a small number of unfair practices by NAB and other major banks, since self-regulation was introduced.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Russell Cousins', with a long, sweeping horizontal stroke extending to the right.

Russell Cousins  
Director, Bank Victims Pty Ltd  
101/10 Albert Avenue  
BROADBEACH QLD 4218

*Email:* [Office@bankvictims.com.au](mailto:Office@bankvictims.com.au)

[www.bankvictims.com.au](http://www.bankvictims.com.au)

## References

- <sup>1</sup> 1 October 2004, NAB Agribusiness Manager, Chris Cullen, provides Facility Approval for the Priestley's Farm Management Account; on 30 November 2004, the bank receives Facility Fee payment of \$7,500.00
- <sup>2</sup> Australian Banking Association's 2004 Code of Banking Practice (May 2004) accessed on 21 April 2017 at <http://www.ccmc.org.au/cms/wp-content/uploads/2014/09/2004-Code-of-Banking-Practice.pdf>
- <sup>3</sup> The Sydney Morning Herald 'Rudd, Howard battle for farm vote' published 31 October 2007 accessed on 22 July 2016 at <http://news.smh.com.au/national/rudd-howard-battle-for-farm-vote-20070921-107z.html>.
- <sup>4</sup> The Sydney Morning Herald 'Over 70% of NSW now in drought' published 20 September 2008, accessed on 22 July 2016 at <http://news.smh.com.au/national/over-70-of-nsw-now-in-drought-20080920-4khk.html>.
- <sup>5</sup> The Sydney Morning Herald 'Best drought figures in four years: Whan' published 17 March 2010, accessed on 22 July 2016 at <http://news.smh.com.au/breaking-news-national/best-drought-figures-in-four-years-whan-20100317-qcxf.html>
- <sup>6</sup> The Sydney Morning Herald 'Drought may be ending in NSW: govt' published 23 January 2008, accessed on 22 July 2016 at <http://news.smh.com.au/national/drought-may-be-ending-in-nsw-govt-20080123-1nlj.html>
- <sup>7</sup> Australian Banking Association's 2004 Code of Banking Practice (May 2004), clause 25.2, "With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan. If, at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them."
- <sup>8</sup> Ibid, clause 7, "Staff training and competency".
- <sup>9</sup> 19 May 2010, River Staation letter to National Australia Bank Chief Executive, Mr Cameron Clyne.
- <sup>10</sup> 25 May 2010, National Australia Bank's Mr James Stafford letter to Mr C & Mrs C Priestley
- <sup>11</sup> Mallesons Stephen Jaques (20 February 2004) "Constitution" CCMCA.
- <sup>12</sup> Ibid, page 3, Clauses 3.2 states: "*Only a Code Subscriber may be an Association Member.*" Clause 3.3 States: "*An Association Member is each Code Subscriber which subscribes to this Constitution by giving a written instrument to that effect signed by its chief executive officer*"
- <sup>13</sup> Ibid, page 2, Definitions 2.1: Forum: means any court, tribunal, arbitrator, mediator, independent conciliation body, dispute resolution body, complaint resolution scheme (including, for the avoidance of doubt, the [FOS] scheme) or statutory Ombudsman, in any jurisdiction.
- <sup>14</sup> Ibid, page 14-15, Clause 8.1 states: "*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) to the extent that the complaint relates to an Association Member's commercial judgement in decisions about lending or security... (b) if the CCMC is, or becomes, aware that the complaint: (i) is being or will be heard by another Forum... (c) if the CCMC thinks there is a more appropriate Forum to deal with the complaint... (h) the complainant was aware of the events to which the complaint relates...more than 1 year before the complainant first notified the CCMC in writing.*"
- <sup>15</sup> ABA's 2004 Code of Banking Practice (May 2004), Clause 35, "Internal dispute resolution".
- <sup>16</sup> 10 December 2012, Supreme Court, New South Wales, Common Law Division 'Case Title: National Australia Bank Ltd v Priestley', page 9.
- <sup>17</sup> 11 March 2008, Code Compliance Monitoring Committee's 'Review of the Code of Banking Practice 2007-2008', Annexure B (page 1), accessed on 21 April 2017 at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=215&ArticleID=1178>
- <sup>18</sup> 10 December 2012, Supreme Court, New South Wales, Common Law Division 'Case Title: National Australia Bank Ltd v Priestley'.
- <sup>19</sup> 14 September 2012, NAB, CEO Board & Feedback Manager, Ms Mel Glasson letter to Ms Claire Priestley stating "NAB ... requests that any further correspondence occur through the appropriate channels, namely between your lawyers and DibbsBarker (as NAB's lawyers)."
- <sup>20</sup> 10 December 2012, Supreme Court, New South Wales, Common Law Division 'Case Title: National Australia Bank Ltd v Priestley', Clauses 40 and 43, page 8-9.
- <sup>21</sup> Ibid, Clause 40, page 8.

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- <sup>22</sup> Australian Banking Association's 2004 Code of Banking Practice (May 2004), Part E: Resolution of Disputes, Monitoring and Sanctions, Clause 34(b)(i).
- <sup>23</sup> 11 March 2008, Code Compliance Monitoring Committee's 'Review of the Code of Banking Practice 2007-2008' accessed on 21 April 2017 at <http://www.reviewbankcode2.com.au/default.aspx?FolderID=215&ArticleID=1178>
- <sup>24</sup> 2 November 2016, Counter Corruption Analysts P/L letter to Ms Sally Davis, Chief Executive, Code Compliance Monitoring Committee, 'Re: Ms Claire Priestley and Chris Priestley (Case No: CX 3680)'
- <sup>25</sup> 14 November 2014, Tasmanian Small Business Council's 'The Impairment of customer loans Submission 61 – Attachment 2' accessed on 21 April 2017 at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/customer\\_loans/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions).
- <sup>26</sup> Australian Banking Association's 2004 Code of Banking Practice, 'Part E: Resolution of Disputes, Monitoring and Sanctions', page 18, Clause 34(b)(ii)
- <sup>27</sup> 4 July 2016, CCMC letter to Counter Corruption Analysts on behalf of the Priestley's.
- <sup>28</sup> 26 September 2016, Counter Corruption Analysts P/L letter to Ms Sally Davis, Chief Executive, CCMC, 'Re: Ms Claire Priestley and Chris Priestley (Case No: CX 3680)'
- <sup>29</sup> Mr Steven Munchenberg, Chief Executive, ABA, signatory #0001102. Mr Brian Hartzler, Chief Executive, Westpac, #0001324. Mr Shayne Elliott, Chief Executive, ANZ Bank, #0001206. Mr Ian Narev, Chief Executive, Commonwealth Bank, #0001581.
- <sup>30</sup> The Banking Oath can be accessed at <http://www.thebfo.org/The-Oath>.
- <sup>31</sup> 16 January 2017, Bank Victims letter to Dr Kenneth Henry, Chairman, National Australia Bank 'Re: Mr Chris Priestley & Ms Claire Priestley Case'.
- <sup>32</sup> Ms Louise Thomson, Secretary NAB, signatory #0001481
- <sup>33</sup> Mr Andrew Thorburn, Chief Executive NAB, signatory #0000685
- <sup>34</sup> Mr Kenneth Henry AC, Chairman NAB, signatory #0000903
- <sup>35</sup> The Banking and Finance Oath Limited Directors included: Mr Steven Harker, signatory #0000005, Mr Stephen Tucker #0000342, Ms Paula Vamos #0001502, Mr Trevor Rowe AO #0000004, Mr Emilio Gonzalez #0000654, Mr John Laker #0000635, Mr Robert Caprioli #0000415 and Philip Chronican #0000236. Former Directors included: Ms Amanda McCluskey #0000007, Mr David Bell #0000009, Mr Stephen Dunne #0000003 and Mr Stephen Fitzgerald #0000008.
- <sup>36</sup> The Banking Oath Signatories accessed on 21 April 2017 at <http://www.thebfo.org/The-Oath/Signatoes>.
- <sup>37</sup> NAB directors as of 21 April 2017 accessed at <https://www.nab.com.au/about-us/our-business-at-a-glance/board-of-directors> that signed the banking oath are: Mr David Armstrong (#0000996), Mr Philip Chronican (#0000236), Mr Peeyush Gupta (#0001487), Ms Anne Loveridge (#0001444), Ms Geraldine McBride (#0001482), Mr Doug McKay (#0001493) and Mr Anthony Yuen (#0001107).
- <sup>38</sup> 10 September 2012, Mr Andrew Wilkie MP, 'Banking Amendment (Banking Code of Conduct) Bill 2012', page 3 accessed on 23 April 2017 at <http://andrewwilkie.org/project/banking-amendment-banking-code-of-conduct-bill-2012-3/>
- <sup>39</sup> Code Compliance Monitoring Committee 2014-15 Annual Report, page 21, accessed on 22 April 2017 at <http://www.ccmc.org.au/2015/11/30/2014-15-annual-report/> and Code Compliance Monitoring Committee 2015-16 Annual Report, page 24, accessed on 22 April 2017 at <http://www.ccmc.org.au/2016-annual-report/>.
- <sup>40</sup> Government of Western Australia: Small Business Development Corporation 'Facts and statistics' accessed on 22 April 2017 at <https://www.smallbusiness.wa.gov.au/about/small-business-sector/facts-and-statistics>
- <sup>41</sup> 14 November 2014, Tasmanian Small Business Council's 'The Impairment of customer loans Submission 61 – Attachment 2', page 33 accessed on 21 April 2017 at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/customer\\_loans/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Submissions).
- <sup>42</sup> Ibid.