The Senate

Select Committee on Lending to Primary Production Customers

Report

December 2017

ISBN 978-1-76010-691-1

This document was produced by the Senate Select Committee on Lending to Primary Production Customers secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator Pauline Hanson (PHON, QLD) (Chair) *(from 13 November 2017)*

Senator John Williams (NATS, NSW) (Deputy Chair)

Senator Slade Brockman (LP, WA) *(from 17 August 2017)*

Senator Anthony Chisholm (ALP, QLD)

Senator Jane Hume (LP, VIC)

Senator Claire Moore (ALP, QLD)

Former Members

Former Senator Chris Back (LP, WA) *(from 16 February 2017 to 22 June 2017)*

Former Senator Malcolm Roberts (PHON, QLD) *(from 16 February 2017 to 27 October 2017)*

Senator Dean Smith (LP, WA) *(from 22 June 2017 to 17 August 2017)*

Participating Members

Senator Fraser Anning (IND, QLD)

Senator Brian Burston (PHON, NSW)

Senator Peter Georgiou (PHON, WA)

Senator Linda Reynolds (LP, WA)

Secretariat

Mr Stephen Palethorpe, Secretary

Ms Natasha Rusjakovski, Principal Research Officer

Ms Kate Campbell, Senior Research Officer

Mr Matthew Hughes, Research Officer

Ms Jade Monaghan, Administrative Officer (from 19 June 2017)

Mr Abe Williamson, Administrative Officer (until 17 May 2017)

Committee web page:
www.aph.gov.au/Parliamentary_Business/Committees/Senate/Lending_to_Primary_Production_Customers

PO Box 6100
Parliament House
Canberra ACT 2600

Ph: 02 6277 3521
Fax: 02 6277 5706
E-mail: primaryproductionlending.sen@aph.gov.au

Table of Contents

Recommendations

Recommendation 1

3.9 The committee recommends that the Australian Bankers' Association revise the Code of Banking Practice to require authorised financial institutions to commence dialogue with a borrower at least six months prior to the expiry of a term loan.

Recommendation 2

3.10 The committee recommends introducing minimum 90 day notice periods for:

- all general restriction clauses and covenants (except for fraud and criminal actions);
- any decision with respect to the rolling over of a small business loan; and
- any decision to commence action against a small business customer for default under a credit contract.

Recommendation 3

3.15 The committee recommends that:

- financiers be prohibited from making fundamental, unilateral changes to the loan agreements where such changes are detrimental to the customer;
- provided that a customer is meeting all terms and conditions of a loan, financial institutions must be required to bear any costs associated with a variation of a loan term, if the variation is sought by the financial institution;
- should a customer suffer any detriment as a result of any unilateral change to a loan agreement by a financier, that the financier be liable to pay for those losses and damages.

Recommendation 4

3.31 The committee recommends that the Australian Bankers' Association Code of Banking Practice be revised to extend:

- the responsible lending obligations contained in the *National Consumer Credit Protection Act 2009*; and
- the unfair contract term protections for small businesses, as set out in the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*

to primary production loans of less than $10 million.

Recommendation 5

3.37 The committee recommends that the Australian Bankers' Association Code of Banking Practice require that financial lending institutions provide farmers who obtain loans with full copies of signed loan applications and other relevant documents:

- prior to the submission of the loan application;
- prior to any final loan approval; and
- at any other time as reasonably requested by the farmer.

Recommendation 6

3.38 The committee recommends that compliance with the Australian Bankers' Association Code of Banking Practice be included as a term of any loan documentation.

Recommendation 7

3.39 The committee recommends that statutory time limits for legal proceedings be removed in circumstances where a bank or its agents have changed the details of loan documents without the customer's knowledge, or the bank or its agents have acted unethically in the course of the commercial dealings with the borrower.

Recommendation 8

3.41 The committee recommends that the Australian Bankers' Association ensure all financial documents provided to its members by a farmer (including but not limited to asset and liability position statements, cash flow projections, business plans, valuations, historical and other similar documentation provided for, or on behalf of, customers either in support of loan applications or at any time throughout the relationship and at times of review) be prepared, altered or updated only by the customer and/or their representatives, and not by the bank or financial institution.

Recommendation 9

3.49 The committee recommends that financial institutions' arrangements for categorising farmland be revised to ensure that agribusinesses are not financed through inappropriate loan categories. Recommended measures include:

- facilitating processes for internal or external dispute resolution of farm debt mediation; and/or
- introducing a civil penalty provision for incorrect categorisations by financiers and providing for corresponding compensation to the farmer.

Recommendation 10

3.56 The committee recommends that the Australian Bankers' Association ensures that penalty rates are imposed on customers:

- only in the most exceptional of circumstances; and
- not in the 12 months after an actual default by the customer of the loan agreement.

3.57 If the default arises from circumstances beyond the control of the farmer (e.g. natural disaster, market conditions, government regulation or otherwise as would be described as *force majeure*) then penalty interest only be imposed as follows:

- for the period commencing 12 months after the actual default and ending 24 months after the actual default—the interest rate at the time of the continuing default plus 1 per cent; and
- for the period commencing 24 months after the default and thereafter—the interest rate at the time of continuing default plus 2 per cent.

Recommendation 11

3.62 The committee recommends that the ANZ takeover of the Landmark loan book be subject to a review by the soon to be incorporated Australian Financial Complaints Authority (or equivalent existing regulatory body) and that such a body have the powers to review:

- all commercial documents regardless of any confidentiality clauses contained therein;
- any other matter which may otherwise be subject to limitation periods; and
- without limitations as to the amount.

Recommendation 12

4.30 The committee recommends that the government establish a nationally consistent compulsory farm debt mediation scheme, based on the NSW model, with a $10 million limit on loan amounts that includes the following provisions:

- that heads of agreement reached at a farm debt mediation conducted in one state, which considered matters relating to the farmer's default under a farm mortgage secured over a farm proper in another state, is recognised by all jurisdictions;
- that the process provides that the mortgagee must produce all documents to the farmer before mediation relating to the loans and banking relationship including all documents required to be produced by the mortgagee/financier to either a court of law or the Australian Financial Complaints Authority should either of those institutions be required to consider farm debt matters; and

- that refusal by the mortgagee to attend mediation results in the mortgagee being prevented from enforcing its rights under the mortgage for a minimum 6 month period.

Recommendation 13

4.49 The committee recommends that the Australian Financial Complaints Authority be able to:

- consider disputes relating to loans of up to $10 million and award compensation up to $5 million, with these figures to be reviewed every 5 years;
- review a customer's complaint within a three year period after the completion of farm debt mediation if the customer provides reasonable grounds for review;
- issue new orders or make any other determination as it sees fit;
- subject to the provisions of the bill establishing the authority, hear and collate evidence both for its own use and the use in any court of law with jurisdiction to hear the complaint; and
- hear complaints about receiver's fees and charges where they are not justified on the degree of difficulty and complexity of the estate.

Recommendation 14

4.66 The committee recommends that the government commit funding to train rural counsellors in mediation (or existing mediators in rural practice) to ensure that all farmers have access to appropriately qualified and experienced representatives during farm debt mediation.

Recommendation 15

5.66 The committee recommends that:

- the government introduce higher standards of accountability and transparency for insolvency practitioners regarding the costs they incur while conducting receiverships;
- insolvency practitioners be required to disclose their estimate of costs of the receivership prior to being engaged;
- insolvency practitioners be required to account for all incurred fees and outlays and report these to both the lender and the borrower; and
- insolvency practitioners be required to provide monthly reports to the lender and the borrower on their farming management and fees incurred (including future plans).

Recommendation 16

5.70 The committee recommends in the strongest possible terms that the Australian Bankers' Association revise the Code of Banking Practice to stipulate that if an amicable agreement between bank and farmer cannot be reached through farm debt mediation and the bank needs to sell the family farm, then:

- receivers not be appointed; and
- instead the family (if willing) is to remain managing the property and be paid a wage to maintain it until it is sold.

5.71 However, in extenuating circumstances the banks can use their legal rights to enforce vacant possession of the land for sale.

Recommendation 17

5.76 The committee recommends that the Australian Restructuring Insolvency and Turnaround Association ensure receivers appointed to agribusiness cases must be appropriately qualified in agribusiness and have a strong background and demonstrated experience in rural management.

Recommendation 18

5.87 The committee recommends that the Australian Bankers' Association and the Australian Restructuring Insolvency and Turnaround Association implement policies to ensure that copies of bank or receiver-ordered valuations are provided promptly to farmers.

Recommendation 19

5.88 The committee recommends that the Australian Bankers' Association and the Australian Restructuring Insolvency and Turnaround Association ensure that banks and insolvency practitioners must only engage independent valuers to value agribusinesses with appropriate qualifications and demonstrated expertise and experience in the field.

Recommendation 20

5.109 The committee recommends that the Australian Bankers' Association revise its Code of Banking Practice and the Australian Restructuring Insolvency and Turnaround Association revise its Code of Professional Practice to stipulate that every effort be made by banks and receivers (in circumstances where they are appointed) to achieve the maximum sale price of an asset.

Recommendation 21

5.112 The committee recommends that the government establish a private right of action for breaches of section 420A of the *Corporations Act 2001*.

Recommendation 22

6.13 The committee recommends that the Australian Bankers' Association ensure that banks offer better training and more comprehensive supervision of bank frontline and management staff to ensure that they deal fairly and reasonably with farming customers and have a sound understanding of the unique characteristics of primary production enterprises.

Recommendation 23

6.21 The committee recommends that the Australian Bankers' Association adopt all relevant recommendations of this report when redrafting the Code of Banking Practice.

Recommendation 24

6.22 The committee recommends that the new Code of Banking Practice currently being drafted by the Australian Bankers' Association specifically recognise the operating environment of primary producers.

Recommendation 25

6.23 The committee recommends that the Australian Bankers' Association stipulate that banks must draw customers' attention to the Code of Banking Practice when establishing new loans.

Recommendation 26

6.31 The committee recommends that the government establish tailored initiatives that provide primary producers with guidance on financial literacy and business management, and resilience training.

Recommendation 27

6.37 The committee recommends that the newly established Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry fully consider the evidence published by this committee in the context of its inquiry.

Chapter 1

Introduction

Inquiry terms of reference

1.1 On 16 February 2017, the Senate established the Senate Select Committee on Lending to Primary Production Customers to inquire into and report on the regulation and practices of financial institutions in relation to primary production industries, including agriculture, fisheries and forestry. The reporting date for the committee was set as 18 October 2017.[1] On 11 September 2017 the reporting date was extended to 29 November 2017 and then on 27 November 2017 the report was again extended to 6 December 2017.[2]

1.2 The terms of reference for the inquiry are:

> a) the lending, and foreclosure and default practices, including constructive and non-monetary default processes;
>
> b) the roles of other service providers to, and agents of, financial institutions, including valuers and insolvency practitioners, and the impact of these services;
>
> c) the appropriateness of internal complaints handling and dispute management procedures within financial institutions; and
>
> d) the appropriateness of loan contract terms particular to the primary production industries, including loan-to-value ratios and provision of reasonable written notice.[3]

Conduct of the inquiry

1.3 The inquiry was publicised on the committee's website.[4] The committee also wrote to key stakeholder groups and organisations to invite submissions, and placed advertisements in a number of regional newspapers. To publicise the inquiry further the former Chair, former Senator Roberts, and Deputy Chair, Senator Williams prepared a piece to camera which was posted on the committee website and published via social media.

---

1 *Journals of the Senate*, No. 30, 16 February 2017, pp. 1000–1001.

2 *Journals of the Senate*, No. 60, 11 September 2017, p. 1935; *Journals of the Senate*, No.72, 27 November 2017, p. 2284.

3 *Journals of the Senate*, No. 30, 16 February 2017, pp. 1000–1001.

4 Senate Select Committee on Lending to Primary Production Customers, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Lending_to_Primary_Production_Customers/LendingPrimaryProducion (accessed 4 October 2017).

1.4 The committee received 77 public submissions which are listed at Appendix 1. The committee also received 38 confidential submissions, largely from farmers who did not want their circumstances to be disclosed publicly.

1.5 The committee held 11 public hearings:

- 13 July 2017 in Charters Towers;
- 19 July 2017 in Perth;
- 2 August 2017 in Roma;
- 11 August 2017 in Sydney;
- 6 September 2017 in Canberra;
- 7 September 2017 in Canberra;
- 11 September 2017 in Canberra;
- 14 September 2017 in Canberra;
- 18 September 2017 in Canberra;
- 20 October 2017 in Canberra; and
- 17 November 2017 in Canberra.

1.6 The witness lists for these hearings are available at Appendix 2.

1.7 The committee also held a number of private briefings and *in camera* hearings.

1.8 In conducting the inquiry the committee resolved not to investigate, or seek to resolve or adjudicate disputes between customers, banks or other parties. The committee did however explore certain individual circumstances to build up a picture of the broader or systemic issues that may be prevalent in this sector.

Structure of the report

1.9 During the course of the inquiry, the committee identified a wide range of matters relating to lending to primary production customers.

1.10 Following this introductory chapter, Chapter 2 provides background information on the unique characteristics of the primary production sector that impact on the lending profiles of farmers.

1.11 Chapter 3 then examines the appropriateness of certain loan contract terms particular to primary production industries, including loan-to-value ratios, provision of reasonable written notice and penalty interest rates.

1.12 Chapter 4 in turn looks at matters relating to dispute resolution and access to justice.

1.13 Chapter 5 goes on to consider the roles and impacts of valuers and insolvency practitioners.

1.14 Finally, Chapter 6 analyses issues related to the broader bank culture in Australia.

Acknowledgment

1.15 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at public hearings. In particular the committee acknowledges the personal stories and experiences of many farmers who often travelled vast distances and incurred significant expense to appear before the committee in person.

Notes on references

1.16 References in this report to the Hansard for the public hearings are to the official and proof transcripts. Please note that page numbers may vary between the proof and official transcripts.

Chapter 2

Background

2.1 The primary production sector has a number of unique characteristics that impact on the lending profiles of farmers and can negatively affect the financial well-being of a farming enterprise. These include factors beyond farmers' control such as:

- weather events and seasonal conditions (such as drought, flood, fire, cyclones);
- product disease;
- product market collapse; and
- market manipulations.[1]

2.2 Income generated from agribusiness is often volatile and cyclical, due to variable seasons and global commodity price fluctuations.[2] In addition, primary producers are 'price takers' for their products, which are often perishable in nature.[3]

2.3 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) summarised the situation as such:

> Income for these businesses [small family primary production businesses] is largely seasonal, tied to market cycles and subject to externalities which can severely change the fortunes of the business, including weather and exchange rates.[4]

2.4 Mr Andrew McLaughlin, a senior consultant mediator with extensive experience in assisting farmers in mediating with banks, noted:

> Farmers should not be compared to other businesses; they rely upon seasonal factors that are out of their control, the average farmer has on average 1 in 3 years where they achieve to break even or make a profit that enables them to pay their creditors or reduce their debt level.[5]

2.5 Representatives of the banking sector also acknowledged the special circumstances faced by farmers. For example Ms Anna Bligh, the Chief Executive Officer of the Australian Bankers' Association (ABA) recognised the particular difficulties primary producers can face:

---

1 Legal Aid Queensland, *Submission 6*, p. 3.

2 ANZ, *Submission 8*, p. 3.

3 Legal Aid Queensland, *Submission 6*, p. 3.

4 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

5 Mr Andrew McLaughlin, *Submission 21*, p. 1.

> The banking industry is acutely aware of the difficult circumstances facing some primary producers across Australia, from droughts to natural disasters and lower domestic farm-gate prices. These events are beyond the control of farmers and they are beyond the control of banks.[6]

2.6 Primary production enterprises are often intergenerational family businesses, a characteristic that can compound the negative impacts that arise during financial hardship. The Department of Agriculture and Water Resources informed the committee that more than 95 per cent of broadacre and dairy farms are family owned and operated. As a result, funding by family farms for expansion and improvement is limited to the funds the family has in reserve, the profits the business can generate, and the funds it is able to borrow.[7]

2.7 On this matter, Legal Aid Queensland observed:

> As a group, rural producers face significantly greater risks compared to most businesses. Most farms are family operations where individuals provide most, if not all, their assets as security to banks for loans for their businesses. The assets provided as security will in most cases include the home or homes where the farmer and members of his family reside. Loss of the assets results not only in loss of livelihood but also security of accommodation and a sense of community and wellbeing.[8]

2.8 Mr Dennis McMahon, a senior lawyer in the Farm and Rural Legal Service section of Legal Aid Queensland, further outlined the complexities around financial troubles for primary producers, in large part because the matters are not only commercial, but also emotional:

> People's livelihoods, homes and whole lives revolve around the property. They are part of the community. When things go awry, it's not just one person that's affected; it's generally a whole family, and it can be generational. Other people within the community can also be affected if the client's business is wound up and other small businesses in towns don't get paid. All sorts of other ramifications might happen. It's also very socially damaging for a lot of people. These hurts don't go away.[9]

2.9 The ASBFEO highlighted particular characteristics of the primary production section that impact on lending profiles:

> Cash flow requirements however are a constant with on-going needs for inputs such as stock feed, equipment maintenance, employee salaries and benefits. The primary production operations of these small businesses tend

---

6 Ms Anna Bligh, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 11 August 2017, p. 61.

7 Department of Agriculture and Water Resources, *Submission 7*, p. 3.

8 Legal Aid Queensland, *Submission 6*, p. 3.

9 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, *Committee Hansard*, 2 August 2017, p. 14.

> to be industry specialised and location specific skill. Small businesses in these industries can appear asset rich at face value, however much of the assets tend to be illiquid, with thin markets for resale of quick disposal.[10]

2.10 Data provided by the Department of Agriculture and Water Resources indicated that nationally, the total indebtedness of the agriculture, forestry and fishing industries (defined by the Reserve Bank of Australia) to institutional lenders was $69.5 billion at 30 June 2016.[11]

2.11 The National Farmers' Federation (NFF) noted that access to credit to manage cash flow is of paramount importance in the farming sector, owing to the infrequent nature of payments for crops, livestock, and other primary products. The NFF also observed that food and fibre producers face significantly more volatility in incomes than in other industries.[12]

2.12 Mr Justin Walsh, a partner with Ernst & Young acknowledged the risks relating to cash flow inherent in primary production:

> ...farming is a difficult business because, in your average business – and I see a lot of business – you can have some degree of certainty about what the cash flows are going to look like going forward. That is sadly not the case for farming, because you can be the best farmer in the world but, if it doesn't rain for two years, that means nought. It's a difficult enterprise where you have to continually service debt.[13]

2.13 Federal and state government policies can also have unanticipated impacts on the viability of farmers. For example, the impact of the live cattle export ban, local and state government planning actions, water entitlements and native vegetation legislation.[14]

Negative impacts on farmers

2.14 The committee received evidence publically and confidentially from numerous primary producers outlining the significant detrimental impacts of certain lending, foreclosure and default practices in the sector. These negative impacts include:

- the loss of property and livelihood;

---

10 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

11 Department of Agriculture and Water Resources, *Submission 7*, p. 2.

12 National Farmers' Federation, *Submission 62*, p. 7.

13 Mr Justin Walsh, Partner, Ernst & Young, *Proof Committee Hansard*, 20 October 2017, p. 58.

14 See for example Mr Charlie Wallace, private capacity, *Proof Committee Hansard*, 11 September 2017, pp. 2–3; Mrs Nolene Bradshaw, private capacity, *Committee Hansard*, 13 July 2017, p. 1; Mr Brian and Mrs Suellyn Webster, *Submission 57*, p. 1l; Mr William Axford, private capacity, *Proof Committee Hansard*, 19 July 2017; pp. 59–63.

- mental health issues and suicide;
- relationship and family breakdown;
- loss of dignity for affected farmers and their families; and
- flow-on effects for close-knit rural and regional communities.[15]

2.15 As Mr Andrew McLaughlin observed:

> I have experienced and seen the impact of the recovery practices used by certain senior managers of a number of banks which have not only in some cases physically removed farmers from their homes, but also abused, threatened, intimidated and divided families to the point of unnecessary suicide.[16]

2.16 During the course of the inquiry the committee was made aware of numerous instances of alleged unreasonable and unethical behaviour by banks, receivers, lawyers and other related stakeholders. While the committee is aware that some of these allegations are contested, on balance, the broader patterns observed by the committee illustrate that in some circumstances there have been significant problems with the methods in which banks and their agents interact with their primary production customers.

2.17 In addition, although the committee accepts that some allegations are contested, the profound emotional toll that bank and receiver behaviour had on many primary production families cannot be disputed.

2.18 Many farmers who spoke to the committee were often distressed, agitated and spoke of the trauma that their experiences with banks and in particular, receivers, had caused their families. They spoke of feeling powerless, humiliated, and intimidated, and of deteriorating mental and physical health.[17]

---

15 For examples of these impacts, see Mr Michael and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017; Mr Charlie Wallace, *Submission 80*; Mrs Noelene and Mr Lloyd Bradshaw, *Submission 43*; Mr Sam Sciacca, *Submission 47*; Mr Gerard O'Grady, *Submission 83*; Mr Harold Cronin, *Submission 50*; Mr Thomas Fox, *Submission 42*; Mr Craig Caulfield, *Submission 55*; Mr Lindsay Dingle, *Submission 84*; Axford Family, *Submission 37*; Mr Bob Yabsley, *Submission 58*; Mr Brian and Ms Suellyn Webster, *Submission 57*. This is not intended to be an exhaustive list, but rather a selection of submissions. The committee also received numerous confidential submissions which outlined similar impacts.

16 Mr Andrew McLaughlin, *Submission 21*, p. 1.

17 For example see verbal evidence from the following submitters: Mrs Nolene Bradshaw, private capacity, *Committee Hansard*, 13 July 2017; Mrs Debbie Viney, private capacity, *Committee Hansard*, 13 July 2017; Mr Lindsay Dingle, private capacity, *Committee Hansard*, 2 August 2017; Mrs Catherine Stuart, private capacity, *Committee Hansard*, 2 August 2017; Mr Michael and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017; Mr David Browning, private capacity, *Proof Committee Hansard*, 11 September 2017; Mr Charlie Wallace, private capacity, *Proof Committee Hansard* 11 September 2017; Mr Harold and Mrs Barbara Cronin; private capacity, *Proof Committee Hansard*, 19 July 2017. The committee also received confidential verbal evidence that outlined such allegations.

2.19 For example Mrs Debbie Viney, a primary producer who appeared at the committee's hearing in Roma, Queensland spoke of her experience with a bank employee:

> Banks seem to think they have the right to tell you that if they were in my shoes they would commit suicide. I have that. You can't have any better proof than that…
>
> Their words were that if they were in my boots they would committee suicide…
>
> You have no idea what is happening out there in the banks, I'm sorry. It is horrific. You should listen to how they can torture you for three or four hours. They twist your mind. At the end of it, you have no hope. You walk away with no hope. It is about two or three days later, when you will go to shoot a cow, that somebody will say to you in your head, 'It would [be] so much easier to shoot yourself'. What are we supposed to do? How many people out there have shot themselves because they have been told the same thing as us? I wasn't the only one there that day. It wasn't just me that heard that. I had a young fellow who was 16 standing there listening to that. I had an older mother that was listening to that. We are supposed to take that and sit back and say, 'No, it's okay'? There isn't a lawyer out there that has the balls or the guys to stand up and do something. No-one has, because they are the banks. They are untouchable.[18]

2.20 A confidential submission from a primary producer illustrated the severe mental and physical toll stemming from the aggressive, unreasonable behaviour of frontline financial institution staff:

> I do not get much sleep and sometimes do not sleep at all. I then go to work and operate large farm machinery for long hours at a time. Do they [bank and their agents] think about my wife, who if she does not come with me to work, is at home wondering if I am alright or am I laying under a machine that has tipped over. Do they think about what goes through my wife's mind if I take a rifle to work to shoot a fox or put a sheep out of its misery. She is thinking and praying that I don't do anything stupid in a moment of madness or frustration.[19]

2.21 The following exchange between the former committee chair and primary producers Mr Harold and Mrs Barbara Cronin during a public hearing in Perth, also exemplified the negative emotional impact, both on individuals and regional communities:

> **CHAIR:** Mrs Cronin, I noticed your discomfort and sadness as your husband was telling the story. There's obviously profound grief and loss there. Is that widespread?
>
> **Mrs Cronin:** Very.

---

18 Mrs Debbie Viney, private capacity, *Committee Hansard*, 13 July 2017, p. 48.

19 *Confidential submission 29*, p. 8.

CHAIR: That didn't take you long.

Mrs Cronin: Do you mean with other farming communities?

CHAIR: Yes

Mrs Cronin: Yes, very much so.

CHAIR: That's what I'm picking up and, in fact, would that have discouraged a lot of farmers from even making a submission – it just hurts too much to even recount it?

Mrs Cronin: That's right, yes.

CHAIR: I can see other people in the room agreeing.

Mr Cronin: It really rips you apart;

CHAIR: Just writing these submissions, because you have to relive all the pain.

Mr Cronin: You're going to relive it all again.

Mrs Cronin: Yes.

CHAIR: So it's much more widespread than the group we see at each of the hearings?

Mrs Cronin: Yes, most definitely.[20]

2.22 In addition, Mr Cronin outlined in detail the impact the bank and receiver behaviour had on his family:

> They [receivers] ended up spending all this money for nothing, and made sure we couldn't survive, and we didn't. My wife had shingles twice, with stress. I don't know whether I had a breakdown or not; I don't know, because I don't know where I am half the time. But I do know what happened to us and what destroyed our family and the farming history for 50 years…
>
> The injustice is the worst part of it. Our son, who won't come back down here again, is in Katherine, managing a farm. He is that wild and disgusted with the whole episode that he won't come down here again. It's split the whole family up. Our three grandsons…are destroyed as well. Why? So the bank can make a loss of $4½ million?... It doesn't make sense.[21]

2.23 Mr Lindsay Dingle, a primary producer from Queensland emphasised the distress his family endured when asked by the committee what services and support were available when he was evicted from his property:

> It is the most harrowing time. You are so isolated, because at the time we were sent into a very inadequate housing situation – no internet, no nothing.

---

20 Mrs Barbara Cronin and Mr Harold Cronin, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 47.

21 Mr Harold Cronin, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 44.

> We tried on the phone to the best of our ability. You are so isolated; there is no one.[22]

2.24 Mr McLaughlin provided the committee with further observations:

> …once you get a farmer in a position where there is no point of return, then you break their spirit. Once you break that spirit, there's nowhere for them to go. Not only do they lose respect for themselves; the family loses respect and the creditors within the area lose respect. Before you know it – fifth, sixth or seventh generations – whether it's the trigger of the bank's pressure, financial pressure or family matters, that then causes suicides. I've seen them. I've been involved with a couple. I've actually institutionalised some of my clients to try and prevent them committing suicide or self-harm, and I believe that's just uncalled for. Material things are important to certain people. Money is important to certain people. Material things can always be replaced and you can always earn a dollar, but you can't replace family.[23]

2.25 Banks such as Westpac acknowledged the effect of enforcement action on the welfare of customers, families and communities, and stated that its priority is to ensure that the welfare and dignity of primary producers are maintained through any process of enforcement.[24]

Committee view

2.26 While the committee understands that for a farmer experiencing financial difficulties there may be a number of stressors, evidence received during the course of the inquiry clearly illustrates that a significant stressor can be the actions and behaviour of financial institutions and their agents.

2.27 The committee acknowledges the pain of all those primary producers who submitted to this inquiry, and is aware of the stress and difficulty present in retelling traumatic experiences. The committee thanks those primary producers and their families for their assistance in putting forward their stories for the purpose of informing the committee's deliberations.

2.28 The committee also notes that concerns about alleged misconduct by some financial institutions are not limited to the primary production sector, with consequential impacts on the life savings, home ownership and business interests of many ordinary Australians. The committee has therefore conducted its inquiry cognisant of mounting pressure for a royal commission into Australia's banking sector. This matter is considered in some detail in Chapter 6.

---

22 Mr Lindsay Dingle, private capacity, *Committee Hansard*, 2 August 2017, p. 43.

23 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 2.

24 Mr Stephen Hannan, National Manager Agribusiness, Commercial Banking, Westpac, *Proof Committee Hansard*, 18 September 2017, p. 39.

Chapter 3

Terms and conditions of rural loans

3.1 Small businesses involved in the primary production industries are frequently family enterprises centred on farming operations. The Office of the Australian Small Business and Family Enterprise Ombudsman explained that many involve inter-generational businesses.[1] Loans for farming operations tend to be below $5 million, and as such are not typically classified as small business loans by lending institutions.[2]

3.2 Access to credit to manage cash flows is critical in the farming sector, which is subject to considerable volatility of income due to multiple extrinsic factors. However, the committee received evidence suggesting that trends in rural lending are hampering farmers' ability to manage cash flows and survive through periods of financial hardship, which are far from unknown in the sector.

3.3 This chapter will look at the appropriateness of loan contract terms particular to the primary production industries, including provision of reasonable written notice, loan-to-value ratios, and penalty interest rates.

Adequacy of notice periods

3.4 There is currently no statutory requirement relating to the period of default notice credit providers may provide a small business borrower before proceeding to enforce rights under the credit contract.[3]

3.5 The Financial Ombudsman Service noted the limited period often provided to borrowers for compliance with a default notice:

> Where a default notice is served, there is usually only a short period of time given to comply with the notice. However, in most cases this follows a longer period of negotiation, where a range of options are usually explored.[4]

3.6 Further to this, small business loan contracts allow financial institutions to disregard prescribed notice periods, effectively allowing borrowers very little time to act on a breach of conditions. This in turn means that even a business in solid financial

---

1 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, pp. 1–2.

2 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2. See also National Farmers Federation, *Submission 62*, p. 2.

3 Financial Ombudsman Service Australia, *Submission 9*, p. 10.

4 Financial Ombudsman Service Australia, *Submission 9*, p. 6.

standing could suddenly be subject to a loan default.[5] To address this, the Office of the Australian Small Business and Family Enterprise Ombudsman recommends:

- introducing a 30-business day notice period for all general restriction clauses and covenants (except for fraud and criminal actions); and
- introducing a longer notification timeframe (in excess of 90-business days) of a decision on rolling over a small business loan.[6]

3.7 In a similar vein, the Financial Ombudsman Service supported the findings of the review of the Banking Code of Practice that recommended:

> …small business customers with a credit facility below $5 million that the Code require signatory banks to provide 30 days' notice before beginning enforcement proceedings against a small business customer in default under a credit contract.[7]

Committee view

3.8 The committee supports each of these recommendations and makes the following related recommendation, which would require dialogue to commence between a lender and borrower at least six months prior to the expiry of a loan term.

Recommendation 1

3.9 The committee recommends that the Australian Bankers' Association revise the Code of Banking Practice to require authorised financial institutions to commence dialogue with a borrower at least six months prior to the expiry of a term loan.

Recommendation 2

3.10 The committee recommends introducing minimum 90 day notice periods for:

- **all general restriction clauses and covenants (except for fraud and criminal actions);**
- **any decision with respect to the rolling over of a small business loan; and**
- **any decision to commence action against a small business customer for default under a credit contract.**

5 For discussion see Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

6 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

7 Financial Ombudsman Service Australia, *Submission 9*, p. 10.

Loan variations

3.11 The committee received evidence of very significant loan variations, initiated by various banks, which put rural borrowers in a highly disadvantageous position. For example, one witness who gave confidential evidence, explained that the radical change in the term of their loan when the loan book of their financial institution was acquired by a second financial institution:

> Within a few weeks of [unnamed financial institution] assuming that loan, they sent us a letter of offer, reducing our term of loan from 21 years to six months.[8]

3.12 This fundamental change occurred less than five years into the term of their loan.[9]

3.13 The same borrower gave evidence that their main interest rate, as well as their overdraft rate, had increased significantly and without justification, leading to an effective doubling of their monthly interest payments.[10]

Committee view

3.14 The committee finds these sorts of unilateral changes to the fundamentals of a borrower's loan arrangements to be wholly unacceptable. If these sorts of practices were replicated elsewhere in Australia, there would be defaults across the country and the economy would come to a standstill. The committee is of the view that the financial impact of such variations, if made in circumstances where the borrower is not at fault, should be borne by the relevant financial institution.

Recommendation 3

3.15 The committee recommends that:

- **financiers be prohibited from making fundamental, unilateral changes to the loan agreements where such changes are detrimental to the customer;**
- **provided that a customer is meeting all terms and conditions of a loan, financial institutions must be required to bear any costs associated with a variation of a loan term, if the variation is sought by the financial institution;**
- **should a customer suffer any detriment as a result of any unilateral change to a loan agreement by a financier, that the financier be liable to pay for those losses and damages.**

---

8 *In camera witness*

9 *In camera witness.*

10 *In camera witness*. Penalty interest rates are discussed in more detail later in this chapter.

3.16 This recommendation is consistent with the nature of the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services report into the *Impairment of Customer Loans*, which are supported by the Financial Ombudsman Service.[11]

Lending obligations for consumer credit

3.17 Responsible lending requires credit licensees to enquire into potential customers' objectives and their financial situation. Providing credit in the absence of such an enquiry and verification of financial status, risks the customer not meeting their financial obligations and incurring substantial financial hardship.[12]

3.18 The Australian Bankers' Association (ABA) informed the committee that banks are required to make responsible lending decisions and consider a number of factors when assessing a loan application or rollover of a credit facility. These include:

- Capacity: This looks at a businesses' ability to meet the loan obligations and repayments, including potential earnings and whether this is sufficient to meet repayments.
- Collateral: This considers the applicant's 'security' for the proposed loan. This would include assessment of the property's security through an independent valuation. This can include the debt-to-equity ratio to understand how much the lender is being asked to provide.
- Capital: The strength of the customer's financial position (e.g. amount of assets and liabilities)
- Character: This considers the applicant's reputation, including past repayment and credit history.
- Conditions of the loan: This looks at the lender's 'terms' for providing the loan, including the repayment schedule, pricing, conditions precedent (which must happen before funding) and duration of the loan.[13]

3.19 Evidence presented to the committee during the course of the inquiry suggests that some financial institutions have acted in a way that is not consistent with responsible lending practices.

3.20 For example, Legal Aid Queensland submitted that some banks clearly employed variable lending practices between different branches:

> FRLS [Farm and Rural Legal Service] recently had a client whose original application was declined by one branch but accepted by another branch of the same bank on the basis of the same information. Within one month of

11 Financial Ombudsman Service Australia, *Submission 9*, pp. 9–10.

12 See Parliamentary Joint Committee on Corporations and Financial Services report, *Impairment of Customer Loans*, May 2016, p. 28.

13 Australian Bankers' Association, *Submission 12*, p. 3.

> the loan being granted, the facility was in default. This is in our view an example of non-prudent lending.[14]

3.21 What protection from irresponsible lending currently exists is limited. The committee heard that new national laws were introduced in 2010 with the aim of regulating consumer lending, prior to which regulation only existed at the state level. The introduction of laws at the Commonwealth level established a higher responsible lending obligation, meaning that a financial lender is responsible for ensuring that consumers can afford the loan they are being provide with:[15]

> The lenders are required to make reasonable inquiries into a borrower's financial situation, and they have to take reasonable steps to verify the information that the borrower has provided to them. So there are two parts to it. They have to make the inquiries, and then they have to verify that information. So you can't have a situation where lenders are providing loans purely against the assets that are being secured for those loans. There has to be capacity within the borrower to service the debt that is being provided to the borrower. That has been in place since 2010 nationally for consumer credit.[16]

3.22 These laws do not, however, apply to all primary producer lending, and any lending that is for investment purposes (other than residential investment property)–business loans–is not included in the protections provided by those laws.[17]

Loan contract terms

3.23 According to information provided by the ABA, credit contracts include both monetary and non-monetary covenants (e.g. specific events and financial indictors), which if breached may foreshadow financial distress and in some circumstances give the bank the right to call in the loan.[18]

3.24 The ABA emphasised that there are legitimate reasons for specific event non-monetary defaults:

> While it has been recommended by the recent Small Business and Family Enterprise Ombudsman inquiry that the only form of default should be monetary or unlawful acts, there are legitimate reasons for specific non-event monetary defaults. For example, voluntary administration, fraud, significant changes in management, loss of trading licence and changes to

14 Legal Aid Queensland, *Submission 6*, p. 6.

15 Mr Michael Saadat, Senior Executive Leader, Deposit Takes, Credit and Insurers, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 4.

16 Mr Michael Saadat, Senior Executive Leader, Deposit Takes, Credit and Insurers, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 4.

17 Mr Michael Saadat, Senior Executive Leader, Deposit Takes, Credit and Insurers, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 4.

18 Australian Bankers' Association, *Submission 12*, p. 4.

> the underlying security, each of which could impact on the viability of the business and its ability to meet future repayments.[19]

3.25 The committee heard that terms and conditions stipulated by small business loans enable financial institutions to 'legally pursue businesses for non-monetary default' if applicable loan covenants are breached.[20] Breaches include non-monetary defaults which may be due to:

> …loan-to-value ratios (LVR) dropping past the institutions' commercially acceptable appetite for risk, or other financial ratios and/or generalised 'material adverse change' clauses.[21]

3.26 To address this, the Office of the Australian Small Business and Family Enterprise Ombudsman recommended removing:

- clauses which allow banks to unilaterally invoke security asset valuation during the life of loan financial covenants; and
- catch-all 'material adverse change' clauses.[22]

3.27 The ABA informed the committee that it is currently in the process of revising the Code of Banking Practice (the code).[23] The revised code will reduce the number of non-monetary covenants in loan contracts and credit products for small business and agribusiness customers. The revisions will:

- remove all general adverse material change clauses.
- reduce the number of specific events of on-monetary default entitling enforcement action. This will be limited to:
  - unlawful behaviour;
  - insolvency, bankruptcy, administration or other creditor enforcement;
  - misrepresentation, use of the loan for non-approved purpose, dealing with loan security property improperly or without consent;
  - change in beneficial control of company except as permitted;
  - loss of licence or permit to conduct business; and
  - failure to provide proper accounts or to maintain insurance (after a reasonable period).
- remove financial indicator covenants as triggers for default.[24]

---

19 Australian Bankers' Association, *Submission 12*, p. 4.

20 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

21 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

22 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 2.

23 Further discussion on this matter can be found in Chapter 6 of this report.

24 Australian Bankers' Association, *Submission 12*, p. 5.

Committee view

3.28 Based on the preceding two sections, the committee is of the view that more must be done to protect primary producers from irresponsible lending practices and unfair contract terms.

3.29 The committee acknowledges the efforts of the Australian Bankers' Association in revising the Code of Banking Practice to reduce the number of non-monetary covenants in loan contracts and credit products for small business and agribusiness customers.

3.30 However, the committee urges the ABA to extend the responsible lending obligations and unfair contract term protections to primary production customers with business loans of less than $10 million.

Recommendation 4

3.31 The committee recommends that the Australian Bankers' Association Code of Banking Practice be revised to extend:

- **the responsible lending obligations contained in the *National Consumer Credit Protection Act 2009*; and**
- **the unfair contract term protections for small businesses, as set out in the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015***

to primary production loans of less than $10 million.

Loan document alteration without customers' knowledge

3.32 The committee is also aware of concerning allegations regarding loan documents which may have been tampered with:

> FRLS [Farm and Rural Legal Service] has observed that disputes can arise when the bank prepares the documents supporting the loan application or makes alterations to them after the documents have been provided/approved/seen by the farmers. Documents such as cash flows, livestock schedules, historical backgrounds etc. have occasionally been prepared by bank staff. The customers are not aware of the contents of these documents. There have been circumstances where the farmer has later obtained copies of this material (after disputes arise or defaults have occurred). Cash flows have been found to be completely wrong. It may incorrectly overstate income or understate expenses and living costs and

> over-estimate livestock on hand, calving rates, projected cattle sales and ongoing crop returns.[25]

3.33 Mr Denis McMahon, representing Legal Aid Queensland, confirmed that he has had clients who allege their documents have been altered without their knowledge:

> I say that there have been circumstances where the clients believe that that's occurred. I can say that we've had instances where clients have alleged that, yes, and it would appear to have been the case.[26]

3.34 In discussion with the committee, Mr McMahon elaborated:

> **Senator WILLIAMS**: Have you seen loan application forms that have had the figures, amounts or cash flows altered?
>
> **Mr McMahon**: I have seen cash flows where there has been included in them income from sources—for example, a grazing enterprise having income for grain production in it—
>
> **Senator WILLIAMS**: And they had no grain growing?
>
> **Mr McMahon**: and I've seen cash flows where we've had cows having three calves in the first year—
>
> **Senator WILLIAMS**: Really! That's a record!
>
> **Mr McMahon**: for the numbers to get up. But they're very rare. We've done many mediations over time, and, on rare occasions, we do see those sorts of instances.[27]

3.35 In such circumstances, there may be a large discrepancy between the financial information seen by a bank's internal credit section and the actual capacity of a business to meet its requirements. This can have very serious consequences:

> In extreme cases, cash flows have no resemblance to the financial performance of the business. On at least one occasion, clear mistakes made by the bank in preparing cash flows used to accompany the loan application were not noticed by the credit section despite the mistake being so basic as to completely compromise the financial performance and production of the business.[28]

---

25 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 5.

26 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, *Proof Committee Hansard*, 2 August 2017, p. 15.

27 See discussion with Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, *Proof Committee Hansard*, 2 August 2017, p. 15.

28 Legal Aid Queensland, *Submission 6*, p. 5.

Committee view

3.36 It is clear that ensuring that farmers are provided with an opportunity to verify information which then goes to a bank's internal credit section would be beneficial. The consequences of the bank making mistakes or altering loan documentation without the farmer being notified can have devastating impacts on the financial position and wellbeing of primary producers. Although it should go without saying that customers should know exactly what the bank is signing them up to, it would appear that this is not always the case. The committee is strongly of the view that steps must be taken to rectify this.

Recommendation 5

3.37 The committee recommends that the Australian Bankers' Association Code of Banking Practice require that financial lending institutions provide farmers who obtain loans with full copies of signed loan applications and other relevant documents:

- **prior to the submission of the loan application;**
- **prior to any final loan approval; and**
- **at any other time as reasonably requested by the farmer.**

Recommendation 6

3.38 The committee recommends that compliance with the Australian Bankers' Association Code of Banking Practice be included as a term of any loan documentation.

Recommendation 7

3.39 The committee recommends that statutory time limits for legal proceedings be removed in circumstances where a bank or its agents have changed the details of loan documents without the customer's knowledge, or the bank or its agents have acted unethically in the course of the commercial dealings with the borrower.

3.40 On a related matter, the committee endorses the recommendation put forward by Legal Aid Queensland in regard to the preparation of financial documents and information provided by a primary producer to their financial institution.[29]

Recommendation 8

3.41 The committee recommends that the Australian Bankers' Association ensure all financial documents provided to its members by a farmer (including but not limited to asset and liability position statements, cash flow projections, business plans, valuations, historical and other similar documentation provided

29 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 5.

for, or on behalf of, customers either in support of loan applications or at any time throughout the relationship and at times of review) be prepared, altered or updated only by the customer and/or their representatives, and not by the bank or financial institution.

Appropriate loan categories

3.42 The committee considered evidence provided by individual farmers who allege they were given home loans to finance commercial farming endeavours.

3.43 In one example, Mr Craig and Mrs Moeroa Caulfield purchased a 110 acre cane farm in 2007, under a contract which contained a number of clauses pointing to their intentions to continue cane farming. The farm was located within a flood plain and zoned as sustainable cane land, with an agricultural rating applied by the council.[30]

3.44 The Caulfields sought and obtained finance from the Commonwealth Bank of Australia (CBA), and were approved for a $480 000 loan without providing pay slips or tax returns.[31] Not long thereafter they experienced financial hardship due to a number of factors. In 2010 they approached the CBA to apply for financial hardship, but were declined, as was their attempt to apply for farm debt mediation with the CBA:

> CBA has obligations under the Queensland Farm Finance Strategy (QFFS) to engage in FDM. CBA has consistently denied our requests for FDM on the basis we are not a farm…
>
> Based on documents we have since received, CBA describe the facility as a Home Loan. There is and was no house on the farm. We believe CBA denied us FDM because it would confirm they sold us the wrong loan.[32]

3.45 This refusal by the CBA came despite the Caulfields' status as farmers having been confirmed by government departments, legal aid and financial counselling services.[33]

3.46 The committee understands that this is not an isolated case.

3.47 Ms Natasha Keys purchased a tea-tree producing property in northern New South Wales, having notified the bank of her intention to commercially harvest the tea tree plantation when applying for a loan. In spite of this, the bank in question

30 Mr and Mrs Craig and Moeroa Caulfield, *Submission 55*, p. 1.

31 Mr and Mrs Craig and Moeroa Caulfield, *Submission 55*, p. 1.

32 Mr and Mrs Craig and Moeroa Caulfield, *Submission 55*, p. 2.

33 Mr and Mrs Craig and Moeroa Caulfield, *Submission 55*, p. 2.

approved Ms Keys for a home loan instead of a farm or business loan. The reasons for this, in Ms Keys' view, were clear:

> This allowed the Bank to lend a higher LVR% against the property and to avoid implications of costs associated with the Farm Debt Mediation Act.[34]

3.48 Ms Keys confirmed that her experience was not unique, submitting that she had come across many other farmers whose loans had been incorrectly classified as home loans:

> We are just one group who have not been able to refinance, nor access proper IDR [internal dispute resolution], EDR [external dispute resolution] or farm debt mediation simply because our lender provided an incorrect product for the purpose in which we sought that credit. There is no recognition of this issue in the current farm debt landscape.[35]

Recommendation 9

3.49 The committee recommends that financial institutions' arrangements for categorising farmland be revised to ensure that agribusinesses are not financed through inappropriate loan categories. Recommended measures include:

- **facilitating processes for internal or external dispute resolution of farm debt mediation; and/or**
- **introducing a civil penalty provision for incorrect categorisations by financiers and providing for corresponding compensation to the farmer.**

Penalty interest rates on default

3.50 Many submitters raised concerns about banks imposing penalty interest rates upon an initial loan default, often leading to crippling debt.

3.51 One such submitter, Mr Andrew McLaughlin, explained how significant penalty interest rates can be:

> The biggest problem with that [default followed by litigation] is the debt from the day of default continues to grow at that rate—and we're not talking 13.7 per cent that they indicate on their documentation; I've seen it as high as 18 and 22 per cent. On $1 million per year, that's $220,000 in interest; you go two years that's $440,000. If you have $10 million debt, that's another $3 million in interest—just in penalty interest. Forget about the normal interest that will be there.[36]

34 Ms Natasha Keys, *Submission 56*, p. 1.

35 Ms Natasha Keys, *Submission 56*, p. 1.

36 Mr Andrew McLaughlin, private capacity, *Proof Committee Hansard*, 11 August 2017, p. 3.

3.52 Mr Robert Yabsley, whom the NAB charged penalty interest averaging 14.5 per cent from 2002 until 2012, added that increasing penalty interest rates applied to customers who are already having difficulty meeting their financial obligations only serves to ensure their failure:

> The NAB continued to charge penalty interest from mid-2002 to when the property was taken from me in September 2012, at an average of 14.05 per cent. I will make a point here which is not particularly relevant to my issue. If a bank customer is having difficulty paying a particular interest rate, and the bank charge additional penalty interest, it is pretty obvious that this will do two things: (1) it ensures the failure of the customer, because if they could not meet the ordinary interest they are not going to be able to meet the additional interest; (2) it ensures increased profit for the bank through increased interest, when they determine to sell the secured asset.
>
> My office researched fully the difference to our bottom line when the property was seized at the existing interest rate—and I do not know what it was, but the average over 10 years was 14.05—which created the debt that gave them the opportunity to do what they did in the end. I make that point because I feel this was organised. It was not something that just happened. I feel that the NAB were very embarrassed about the fact that they could not complete the receivership in 2001. They had no option, basically, other than to give us the property back when we could do something, which we did, by giving them a few bob. The only other alternative they had was to go to court and ask for a court to rule that they could do this, and that was very expensive and it would have taken them a long time. If the debt had been an average of 10 per cent instead of 14.05, our debt would have been $5.573 million less. At eight per cent it would have been $7.5 million less—almost nothing.[37]

3.53 Mr Brian and Mrs Suellyn Webster recounted their bank's unwillingness to engage with and consider the financial ill-effects they were suffering as a result of circumstances beyond their control:

> We advised the bank of the problems these factors [the Live Cattle Trade suspension, drought and unwanted construction work through our pastures] posed for our interest payments, including our inability to sell cattle including one load worth $225,000. The bank was relentless in demanding that we meet our loan obligations regardless of the unique situations we were battling through no fault of our own and charged many hundreds of thousands of dollars in late penalty interest. This treatment again was contrary to the enforceable Code of Banking Practice.[38]

3.54 A confidential submission described the significance of the interest rate increase:

---

37 Mr Robert Yabsley, private capacity, *Proof Committee Hansard*, 2 August 2017, p. 76.

38 Mr and Mrs Brian and Suellyn Webster, *Submission 57*, p. 1.

> Approximately 12 months into the loan, the bank put pressure on us to sell our investment property in [state] and increased interest rates by a 2% penalty rate… We repeatedly asked that these excessive rates be reduced as they were overbearing and unreasonable as put across the whole of the term loan, causing defaults on the overdraft account which caused a further 3% a total of 5%. This is nearly an 80 % increase in our interest rate of about 6.3%. We weren't aware that the interest rate increase would be over the whole term loan of $6.29M.[39]

Committee view

3.55 The committee views the imposition of penalty interest rates as a punitive mechanism that is more likely to send farmers in default further into financial difficulty. Their widespread use by banks is completely contradictory to the banks' evidence that their preference is to support struggling farmers to trade out of their financial problems. As witnesses rightly pointed out, the imposition of penalty 'ensures the failure of the customer, because if they could not meet the ordinary interest they are not going to be able to meet the additional interest'[40]

Recommendation 10

3.56 The committee recommends that the Australian Bankers' Association ensures that penalty rates are imposed on customers:

- **only in the most exceptional of circumstances; and**
- **not in the 12 months after an actual default by the customer of the loan agreement.**

3.57 If the default arises from circumstances beyond the control of the farmer (e.g. natural disaster, market conditions, government regulation or otherwise as would be described as *force majeure*) then penalty interest only be imposed as follows:

- **for the period commencing 12 months after the actual default and ending 24 months after the actual default—the interest rate at the time of the continuing default plus 1 per cent; and**
- **for the period commencing 24 months after the default and thereafter—the interest rate at the time of continuing default plus 2 per cent.**

---

39 *Confidential submission 66*, p. 1.

40 Mr Robert Yabsley, private capacity, *Proof Committee Hansard*, 2 August 2017, p. 76.

Corporate take-overs and loan books

3.58 The committee received a number of submissions which raised issues involving the ANZ takeover of the Landmark loan book.[41] The background to the Landmark loan book was described by the Parliamentary Joint Committee on Corporations and Financial Services in its report on the *Impairment of Customer Loans*:

> Landmark is a diversified rural merchandise business which, at the time it was acquired by ANZ, was a division of the Australian Wheat Board. Landmark Financial Services (LFS) was a division of Landmark that, at the time of its acquisition by ANZ, provided agribusiness lending of about $2.4 billion, had debenture (akin to deposit) accounts of about $300 million and had about 10,000 customers.[42]

3.59 ANZ acquired the Landmark loan book in March 2010, precipitating a number of complaints concerning the ensuing transition. Mr Ben Steinberg, representing ANZ, informed the committee that the bank was aware of the concerns, acknowledged shortcomings in the transition, and had sought to resolve outstanding issues:

> We've said to a previous parliamentary inquiry—specifically, the parliamentary inquiry into impaired loans—that ANZ could have and should have done a better job in terms of transitioning the Landmark portfolio under ANZ ownership. That said, we also agree with you that there have been a number of unsatisfied customers who are not happy with the way their loans were transitioned. We've met with a large number of those customers and we've heard their concerns and we've done everything that we've possibly been able to do to resolve them.[43]

3.60 Mr Steinberg did, however, acknowledge that a number of matters were still 'subject to discussions'. In response to the committee's concerns, he indicated ANZ would readily agree to meet with the customers and former customers in question, along with members of the committee, to work towards resolving any outstanding problems.[44]

---

41 See for example Mr David and Mrs Elizabeth Browning, *Submission 81*; Mr Sam Sciacca, *Submission 4*; Mr William Axford, private capacity, *Proof Committee Hansard*, 19 July 2017, pp. 59–63.

42 Parliamentary Joint Committee on Corporations and Financial Services, *Impairment of Customer Loans*, May 2016, p. 144.

43 Mr Ben Steinberg, Head of Lending Services, Corporate and Commercial, ANZ, *Proof Committee Hansard*, 11 August 2017, p. 15.

44 Mr Ben Steinberg, Head of Lending Services, Corporate and Commercial, ANZ, *Proof Committee Hansard*, 11 August 2017, p. 15.

Committee view

3.61 The committee appreciates the ANZ's commitment to meet with former Landmark customers. Nevertheless, while there are ongoing issues to be resolved and further details to be gathered, the committee is of the view that a separate inquiry should be launched to shed more light on the implications of this significant corporate takeover.

Recommendation 11

3.62 The committee recommends that the ANZ takeover of the Landmark loan book be subject to a review by the soon to be incorporated Australian Financial Complaints Authority (or equivalent existing regulatory body) and that such a body have the powers to review:

- **all commercial documents regardless of any confidentiality clauses contained therein;**
- **any other matter which may otherwise be subject to limitation periods; and**
- **without limitations as to the amount.**

Chapter 4

Dispute resolution and access to justice

4.1 This chapter examines matters relating to dispute resolution and access to justice.

Farm Debt Mediation

4.2 In most parts of Australia, a primary producer with a dispute over a farm debt can seek resolution under a farm debt mediation (FDM) scheme. Creditors can also initiate FDM. FDM schemes aim to provide farmers with rights to participate in mediation before lenders can enforce their rights under a mortgage.

4.3 The New South Wales Rural Assistance Authority, which oversees the New South Wales FDM scheme, emphasised the benefits of farm debt mediation for primary producers:

> New South Wales' view is that farm debt mediation is a proven and effective access to justice mechanism for farmers and creditors that has worked well in NSW for more than 22 years.[1]

4.4 Ms Amanda Pullinger, policy director for retail policy for the ABA outlined the benefits of farm debt mediation in relation to addressing the power imbalance between a farmer and a bank:

> One of the main benefits of farm debt mediation is that it's run by an independent mediator in a neutral environment. The farmer is able to get advice from advisers there. The process is overseen by another government authority, and so it's not the bank necessarily influencing the process. The process does help to redress that power imbalance that some people perceive.[2]

A national scheme

4.5 There is currently no national FDM scheme. Although there are similarities across some jurisdictions, the approaches taken across Australian states are not consistent. New South Wales, Victoria and Queensland have legislative (i.e. compulsory) schemes, South Australia has a bill before Parliament and Western

---

1 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 2.

2 Ms Amanda Pullinger, Policy Director, Retail Policy, Australian Bankers' Association, *Committee Hansard*, 11 August 2017, p. 62.

Australia has a voluntary scheme. There are no formal arrangements in Tasmania, the Northern Territory, or the Australian Capital Territory.[3]

4.6 The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) estimates that the combined reach of the three legislated schemes would cover approximately 77 per cent of Australia's farm businesses.[4]

4.7 Under FDM schemes, a primary producer cannot force a mortgagee to mediate a dispute. However, if the primary producer is in default, refusal by the mortgagee to attend mediation can lead to the mortgagee being prevented from enforcing its rights under the mortgage for a specified period of time (generally six months).

4.8 Under the *Farm Debt Mediation Act 2011* (Vic), if the farmer in default requests mediation and the creditor refuses to mediate (either through declining the request or failing to respond to the request within 21 days), this provides the farmer with grounds to apply to the Victorian Small Business Commissioner for the issue of a prohibition certificate. A prohibition certificate prevents the creditor from commencing enforcement action against the farmer for a period of six months.[5]

4.9 Under the *Farm Debt Mediation Act 1994* (NSW), if a farmer is in default and the creditor declines to mediate, he or she can apply to the NSW Rural Assistance Authority for a section 9B certification of exemption from enforcement action.[6]

4.10 A section 9B exemption certificate prevents a creditor from taking enforcement in relation to a farm debt specified on the certificate for six months from the day on which the creditor declined to mediate, or until the day on which the farmer and creditor enter into mediation about the farm debt.[7]

4.11 Farm debt mediation in Queensland is enabled under the *Farm Business Debt Mediation Act 2017* (Qld). The Queensland Rural and Industry Development Authority outlined to the committee:

> If the farmer requesting mediation is not in default under the farm mortgage and the mortgagee refuses the mediation, there are no consequences under the act. However, if the farmer requesting mediation is in default under the farm mortgage, the mortgagee's refusal may be grounds for the farmers to

3 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans*, December 2016 (released February 2017), p. 60.

4 Department of Agriculture and Water Resources, *Submission 7*, p. 12.

5 Victorian Government, additional information received 6 November 2017, p. 1.

6 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 1.

7 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 1.

> apply for an enforcement action suspension certificate. This stops the mortgage taking enforcement action under the farm mortgage.[8]

4.12 If an enforcement action suspension certificate is issued, it remains in force for six months after the mortgagee gave the farmer a notice refusing the mediation.[9]

4.13 In regard to these three state-based suspension certificates, the ASBFEO observed:

> This temporary deferral of enforcement action does not address the underlying problem for the farmer, which is the inability to meet financial obligations.[10]

4.14 Numerous submitters expressed support for farm debt mediation and recommended the implementation of a national FDM scheme, including the big four banks (the ANZ, the National Australia Bank, the Commonwealth Bank of Australia, and Westpac) and the Australian Bankers' Association (ABA).[11]

4.15 ABA chief executive officer, Ms Anna Bligh made the following comments regarding the need for a national approach to farm debt mediation:

> …the ABA strongly encourages this committee to consider recommending a national model of compulsory farm debt mediation to help ensure all farmers are treated fairly across Australia. Mediation can help farmers in financial difficulty to re-establish financial viability or to exit the industry with their heads held high. It is a less expensive, more accessible and quicker way of resolving a dispute than through the legal system. Currently, the process varies between states and territories, and the ABA and its members believe that a national system would provide greater certainty for farmers, especially when their properties cross multiple states.[12]

4.16 Insolvency practitioners informed the committee of their support for a national FDM scheme. For example, Mr Stephen Longley, a partner and head of restructuring at PPB Advisory stated:

> In my discussion with the banks, they are just as vocal about it as us – that, if we get a national farm debt mediation, a consistent scheme across the country, and have someone monitoring that centrally, you can sit there and

---

8 Queensland Rural and Industry Development Authority, additional information received 11 October 2017, p. 1.

9 Queensland Rural and Industry Development Authority, additional information received 11 October 2017, p. 1.

10 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, p. 3.

11 See ANZ, *Submission 8*, p. 2; National Australia Bank; *Submission 10*, p. 3; Commonwealth Bank of Australia; *Submission 11*, p. 3; Westpac, *Submission 13*, p. 2; Australian Bankers' Association, *Submission 12*, p. 8.

12 Ms Anna Bligh, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 11 August 2017, p. 62.

> say, 'If it's got to this point, a receivership or an enforcement – or the farmer might even appoint an administrator soon', so you have a bit of oversight in it happening. It's difficult looking back at the past and trying to fix things in the past. We have to try and sort things out in the future. This is a way of looking at it and saying. 'Here are the warning signs'.[13]

4.17 The Financial Ombudsman Service also indicated that it supports calls for a nationally consistent approach.[14]

4.18 Legal Aid Queensland recommended a nationally consistent FDM process be adopted which included provisions:

> a. that heads of agreement reached at a farm debt mediation conducted in one State, which considered matters relating to the farmer's default under a farm mortgage secured over a farm proper in another State, is recognised by all jurisdictions; and
>
> b. that the process provide that the mortgagee must produce all documents to the farmer before mediation relating to the loans and banking relationship including all documents required to be produced by the mortgagee/financier to either a court of law or the Financial Ombudsman Service should either of those institutions be required to consider farm debt matters.[15]

4.19 Legal Aid Queensland noted that jurisdictional recognition as proposed in the above mentioned provision (a) is contained in the *Farm Business Debt Mediation Act 2017* (Qld) and the *Farm Debt Mediation Act 2011* (Vic).[16]

4.20 In regard to the above mentioned provision (b), Legal Aid Queensland also observed that in order for parties to mediate in good faith, free and open disclosure of all relevant documentation by both parties is necessary. This ensures power imbalances between parties are minimised and that the basis of the legal positions of each party is fully disclosed. In this regard Legal Aid Queensland stated:

> …banks and credit providers rely on legislation and contract law in order to enforce their rights against the mortgagor. In creating the contractual relationship with the mortgagor, the mortgagee is required to have complied with relevant laws and codes of conduct. The only way that a mortgagor can ensure that the mortgagee has acted lawfully is by having access to

13 Mr Stephen Longley, Partner and Head of Restructuring, PPB Advisory, *Proof Committee Hansard*, 20 October 2017, p. 30.

14 Financial Ombudsman Service, *Submission 9*, p. 5.

15 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 9.

16 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 9.

relevant documentation relating to the creation of the contractual relationship.[17]

4.21 The Department of Agriculture and Water Resources informed the committee that the government is continuing its process to develop a nationally consistent FDM scheme, with the intent being to provide an efficient and equitable process to resolve farm debt disputes. It advised that the government's preferred model for achieving a national scheme is through the harmonisation of legislation across the country and its implementation at the state and territory level.[18]

4.22 It also noted that at a meeting of the Agricultural Finance Forum in September 2014, the then Minister for Agriculture confirmed his commitment to the development of a nationally consistent scheme.[19]

4.23 The ASBFEO small business loans report, released in February 2017, recommended that a nationally consistent approach to FDM be introduced in order to ensure that all farmers in all states and territories have access to FDM, and reduce confusion of both small business and banks over when a small business owner can seek assistance.[20]

4.24 ANZ noted that it seeks farm debt mediation in all cases involving agriculture customers prior to taking any action under its security documents, even in jurisdictions where FDM is not compulsory.[21]

4.25 The Department of Agriculture and Water Resources advised that anecdotal information provided by rural financial counsellors to the New South Wales Government for its 2017 review of the *Farm Debt Mediation Act 1994* (NSW) indicated that:

- the process of FDM, particularly through legislated processes, is valuable and preferable to rapid foreclosure decisions; and
- financial institutions do operate within the intent of existing farm debt mediation legislation.[22]

4.26 This feedback also identified improvements that could be made to the FDM process, particularly when considering legal aspects. For example:

---

17 Mr Denis McMahon, Senior Lawyer, Farm and Rural legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 9.

18 Department of Agriculture and Water Resources, *Submission 7*, p. 3.

19 Department of Agriculture and Water Resources, *Submission 7*, p. 12.

20 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans*, December 2016 (released February 2017), p. 54.

21 ANZ, *Submission 8*, p. 11.

22 Department of Agriculture and Water Resources, *Submission 7*, p. 7.

> The days of farmers negotiating 'in good faith' with their local bank representative have lapsed. In some instances, banks appear to outsource their credit/control and direct recovery to their legal representatives much earlier than previously.
>
> While it is anticipated that banks attend mediation with their legal representatives, there have been instances where the bank's legal representatives has attended as their sole agent. This often places the farmer at a disadvantage as they have to make the decision as to whether or not to have legal representation, generally when they are in a position of severe financial disadvantage.
>
> Legal costs incurred by banks through the farm debt mediation process should, in the spirit of the legislated process, be borne by the banks, just as the farmer would be expected to meet any legal costs they incur in supporting themselves through farm debt mediation.[23]

4.27 The New South Wales Rural Assistance Authority indicated strong support for a national scheme:

> Harmonised FDM legislation would benefit lenders, borrowers and other decision-makers across Australia by enabling a consistent interpretation and application of FDM legislation. This would reduce the inefficiency, inequity and costs for stakeholders of engaging with different statutory requirements, and improve equality under the law**…**
>
> If FDM legislation were to be harmonised, the primary production sector and sectoral representatives could share learnings and experience, facilitating access to justice for farmers across Australia.[24]

Committee view

4.28 The committee believes that farm debt mediation is a valuable tool that will assist in partially addressing the power imbalance between primary producers and banks, as well as facilitating access to justice.

4.29 The committee notes that the government has indicated it supports the creation of a nationally consistent farm debt mediation scheme and urges it to prioritise this task. The committee considers that such a scheme should incorporate features such as a $10 million limit on loan amounts, recognition of heads of agreement across states, and the production of all relevant documents to the farmer by the bank before mediation.

---

23 Department of Agriculture and Water Resources, *Submission 7*, p. 7.

24 New South Wales Rural Assistance Authority, additional information received 25 October 2017, p. 2.

Recommendation 12

4.30 The committee recommends that the government establish a nationally consistent compulsory farm debt mediation scheme, based on the NSW model, with a $10 million limit on loan amounts that includes the following provisions:

- **that heads of agreement reached at a farm debt mediation conducted in one state, which considered matters relating to the farmer's default under a farm mortgage secured over a farm proper in another state, is recognised by all jurisdictions;**
- **that the process provides that the mortgagee must produce all documents to the farmer before mediation relating to the loans and banking relationship including all documents required to be produced by the mortgagee/financier to either a court of law or the Australian Financial Complaints Authority should either of those institutions be required to consider farm debt matters; and**
- **that refusal by the mortgagee to attend mediation results in the mortgagee being prevented from enforcing its rights under the mortgage for a minimum 6 month period.**

Australian Financial Complaints Authority

4.31 The Australian Financial Complaints Authority (AFCA), a 'one-stop-shop' external dispute resolution framework, was announced as part of the 2017-18 Budget. AFCA will resolve disputes about products and services provided by financial firms, replacing the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal. It will be established as part of the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, and following the passage of the legislation, a not-for-profit company will be authorised as AFCA by the Minister for Revenue and Financial Services. It is expected AFCA will commence operations on 1 July 2018.[25]

4.32 AFCA will be based on an ombudsman model and will be established by industry as a company limited by guarantee. Various categories of financial firms will be required to be members of AFCA, and members will be contractually bound to comply with AFCA's operating rules. AFCA will be required to comply with a number of mandatory requirements, including:

- that operations of the scheme must be financed by contributions made by members of the scheme;

25 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, *Explanatory Memorandum*, pp. 3, 9 and 65.

- that the scheme must have an independent assessor, to focus on reviewing the handling of complaints;
- that customers must be able to access the scheme cost-free;
- that the complaints mechanism under the scheme must be accessible to people who are dissatisfied with the response of a member of the scheme to their complaint; and
- that the scheme must resolve dispute in a way that is fair, efficient, timely and independent. ASIC will have regulatory oversight and undertake action where necessary to ensure that disputes are resolved in this way.[26]

4.33 For issues related to small business credit facilities, a small business will be able to lodge a dispute where the credit facility is of an amount up to $5 million, and will be able to receive compensation of up to $1 million.[27] FOS can currently only look at small business facilities up to $2 million, and the claim must be under $500 000. In addition, the maximum amount of compensation FOS can award is $309 000.[28]

4.34 FOS advised the committee that based on data it had sought from ABARES, the $5 million AFCA limit would cover around 99 per cent of loans in the rural sector.[29]

4.35 FOS also noted that under the legislation to establish AFCA, the terms of reference for the body will be able to be altered in order to allow for continuous improvement to the scheme.[30]

4.36 The explanatory memorandum provided further detail on AFCA's arrangements:

> ASIC will be responsible for ongoing monitoring of AFCA to ensure that it meeds the standards set out in legislation. In addition, AFCA will be subject to periodic independent reviews. AFCA will also be required to establish an

26 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, *Explanatory Memorandum*, p. 9.

27 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 'Putting consumers first – improving dispute resolution', *Media release*, 14 September 2017.

28 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 20.

29 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 20.

30 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 21.

> independent assessor who will assess the processes by which AFCA makes decisions.[31]

Interaction with FDM

4.37 The committee heard evidence that indicates that farmers who had been through farm debt mediation and then attempted to lodge the matter with the Financial Ombudsman Service (FOS) had been turned away.[32]

4.38 Mr Philip Field, lead ombudsman for banking and finance from FOS confirmed his organisation's position to the committee:

> The position to date has been that, where a matter has been through farm debt mediation, a certificate is issued at the end of that process, so we've taken the view that the matter has been through an alternative dispute resolution process.[33]

4.39 However, he also advised that this may change in the future:

> There's a proposal in the code of banking practice review that came out recently that the banks agree to allow unresolved farm debt mediations to come to external dispute resolution, and we're happy to work with stakeholders about implementing that.[34]

4.40 Legal Aid Queensland observed that in its experience FOS had appeared reluctant to become involved in matters after farm debt mediation had taken place. It noted that in such instances, the internal dispute resolution process within the bank could be the only financially viable option available to a farmer with limited funds.[35]

4.41 The ASBFEO touched on this matter and asserted that the asymmetry of power between banks and their customers was a significant problem regard access to justice. This was due to the 'sheer firepower' of legal representation banks had access to in contrast to an individual farmer in financial difficulty.[36]

4.42 The ASBFEO also emphasised the importance of mediation being conducted in good faith and noted that this was not always the case:

---

31 Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, *Explanatory Memorandum*, p. 65.

32 See for example Mr Gerard O'Grady, private capacity, *Proof Committee Hansard*, 6 September 2017, pp. 4–5.

33 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 22.

34 Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service, *Proof Committee Hansard*, 18 September 2017, p. 22.

35 Legal Aid Queensland, *Submission 6*, p. 10.

36 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 30.

> As with everything, you'll find that there's a large proportion of mediation that are conducted correctly, and then you'll get the off on that has not been conducted correctly and not been done in good faith. This is where a lot of the asymmetry with bank-related activity is. There's a lack of constraint on practice, so it would be around how a mediation would be conducted properly. That's because at the moment, it could be that a mediation is conducted because the bank can immediately then step into enforcement action after the mediation's taken place. If the mediation is not done in good faith, done under duress and basically a take it or leave it kind of situation, then that really doesn't meet the principles of true mediation.[37]

4.43 As a result of this, the ASBFEO recommended that if a farmer had gone to FDM and the process was not conducted in good faith, they should still have the right to go to AFCA for assistance.[38]

4.44 Legal Aid Queensland also put forward a view on having an independent authority for farmers to approach if farm debt mediation was not satisfactory:

> Legal Aid Queensland has consistently referred to the fact that farm debt mediation may not be able to obtain a satisfactory outcome for a farmer where complex legal issues are in dispute and agreement cannot be reached. In these cases, there is currently no other venue available other than a court determine these issues. Court litigation is outside of the financial capacity of most farmers to fund.[39]

4.45 To counter these difficulties, Legal Aid Queensland recommended that where a dispute arises between a bank or other financial institution which cannot be resolved by negotiation, or at farm debt mediation, that either party is able to refer the matter to a free independent authority which is appropriately resourced with appropriately trained staff. The result from such an authority could be binding on both parties, thereby avoiding the expensive and lengthy legal battles within the court system.[40]

Committee view

4.46 Based on the evidence, the committee has come to the conclusion that it is extremely important that primary producers are given options to access justice and resolve disputes with banks in a forum outside of the formal court system. Dealing with disputes in the court system is resource and time intensive, and this exacerbates

---

37 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, pp. 31–32.

38 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 32.

39 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 12.

40 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 11.

the significant power imbalance inherent in the relationship between banks and their customers.

4.47 As such, the committee supports the establishment of the Australian Financial Complaints Authority as it will to some degree address the power imbalance between banks and their rural customers.

4.48 The committee is also of the opinion that farmers who have been through farm debt mediation should also have access to an external dispute resolution mechanism if the need arises.

Recommendation 13

4.49 The committee recommends that the Australian Financial Complaints Authority be able to:

- **consider disputes relating to loans of up to $10 million and award compensation up to $5 million, with these figures to be reviewed every 5 years;**
- **review a customer's complaint within a three year period after the completion of farm debt mediation if the customer provides reasonable grounds for review;**
- **issue new orders or make any other determination as it sees fit;**
- **subject to the provisions of the bill establishing the authority, hear and collate evidence both for its own use and the use in any court of law with jurisdiction to hear the complaint; and**
- **hear complaints about receiver's fees and charges where they are not justified on the degree of difficulty and complexity of the estate.**

The importance of good advice

4.50 Throughout the inquiry the committee considered the question of how to ensure that farmers are adequately supported and properly advised during the FDM process.

4.51 Evidence received from farmers indicated that they often found FDM to be a stressful experience, and some reported feeling pressured or let down by the other stakeholders involved.[41]

41 See for example evidence from Mrs Nolene Bradshaw, private capacity, *Committee Hansard*, 13 July 3017, p. 9; Mrs Catherine Stuart, private capacity, *Committee Hansard*, 2 August 2017, pp. 57–58.

4.52 The committee was informed about the work of the Rural Financial Counselling Service (RFCS), a service funded by the Commonwealth, state and Northern Territory governments. It aims to provide free financial counselling to farmers, fishing enterprises, forestry growers and harvesters, and small, related businesses who are suffering financial hardship. There are strict guidelines on what services a rural financial counsellor can offer their clients. For example, counsellors are not permitted to provide family, emotional or social counselling, or financial advice; rather, they can provide a referral service, allowing clients to obtain professional information and service in those areas.[42]

4.53 The RFCS is comprised of 12 service providers across Australia, with approximately 100 rural financial counsellors employed in total. The counsellors are based in regional locations and can also travel to meet in person with primary producers.[43] Rural financial counsellors are required, at a minimum, to either hold, or achieve within two years of their employment under the RFCS, a Diploma of Community Services (Financial Counselling).[44]

4.54 In regard to the effectiveness of the RFCS, the Department of Agriculture and Water Resources advised that service providers submit annual reports to the department in which they assess their performance against the program's key performance indicators. The department also performs a regular monitoring and evaluation function using data from the program.[45]

4.55 The committee also received evidence about the adverse impacts of some 'non-mainstream' advisers to primary production customers in solving disputes with banks.[46] 'Non-mainstream' advisers were defined as individuals without appropriate qualifications or experience. By contrast, mainstream advisers were argued to be qualified lawyers, accountants, rural counsellors, mediators or other reputable consultants with appropriate experience.[47]

---

42 Department of Agriculture and Water Resources, *Submission 7*, p. 6.

43 Mr Cameron Hutchison, Acting Assistant Secretary, Department of Agriculture and Water Resources, *Proof Committee Hansard*, 18 September 2017, p. 54.

44 Department of Agriculture and Water Resources, answers to questions on notice, 18 September 2017 (received 3 October 2017), p. 1.

45 Department of Agriculture and Water Resources, answers to questions on notice, 18 September 2017 (received 3 October 2017), p. 1.

46 See for example Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 47–49. See also evidence from Mr Will Colwell, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, pp. 4–6.

47 See for example Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 56.

4.56 Mr Scott Couper, a partner with Gadens Lawyers observed:

> A matter of concern to us as solicitors acting in this area is the role of and the quality of some advisors to bank customers in financial difficulty. A consistent element of matters which become protracted and difficult to resolve and unfortunately require legal action is that involvement of what can be referred to as non-mainstream advisers. Their modus operandi is often not to seek mutually acceptable outcomes but rather to run interference… This invariably results in the lines of communication stopping, a loss of trust between the parties, an escalation of costs, and the loss of an opportunity to amicably resolve matters.[48]

4.57 Mr Couper further elaborated on the common characteristics of cases where it becomes necessary to have recourse to the legal process to recover assets to repay debt, in particular highlighting the presence of 'non-mainstream' advisors:

> Those characteristics include the bank's customer engaging persons who are not objective, professionally qualified advisers with appropriate experience. These non-mainstream advisers can sometimes have experienced their own adverse outcomes with financiers, which can cloud their objectivity.[49]

4.58 Representatives from Ferrier Hodgson also detailed their experiences with non-mainstream advisers and the detrimental impact such advisers can have on the prospects of farmers in financial distress:

> Unfortunately, there is a very small minority of borrowers who are unable to accept their financial position, who adopt unconventional positions and who maintain legal arguments that have no chances of success. It is usually the case that those borrowers are represented by unqualified advisers as opposed to well-credentialed lawyers, accountants or specialist debt advisers from reputable firms. Such advisers only gift false hope to those borrowers, who are understandably desperate and potentially vulnerable to such false hope. Further, the borrowers will often change advisers on multiple occasions, when their advisers failed to deliver on what they may have promised or because the borrowers themselves do not like the advice they are receiving. The outcome is often a long, protracted dispute with the bank and only leads to further costs being incurred.[50]

4.59 KordaMentha also provided evidence on their interactions with non-mainstream advisers:

> Our experience is that 'non-mainstream advisers' to farmers are often advising on multi-million dollar financial outcomes but these advisers have no qualifications and there is no recourse for bad advice. They are not required to hold insurance to cover losses for negligent advice…

---

48 Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 47.

49 Mr Scott Couper, Partner, Gadens Lawyers, *Proof Committee Hansard*, 20 October 2017, p. 47.

50 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, pp.1–2.

> We consider the growth in 'non-mainstream advisers' reflects the lack of access to rural financial counsellors.[51]

4.60 The ASBFEO highlighted the need for education, advice and early intervention in farm debt disputes to ensure that farmers are aware of all their options and are able to make informed choices at the best possible time. For example, principal adviser Ms Anne Scott observed:

> If you were looking at a farm debt mediation scheme, then you would need to look at it holistically from beginning to end. One of the issues that rural counsellors have raised with us is that farmers often don't come to see them until it's too late, or they don't go to mediation until it's too late and that early intervention would be far better.[52]

4.61 Ms Scott also emphasised that farmers may benefit from increased education around how the process of farm debt mediation works and the options available to them:

> ..there's an educational, 'You're not going to lose face', aspect for a farmer who feels that he or she is getting into difficulties by approaching things early rather than when things have turned to custard.[53]

Committee view

4.62 During the course of the inquiry the committee was made aware of a number of individuals who had acted as 'non-mainstream' advisers to primary producers, providing unqualified advice which hindered the possibility of a successful resolution of the dispute.

4.63 Due to the nature of their circumstances, primary producers and their families who find themselves in dispute with their banks are often highly stressed, vulnerable and unsure of the processes to be followed. The committee is concerned that such 'non-mainstream' advisers take advantage of these farmers, and in addition to extracting money from them, behave in such a way that ultimately thwarts the prospects of the farmer and bank reaching an amicable, or at least mutually agreed upon resolution.

4.64 However, the committee also observed instances where appropriately qualified advisers were able to meaningfully assist primary producers to negotiating and mediating with their bank to reach a mutually beneficial outcome.

---

51 KordaMentha, *Senate Committee: Lending to primary production customers*, p. 5, (tabled 17 November 2017).

52 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 32.

53 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 32.

4.65 As such, to complement recommendation 12 (i.e. a nationally consistent FDM scheme), the committee sees the need to ensure that primary producers involved in FDM have access to the right kind of advice and support. This will ensure that farmers have adequate access to justice in resolving their dispute, and assist in combatting the asymmetry of power and resources that favours the banks. It may also mean that farmers do not become so desperate as to rely on potentially ineffective and harmful advice from 'non-mainstream' advisers.

Recommendation 14

4.66 The committee recommends that the government commit funding to train rural counsellors in mediation (or existing mediators in rural practice) to ensure that all farmers have access to appropriately qualified and experienced representatives during farm debt mediation.

Chapter 5

Role and impact of insolvency practitioners

5.1 Having considered the farm debt mediation process in the previous chapter, this chapter will examine the role and impact of insolvency practitioners (including liquidators, administrators and receivers) in the primary production sector.

Role of receivers

5.2 A receivership is an administrative procedure by which a person, who must be a registered liquidator, is appointed to administer assets on behalf of a secured creditor. The secured creditor (e.g. a bank) appoints the receiver.[1] The duty of the receiver is to manage and realise the secured asset for the purpose of discharging the debt.[2]

5.3 In a primary production context, for example, a bank would appoint a receiver to administer the assets of a farmer. The receiver has a duty to the bank, as outlined by Mr Stewart McCallum, a partner with the restructuring and insolvency firm Ferrier Hodgson:

> When we're appointed as receiver by the banks, our obligation is to collect and realise the assets that the bank holds as security. In other words, our role is serving the banks to maximise the sale value of the assets that they have as security. In the context of receiverships, it's obviously important that we continue to work cooperatively with the borrower where we can because, to put it colloquially, that provides the path of least resistance. That's the best way to go about it. But our duty is to the bank.[3]

5.4 Legal Aid Queensland observed that after a bank appoints receivers it is no longer legally involved in the sale process and is exempt and removed from any claims or actions by the farmer against the receivers. As such, there is no obligation on the bank to ensure that the receiver acts to obtain the best market price for the assets.[4] A receiver however has a statutory obligation under section 420A of the *Corporations Act 2001* to undertake reasonable care to sell charged assets that have a

---

1 Australian Restructuring Insolvency and Turnaround Association, *Submission 4*, Appendix 4, p. 24.

2 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 5.

3 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 7.

4 Legal Aid Queensland, *Submission 6*, p. 9.

market value for 'not less than market value'.[5] The application of section 420A is considered in further detail below.

5.5 Insolvency practitioners can also work for banks in non-enforcement matters, for example as investigative accountants. Mr Will Colwell, a partner with Ferrier Hodgson explained:

> In any sector, not just the rural sector, the bank will send us in, saying, 'This person is in emerging financial distress.' So we might be engaged to see if they can be structured and their business turned around to profitability…[6]

5.6 Although receivers are recovering funds on behalf of banks, their fees are added to the debt of the farmer. Mr McCallum from Ferrier Hodgson summarised the typical situation:

> Receivers are personally liable for all of the expenses that we incur in the receivership, but we have a right to claim those costs out of the assets that we realise, so our costs effectively come out of the value of the asset we realise.[7]

5.7 The fees charged by receivers will be discussed in more detail later in this chapter.

5.8 The committee heard evidence that receivers, who are in fact appointed as an agent of the borrower, have minimal obligations to farmers:

> **Senator BROCKMAN**: Your legal obligation is to the bank. That is very clear… What are your obligations to the owner of the property beyond achieving market value for sale of assets [under section 420A of the *Corporations Act 2001*]?
>
> **Mr McCallum**: In high-level terms, not a lot. By that I mean our primary obligation is to the bank… As an agent of the borrower – and agency is a difficult concept – we've got obligations to act in their best interests. We've got the Corporations Act duties of good faith – they're the duties we've got to the borrower.[8]

5.9 The Australian Restructuring Insolvency and Turnaround Association (ARITA) provided the committee with further information around the agency dynamics in a receivership:

> Agency in a receivership is very complicated. While a receiver is appointed by the Bank and acts for the benefit of the Bank, they are generally the

---

5 *Corporations Act 2001*, paragraph 420A(1)(a).

6 Mr Will Colwell, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 7.

7 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 10.

8 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 10.

> agent of the borrower as stipulated in the security documentation, however, they do not work for the borrower. Such an agency, often referred to by the courts as a 'special' or 'limited' agency, protects the receiver from personal liability for breaches of a company contract.[9]

5.10 The committee is concerned that these complicated dynamics lead to an inherent conflict of interest for the receiver. This matter will be discussed later in this chapter.

Rates of receivership in the primary production sector

5.11 Banks informed the committee that they viewed receiverships as a 'last resort', and generally spent a significant amount of time working with farmers to find other options before commencing any foreclosure action. For example, ANZ stated:

> It should be recognised that by the time ANZ takes action under its security documents, the customer has always exhausted all other possibilities to meet their commitments to the bank and other creditors. We estimate that in the past the time between ANZ first issuing a breach or default notice and ANZ taking action under its security documents is on average a period of over 2.5 years for agribusiness customers.[10]

5.12 Similarly, Westpac informed the committee:

> It is Westpac's preference to work with customers to restore their financial position and resolve defaults without relying on legal rights in loan contracts. After all, our original credit assessment is based on the customer's ability to service the loan ('the first way out') not the enforcement of security ('the second way out').[11]

5.13 Rural Bank advised that foreclosure was a last resort, only entered into once all other avenues to remedy defaults had been explored and exhausted.[12] Rabobank also expressed a similar sentiment.[13]

5.14 A number of banks also noted that they only appointed receivers in a small number of cases. For example, NAB stated they have 'avoided receivership for all but 1.51 per cent of [their] agribusiness workout [financially distressed] customers in the last twelve months, representing 0.0136 per cent of [their] overall agribusiness book.'[14]

---

9 Australian Restructuring Insolvency and Turnaround Association, answers to questions on notice, 23 October 2017 (received 3 November 2017).

10 ANZ, *Submission 8*, p. 10.

11 Westpac, *Submission 13*, p. 6.

12 Rural Bank, *Submission 14*, p. 3.

13 Rabobank, *Submission 5*, p. 8.

14 NAB, *Submission 10*, p. 3.

5.15 ANZ also provided information to the committee on this matter:

> In the 18 months from 1 October 2015 to 31 March 2017, ANZ has appointed an insolvency practitioner in relation to an agribusiness customer on six occasions. In each of these cases, the decision was made at the request of the customer who, after receiving their own independent legal advice, believe that this action was in their best interests.[15]

5.16 The Commonwealth Bank of Australia informed the committee that in 2016 it instigated enforcement action in relation to six farming businesses, and that in those cases they had worked with the customers to explore alternative solutions for an average of 44 months.[16]

5.17 Westpac advised that out of the over 30 600 agribusiness customers on its books, it had only appointed receivers and mangers to 15 customers over the last two years.[17]

5.18 Insolvency firm KordaMentha informed the committee that according to its estimates based upon its market knowledge and bank submissions, receiverships in 2017 will impact on less than 0.05 per cent of Australian farm businesses.[18]

Impact of receivers on primary producers

5.19 Throughout the inquiry the committee received evidence from primary producers and other stakeholders outlining instances of unreasonable or inappropriate behaviour on the part of insolvency practitioners.

5.20 The committee heard allegations relating to:

- fire sales of assets where assets were sold for significantly under their market value;
- poor farm management (including animal welfare issues);
- receiver costs which appeared unwarranted or inconceivably high; and
- possible unlawful behaviour.

5.21 Examples of some of these allegations are set out below.[19]

---

15 ANZ, *Submission 8*, p. 2.

16 Commonwealth Bank of Australia, *Submission 11*, p. 2.

17 Westpac, *Submission 13*, p. 2.

18 KordaMentha, *Senate Committee: Lending to primary production customers*, pp. 2–3 (tabled 17 November 2017).

19 The committee also received a number of confidential submissions that outlined such allegations.

Fire sale of assets

5.22 The committee heard of several instances where farms and related assets were sold by receivers for significantly under their market value.

5.23 For example, the committee was informed of a case of a cattle property in Queensland that was valued in 2009 at $3.3 million bare (i.e. no stock on it). In 2012 the receivers for the property valued it at $1.6 million bare, but ultimately sold it for $800 000 with 800 head of cattle given in. Given that 800 head of cattle would be valued at approximately $400 000, the property itself was sold for only $400 000.[20]

5.24 The committee heard of another case where a Queensland property was valued at $1.3 million and sold by the bank 20 months later for $590 000.[21]

5.25 Yet another striking example was provided by Mr Harold Cronin, a primary producer in Western Australia, who submitted:

> The NAB and their appointed receiver manager, Ferrier Hodgson, took nearly three years to dispose of the Cronin's farms. The price they eventually received for the farms was a little over half of their sworn valuation. Other farms were sold in the district for 'market price' during the time the Cronin properties were for sale. There has been no explanation as to why the Cronin's farms sold for half their sworn value.[22]

5.26 Mr Bob Yabsley stated that his property in Queensland was valued at $27.2 million, but sold by the bank many years later for $12 million.[23]

5.27 The committee was also told of another case where receivers sold more than $1.2 million of farm machinery in good condition for $550 000.[24]

5.28 The committee was also informed of the following situation by Mr Michael and Mrs Cherie Doyle, primary producers in Western Australia:

> **Mrs Doyle:** Then they [receivers] decided they were going to sell the town property. We felt that the real estate agent was trying to undersell it. We know that he actually was underselling it. It ended up being put to tender. We had buyers out there for it. He would ring them up and we were trying to sell it for $10 million or $12 million, and he was saying, 'Oh, no; you can get about $3.2 million.'

---

20 Senator John Williams, Committee Deputy Chair, *Proof Committee Hansard*, 17 November 2017, p. 4.

21 Mr Lindsay Dingle, private capacity, *Committee Hansard*, 2 August 2017, pp. 37–38.

22 Mr Harold Cronin, *Submission 50*, p. 2.

23 Mr Bob Yabsley, private capacity, *Committee Hansard*, 2 August 2017, p. 79. Note: the receivers provided a response to this claim. See response to submission 58 from PPB Advisory.

24 *Confidential Submission 65*, p. 4.

> **Senator MOORE:** This is the one that was seven point something [million dollars] at one stage—is that right?
>
> **Mrs Doyle:** This is the one where they valued it, yes.
>
> **Senator MOORE:** At $3.2 million.
>
> **Mr Doyle:** They originally valued it at about $6.7 million, I believe. Then they revalued it at $4.96 million. And this is the one for which the real estate agent, who was dodgy—I went to Perth and spoke to these people and one guy in particular, of four, was very keen; I'd given him a whole background on the area, the property and what it could achieve. He had looked at all the data I'd given him, and he was sold. He said, 'Mate, we can definitely do a deal; I've got people who will buy this tomorrow.' And I said, 'Look, it's worth $12 million, but we need to sell it, so if you give us $10½ million we can do a deal,' and he said, 'No problem.' He said that at 10½ he'd just need to go down and have a look and let the agent know. He went down there and the agent told the guy, 'Hey, mate: don't even worry about 10; I reckon I'll get this for you for 3.2, no worries.' And the guy said, 'Thanks very much for your time; see you later.' And then it was, 'Oh, I've got other properties; do you want to look at other properties—much better-value properties—elsewhere?' So, the guy went back to Perth, wrote the information down, let me know what had happened and said, 'Not interested'—like there's something dodgy going on down there.[25]

Poor farm management

5.29 The committee heard allegations of poor farm management by receivers, including animal welfare issues and land neglect resulting in out of control weeds and lost crop.[26]

5.30 For example, Mr Charlie Wallace alleged that receivers incorrectly sent stud bulls and cattle to the abattoirs.[27] He also alleged that the receivers neglected livestock on his property in Queensland, causing adult cattle and calves to perish:

> **Mr Wallace:** …We managed our properties spick and span. It was 100 per cent. We did not run them down. When the receivers came, the first letter they wrote said that everything was run down. That is a load of crap. It runs down after they take possession. That is when everything falls down, because they do nothing. Cattle perished on Newburgh. The big mob perished at Newburgh. They were too lazy to go and start pumps. I have photographic evidence.
>
> **Senator WILLIAMS:** Are you saying they literally died of thirst?

---

25 Mr Michael and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 7–8.

26 The committee also received a number of confidential submissions that outlined such allegations.

27 Mr Charlie Wallace, *Submission 80*, p. 4.

> **Mr Wallace:** Yes. There was no water in the troughs.
>
> **Senator WILLIAMS:** What?
>
> **Mr Wallace:** When potential buyers of Newburgh did an inspection, they rang me and said that they were horrified. They said: 'Lee, there are cattle dead around the troughs. There was no water.'
>
> **Senator WILLIAMS:** That is disgraceful.[28]

5.31 Mr Bob Yabsley stated that receivers failed to undertake weed management or flood protection measures, resulting in the significant devaluing of the property.[29]

5.32 Mr Harold Cronin alleged that receivers on his properties in Western Australia did not undertake essential maintenance, that fixed assets such as pumps and piping disappeared, that houses were neglected and weed growth across all properties was left unchecked.[30]

5.33 Mr Thomas Fox of Western Australia submitted that receivers had failed to understand the perishable nature of his crop, which had detrimental impacts on the amount and quality of crop exported, and the price able to be obtained for it.[31]

5.34 The Doyle family alleged that the receivers managing their dairy farm in Western Australia made mistakes with the timing of feeding and animal husbandry tasks, which led to decreased production.[32]

5.35 Mr Doyle stated:

> But they [receivers] took it [the dairy] and then, fairly quickly after the receivers took control, they wouldn't buy feed, and when they did it was late. The cows started dying….The milk production went shocking.[33]

5.36 Mrs Doyle also stated:

> Basically the business went backwards through the receivers. They had a lot of juniors working there. They didn't really know about dairy farming at all. They did get a bit of advice from the vets. They didn't heed any of the advice.[34]

---

28 Mr Charlie Wallace, private capacity, *Proof Committee Hansard*, 11 September 2017, p. 13. See also Mr Charlie Wallace, *Submission 80*, pp. 8, 13.

29 Mr Bob Yabsley, *Submission 58*, pp. 5–6. Note: the receivers refuted these allegations. See response to submission 58 from PPB Advisory.

30 Mr Harold Cronin, *Submission 50*, p. 2.

31 Mr Thomas Fox, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 44.

32 Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 7, 15.

33 Mr Michael Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, p. 6.

34 Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, p. 6.

High receiver costs

5.37 The committee was informed of instances where the receiver costs appeared unwarranted or inconceivably high. The committee was informed that the hourly rates for a partner in receivership firm are typically in the order of $650, plus GST.[35] Due to this very high hourly rate, if receivers do not sell the secured property in a reasonable period of time, the amount added to the farmer' debt can increase very dramatically.

5.38 For example, a primary producer in Western Australia advised the committee that he was charged $650 000 in receiver fees over a 9 month period. The receiver in question refuted this figure and provided information demonstrating the fee was $249 000 (including GST and disbursements). The receiver also noted that this receivership involved extenuating circumstances, including security threats against receivers that required additional expenditure to be mitigated.[36]

5.39 Mr Harold Cronin alleged that his receivers charged approximately $700 000 over three years. He provided the committee with an example of what he considered unreasonable fees charged by his receivers:

> ...we had no money, nothing, because all the finances were cut off. When we had to pay an account, a phone bill or something like that, we had to get their permission to write the cheque out so that they could pay it – but they charged us $40 for every cheque. Whether it was only a $20 cheque or a $50 cheque, they charged us $40 on every cheque.[37]

5.40 Mr Andrew McLaughlin detailed one particular case he had come across with unreasonably high receiver fees:

> In one particular case in 11 months the receiver was appointed and in a lot of cases the farmers have asked the receiver whether they could remain there as caretakers – make sure the weeds are under control, do whatever, and present the property as best they can to maximise the return. And what's happened? They don't let you near the farm. They can charge you with trespassing, which has happened. And their receiver's costs within 11 months are $1.2 million.[38]

5.41 The committee heard from Dr Graham Jacobs, a former MLA for the region of Eyre in Western Australia. He outlined a situation which involved exorbitant receiver fees that he had come across during his time as an elected representative:

---

35 Mr Matthew Caddy, Partner, McGrathNicol, *Proof Committee Hansard*, 20 October 2017, p. 14.

36 See exchange between Senator Peter Georgiou and Mr Mark Mentha, Partner, KordaMentha, *Proof Committee Hansard*, 17 November 2017, p. 14. See also KordaMentha, answers to questions on notice, 17 November 2017 (received 27 November 2017).

37 Mr Harold Cronin, *Submission 50*, p. 2l; see also Mr Harold Cronin, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 45.

38 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 5.

> I sat with a farmer east of Ravensthorpe as he told me this at his kitchen table. The receiver's fees were charged against the remaining farm asset and reduced all remaining equity. The costs could be exorbitant. In one case, when they appointed the receiver they took over the spraying program to knock down weeds. This was ordered by the receiver. That cost $350,000. An earlier program, which could have been done by the farmer, would have cost $100,000. The ongoing management fees by the bank receivers and the lawyers can be up to $50,000 a month.[39]

5.42 On the broader issue of high receiver fees, Dr Jacobs also commented:

> ...my contention is that following the receiver's fees and legal costs – which are exorbitant and, tragically, whittle away the remaining equity that the farmer has – the major insolvency firms and law firms preferred by the banks have cost structures and charge-out rates that are largely geared towards big corporate groups. These are not relevant to small businesses and smaller farms. One could suggest that, by the time the receivership machinery is put in motion, the remaining equity is known and the process works backwards in determining fees. I am not a conspiracy theorist, but, if an asset is valued at $3 million and the debts are $2 million, there is a $1 million equity left in the business, and I contend that often that equity is eroded until there's nothing left determining the equity and working backwards.[40]

Possible unlawful behaviour

5.43 The committee also heard allegations of possible unlawful actions by receivers. For example the committee was told that receivers for a property in Queensland had illegally removed National Livestock Identification System (NLIS) tags from cattle:

> **Mr Jensen:** They're not supposed to remove a beast off a property without a bloody NLIS tag in its ear…
>
> **Senator WILLIAMS:** Why was the receiver changing the NLIS tags?
>
> **Mr Jensen:** Don't ask me.
>
> **Senator WILLIAMS:** If they have the ownership of the farm as they should have been—the breeder of them, in the ear, at marking time—they should stay with that beast until slaughter time. What is the motive for the receivers to change the original NLIS tag?
>
> **Mr Jensen:** I have absolutely no idea.
>
> **Senator WILLIAMS:** There must be some reason or they wouldn't do it.
>
> **Mr Jensen:** Yes, there must be. It's illegal to do it. They must have had some reason to do it.

---

39 Dr Graham Jacobs, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 56.

40 Dr Graham Jacobs, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 56.

Senator WILLIAMS: And you are sure that is happening in this area.

Mr Jensen: That happened out there.

Senator WILLIAMS: When you say 'out there', please clarify 'out there'.

Mr Jensen: Out at Richmond saleyards…[41]

Broader impact

5.44 Primary producers expressed significant distress and frustration that the receiverships of their properties and assets were not undertaken in what they deemed a comprehensive or respectful way. Individuals indicated they felt ignored, deliberately uninformed, and excluded by receivers and the instructing bank.[42]

5.45 Legal Aid Queensland outlined a general picture of how such feelings of exclusion arise:

> It is not uncommon for the receiver to have minimal contact with the farmer after serving them with compliance documents etc. Often there is little information sought from the farmer regarding the operation of the farm which might be useful in a practical sense regarding the operation of the business. Often receivers will reinsure the property, change locks, appoint managers and security over the property, engage contract musters and farmers and other 'experts' to advise them in the conduct of the business. All of these activities are expensive and added to the debt of the farmer.[43]

5.46 Legal Aid Queensland emphasised that many such issues could be avoided by civil contact between the farmer and receiver. It was noted that if receivers and farmers choose to work cooperatively it could avoid significant costs for the farmer (who is still responsible to the bank for all receiver's costs incurred), but that such an outcome requires the trust and goodwill of both parties.[44]

5.47 Mr Denis McMahon, a senior lawyer with Legal Aid Queensland informed the committee that in some circumstances he has seen, receivers and farmers have been able to communicate well and work together. However, he also noted that such a

---

41 Mr Andrew Jensen, private capacity, *Committee Hansard*, 13 July 2017, pp. 45–46.

42 See for example Mr Michael and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017; Mr Charlie Wallace, private capacity, *Proof Committee Hansard*, 11 September 2017; Mr Bob Yabsley, *Submission 58*; Mr Harold Cronin, private capacity, *Proof Committee Hansard*, 19 July 2017; Mr Thomas Fox, private capacity, *Proof Committee Hansard*, 19 July 2017. The committee also received a number of confidential submissions that outlined such allegations.

43 Legal Aid Queensland, *Submission 6*, p. 9.

44 Legal Aid Queensland, *Submission 6*, p. 9.

positive outcome depended heavily on the level of conflict between the parties and the attitudes of the receivers.[45] He detailed one particular negative incident as follows:

> I've had a matter where the clients weren't aware that the receivers were going to be appointed. They arrived home to find the receivers there, and they were locked out of their home and were asked to leave the property. The locks were changed and the gates altered et cetera. We had to make submissions just for them to get their household goods and clothing and the like out of the property. In that particular instance, the property had been in the process of being developed as an irrigation property. There were certain licences that had to be obtained. Certain licences were in the process of being obtained.
>
> The clients instructed that the receivers didn't communicate with them about any of those processes. They [the receivers] made inquiries to the various departments and took the view that the work was done illegally, which wasn't the case at the time; there had just been a recent change of legislation. Some of the infrastructure that had been developed and created was bulldozed and the property wasn't able to be sold in the way that promoted the potential of the property as an irrigation property. That was, probably, the most stark matter I'd had. There seemed to have been quite a deal of mistrust and failure to communicate between the party, the bank and the receivers.[46]

5.48 In summary, evidence received by the committee indicates that for primary producers, foreclosure action and being put into receivership are particularly stressful and emotional experiences. Several receivers the committee heard from confirmed this assessment. For example Mr Justin Walsh, a partner at Ernst & Young, observed:

> For those who own a business, a receivership is a tremendously emotional and life-changing event. This is the case for all businesses, but obviously especially in agriculture.[47]

5.49 Similarly, Mr John Winter, chief executive officer of ARITA commented:

> As you well know, we deal with humans at their lowest ebb, and that is the greatest challenge in this profession [insolvency practitioners]. People are staring down terrible personal and financial loss, and we have to come along at the most tragic of points.[48]

---

45 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Queensland Legal Aid, *Committee Hansard*, 2 August 2017, p. 18.

46 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Queensland Legal Aid, *Committee Hansard*, 2 August 2017, p. 17.

47 Mr Justin Walsh, Partner, Ernst & Young, *Proof Committee Hansard*, 20 October 2017, p. 57.

48 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 20 October 2017, p. 40. See also Mr Stephen Longley, Partner and Head of Restructuring, PPB Advisory, *Proof Committee Hansard*, 20 October 2017, p. 23; Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 1.

5.50 Mr Andrew McLaughlin, a senior consultant mediator, emphasised the detrimental impact that poor receiver behaviour can have not only on farmers, but on their broader communities:

> There is depression and peer pressure, pressure that you're going to get back from your creditors, because these are people you have dealt with in your community and your family before you that have provided you with the seed or the fertiliser or the fuel, and even in tough times they still supplied you, they gave you time to pay, perhaps 12 months. They knew that eventually your family would pay. What happens when the receiver sells all the assets? There's nothing left. What happens then? You have a divided community.[49]

5.51 Several banks also acknowledged the stressful nature of foreclosure action on farmers and their families.[50]

Committee view

5.52 The committee is aware that many of the allegations made about the conduct of receivers are contested or have been refuted. Nevertheless, without wishing to adjudicate or comment on individual disputes, the general picture observed by the committee indicates that there is a significant problem with the way in which some insolvency practitioners interact with primary producers, and the attitude and methods with which they carry out their duties.

5.53 Additionally, the committee is concerned that the farmers directly affected by the conduct of receivers, and who suffer the financial and emotional consequences of receiver behaviour, are generally excluded from the entire process.

5.54 The committee also holds significant concerns about the potential for conflicts of interest between receivers and banks inherent in the structure of the receiver industry. As former chair, former senator Malcolm Roberts observed to receivers during a public hearing:

> You're [the receiver] working for the bank. Your future engagements will come from that bank, so you must do a good job for them, and all the costs will be paid for by the farmer. Then, in addition, the bank contract terms are really detailed and comprehensive and the farmer is in a position where, with the power of finance and the power of the courts, there is such an imbalance of power, and you're working under the shadow of that imbalance.[51]

---

49 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 4.

50 For example: NAB, *Submission 10*, p. 6; ANZ, *Submission 6*; Mr Peter Knoblanche, Chief Executive Officer, Rabobank, *Committee Hansard*, 11 August 2017, p. 43.

51 Former senator Malcolm Roberts, Proof *Committee Hansard*, 20 October 2017, p. 11.

5.55 The committee observed and is concerned by an apparent inability on the part of ARITA to consider the possibility that some insolvency practitioners may act inappropriately or unreasonably while carrying out their duties in primary production receiverships. When queried by the committee on the issues with receivers that had come to light during the inquiry, ARITA representatives were all too willing to underscore that some farmers may lodge 'unnecessary and inappropriate complaints on many occasions' due to the fact that receiverships were stressful experiences that led to people being 'at their lowest ebb'.[52] However, ARITA was seemingly unable to seriously countenance the possibility that individuals in their industry had behaved improperly and that at times the complaints from farmers were indeed warranted.

5.56 Additionally, several insolvency firms that appeared before the committee exhibited similar attitudes. The committee was not impressed by the indifference on display by certain receivers during hearings, and the vague, elusive answers given in response to committee questioning. For example, the responses given by representatives of KordaMentha at the hearing and subsequently to questions on notice, demonstrated a unwillingness to provide clear and direct responses to the committee's questions.[53]

5.57 The committee finds such attitudes to be alarming. In the committee's opinion, this lack of self-awareness as an industry, obfuscation of responsibility, and dismissive approach to complaints about inappropriate receiver conduct are not acceptable. The committee strongly rejects ARITA's inference that in difficult or challenging receiverships the fault more often than not lies with the behaviour of farmer, with no connection to the behaviour of the receiver.

5.58 The committee was also highly concerned by the behaviour of a Grant Thornton representative and his legal counsel. When the committee sought further information from Mr Stephen Dixon of Grant Thornton on his activities as trustee for the bankrupt estate of primary producer Mr Lindsay Dingle, Mr Andrew Behman of CLH Lawyers, legal counsel for Mr Dixon, stated on more than one occasion that the cost of his and Mr Dixon's appearance at a public hearing would be charged to the bankrupt estate. As Mr Behman wrote in an email to the committee, for Mr Dixon to appear would 'unduly deplete the assets of the Bankrupt Estate'.[54]

---

52 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 20 October 2017, p. 43.

53 Mr Mark Mentha, Partner, KordaMentha, *Proof Committee Hansard*, 17 November 2017, pp. 11–12, 14; KordaMentha, answers to questions on notice, 17 November 2017 (received 27 November 2017), pp. 5–7.

54 See written questions from Senator John Williams in: Mr Stephen Dixon, Partner, Grant Thornton, answers to questions on notice, 21 November 2017 (received 27 November 2017); and exchange between Senator John Williams and Mr Andrew Behman, Associate, CLH Lawyers, *Proof Committee Hansard*, 17 November 2017, p. 2.

5.59 This threat caused great distress to Mr Dingle and his family, and the committee remains deeply unimpressed by this needlessly provocative behaviour, which it believes was designed to dissuade the committee from calling the witness and also intimidate Mr Dingle.

5.60 The committee notes that when ARITA was informed of the situation, Chief Executive Officer Mr John Winter stated that ARITA, along with ASIC, would 'have a problem with that'.[55] On this matter, the committee thanks ARITA for promptly commencing a review of the situation.

5.61 In response to questioning at the 17 November public hearing in Canberra, Mr Behman advised the committee that his travel from Sydney and accommodation costs would be paid for by his client (Grant Thornton). Mr Behman advised that it was only the 'cost of preparation in preparing for the appearance' that would be billed to the bankrupt estate of Mr Dingle.[56] The committee was not reassured by this admission, but rather found it astounding that the intention to charge the bankrupt estate, albeit for fewer costs, was again repeated.

5.62 After further written questions on notice from the committee, Mr Dixon subsequently confirmed in writing that the bankrupt estate would not be billed for 'any costs associated with either Mr Behman or me providing evidence to the committee'.[57]

5.63 Although the committee acknowledges evidence from banks and insolvency practitioners noting that the number of agribusiness customers placed into receivership is low as a percentage of their respective overall loan books, or receivership engagements, this does not discount or minimise the distress and frustrations of primary producers who have been placed into receivership and do experience poor receiver behaviour. Even if agribusiness receiverships only comprise a very small proportion of files for a bank or a receiver, for those farmers experiencing that receivership, it is 100 per cent of their lives.

5.64 As such, the committee urges insolvency practitioners to act with transparency, accountability and empathy when discharging their duties. The committee agrees with the observation expressed by Mr Justin Walsh from Ernst & Young:

> These people [farmers facing foreclosure] have not committed a crime. They have not murdered someone. They've just run out of money. Going

55 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 20 October 2017, p. 41.

56 Exchange between Senator John Williams and Mr Andrew Behman, Associate, CLH Lawyers, *Proof Committee Hansard*, 17 November 2017, p. 2.

57 Mr Stephen Dixon, Partner, Grant Thornton, answers to questions on notice, 21 November 2017 (received 27 November 2017).

> into receivership is not a punishment. It's just something that is a sad part of life.[58]

5.65 The committee supports recommendations that seek to bridge the divide between farmer and receiver, in order to make sure farmers who experience foreclosure action are as informed as possible in such situations. The committee is of the opinion that this will assist in easing the frustrations felt by farmers during receivership situations. By requiring greater transparency and communication on the part of receivers, the committee hopes that this will inform and empower the farmers throughout these difficult situations. More openness and transparency will also mitigate the impacts of the apparent conflict of interest inherent in the role of receivers.

Recommendation 15

5.66 The committee recommends that:

- **the government introduce higher standards of accountability and transparency for insolvency practitioners regarding the costs they incur while conducting receiverships;**
- **insolvency practitioners be required to disclose their estimate of costs of the receivership prior to being engaged;**
- **insolvency practitioners be required to account for all incurred fees and outlays and report these to both the lender and the borrower; and**
- **insolvency practitioners be required to provide monthly reports to the lender and the borrower on their farming management and fees incurred (including future plans).**

5.67 The committee agrees with Dr Graham Jacobs' observation that the major insolvency firms preferred by the banks have cost structures and fees geared towards big corporate groups, rather than family farms and small businesses.

5.68 The committee is of the opinion that receivers appointed to family farms cause unnecessary harm and lead to detrimental outcomes, both in regard to farm management (e.g. neglected animals and land), and the farmer's ultimate financial position.

5.69 As Deputy Chair Senator Williams observed:

> I am of the opinion that receivers shouldn't go into family farms. I've got no problem with receivers going into corporate farms – like when McGrathNicol went in to Cubbie Station – because in a corporate farm the management is retained. But if you go into a family farm and the farmer is kicked off – and probably generations of knowledge of how to look after

58 Mr Justin Walsh, Partner, Ernst & Young, *Proof Committee Hansard*, 20 October 2017, p. 66.

> the animals et cetera is gone – if often turns to tears as far as managing the property goes.[59]

Recommendation 16

5.70 The committee recommends in the strongest possible terms that the Australian Bankers' Association revise the Code of Banking Practice to stipulate that if an amicable agreement between bank and farmer cannot be reached through farm debt mediation and the bank needs to sell the family farm, then:

- **receivers not be appointed; and**
- **instead the family (if willing) is to remain managing the property and be paid a wage to maintain it until it is sold.**

5.71 However, in extenuating circumstances the banks can use their legal rights to enforce vacant possession of the land for sale.

5.72 The committee is aware that primary production and farm management is a specialist field. The committee became increasingly concerned during the inquiry by evidence indicating that some insolvency practitioners involved in agribusiness receiverships did not possess adequate experience, nor seek to utilise the skills and knowledge of the relevant farmer where possible.[60]

5.73 The committee was informed by the Australian Securities and Investments Commission (ASIC) that receivers do have an element of discretion as to how to care for assets, which may be problematic if the receiver does not have the appropriate primary production expertise and experience:

> Receivers do have to take basic steps to care for an asset, but they've got a fair degree of latitude in how they do that, and it's probably fair to say that they may not always have the expertise in relation to that. Think about it: they to tend to be receivers for a very wide range of industries.[61]

5.74 In response to observations that some receivers treated livestock they were meant to be managing appallingly, Mr Warren Day, Senior Executive Leader of Assessment and Intelligence for ASIC commented that receivers may have different attitudes to farmers to what constitutes caring for an asset:

> Picking up on the point you were referring to, Senator Williams, you're right: there is no obligation on a receiver to keep the cattle to a certain standard. Similarly, if there's a crop out in the paddock and it's ready to be brought in, on one view there's no real requirement for the receiver to bring

---

59 Senator John Williams, *Proof Committee Hansard*, 17 November 2017, p. 3. See also Senator John Williams , *Committee Hansard*, 13 July 2017, p. 42.

60 See for example comments from Mr Michael Doyle and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 7, 15.

61 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 9.

> that crop in. They can just let it rot in the paddock if they need to, because, again, as we know, they've got to spend money to bring that in and they may decide that they're not, as they might see it, going to throw good money after bad. But then, again, the farmer would say, 'Well, if you do that and then you sell it, you're going to make a profit, which'll help offset some of the problem.'[62]

5.75 In order to avoid detrimental impacts in terms of land management and animal welfare, as well as the reduction in the value of foreclosed assets, the committee believes it is imperative that all stakeholders involved in agribusiness receiverships are equipped with the relevant experience and knowledge.

Recommendation 17

5.76 The committee recommends that the Australian Restructuring Insolvency and Turnaround Association ensure receivers appointed to agribusiness cases must be appropriately qualified in agribusiness and have a strong background and demonstrated experience in rural management.

Valuations

5.77 Numerous witnesses raised concerns about the cost, use and availability of valuations in the course of this inquiry.

5.78 Valuations of primary production properties are guided by factors such as historical sales data, current market conditions, the carrying capacity of the property, soil types and water infrastructure. However, ultimately valuations are subjective opinions.[63]

5.79 Legal Aid Queensland identified that the issue of valuations ordered by receivers (and by extension, the subsequent sale price of properties based on those valuations) caused significant distress to farmers:

> The receivers will engage their own valuers and are not obliged to provide copies of these valuations to the farmer during the period of insolvency even though the farmer will ultimately bear the costs of obtaining the valuation. It is understood that these valuations would be prepared on the basis of an early sale and not taking into account the period of time which would normally be required for a property to be on the market to sell. It is not uncommon for larger western [Queensland] properties to have an average marketing period of 12 months or more, but a sale by receivers usually occurs after about a six week marketing campaign. Farmers are not made aware of discussions between the bank, receiver and valuers during

62 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 9.

63 Legal Aid Queensland, *Submission 6*, p. 8.

> these periods. They do not receive copies of valuations obtained for sale purposes, yet the outcome affects them directly as they are the ones responsible for any shortfall.[64]

5.80 This sentiment was echoed by individual primary producers who expressed frustration and anger that they were not provided with access to valuations that they would ultimately pay for.[65]

5.81 The Financial Ombudsman Service (FOS) referred to its experience in investigating lending disputes and noted that in its opinion, fewer disputes would arise if valuations were provided to borrowers at the earliest opportunity in the lending process. The FOS submission stated:

> Our dispute experience indicates that, where borrowers do not receive valuations of their property in issues arise in relation to the provision of the loan, they end up feeling as if they are/were unable to make an informed decision in respect of their loan application.[66]

5.82 The ASBFEO's submission recognised that the valuation of primary producing small business assets is localised and industry specific. It also raised the point that there is a lack of understanding on the part of some small business owners about the temporary nature of a valuation. International Valuation Standards state that valuations are only valid for three months.[67]

5.83 In its inquiry into small business loans report, the ASBFEO also made recommendations relating to valuations for small businesses. These included:

- All banks must provide borrowers with a choice of valuer, a full copy of the instructions given to the valuer, and a full copy of the valuation report. [68]

5.84 The committee notes that at least one major financial institution, the ANZ, already provides customers with a copy of a valuation and instructions relating to that valuation where the customer pays for the report.[69] However, the ANZ appears to be in the significant minority in this regard.

---

64 Legal Aid Queensland, *Submission 6*, p. 9.

65 See for example Mr Harold Cronin, *Submission 50*, p. 1l; Mrs Debbie Viney, private capacity, *Committee Hansard*, 13 July 2017, p. 50.

66 Financial Ombudsman Service, *Submission 9*, p. 7.

67 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, pp. 2, 42.

68 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans*, p. 7.

69 ANZ, *Submission 8*, p. 2.

Committee view

5.85 The committee is of the strong opinion that copies of bank or receiver-ordered valuations should be provided to farmers, given that it is the farmers who pay for the documents. The committee considers that this would ease the feelings of exclusion felt by farmers during their receiverships.

5.86 Given the specialised nature of primary production, the committee also considers it imperative that valuers valuing agribusinesses have the appropriate qualifications and experience to be able to competently carry out their duties.

Recommendation 18

5.87 The committee recommends that the Australian Bankers' Association and the Australian Restructuring Insolvency and Turnaround Association implement policies to ensure that copies of bank or receiver-ordered valuations are provided promptly to farmers.

Recommendation 19

5.88 The committee recommends that the Australian Bankers' Association and the Australian Restructuring Insolvency and Turnaround Association ensure that banks and insolvency practitioners must only engage independent valuers to value agribusinesses with appropriate qualifications and demonstrated expertise and experience in the field.

Achieving market value for forced sales

5.89 As noted above, the committee repeatedly heard evidence that properties under receivership were often subject to an assets fire sale. This is despite statutory requirements under the *Corporations Act 2001* (Corporations Act) for receivers to achieve market value of the assets they are appointed to. Section 420A of Corporations Act states:

> **Controller's duty of care in exercising power of sale**
>
> (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
>
> a. if, when it is sold, it has a market value – not less than that market value; or
>
> b. otherwise – the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.[70]

5.90 Mr Warren Day, Senior Executive Leader of Assessment and Intelligence for ASIC set out the basis for section 420A:

70 *Corporations Act 2001*, Section 420A.

> The rationale behind the 420A is that, if you go through that process, you give everyone, wide and large, an opportunity to participate – that is, all buyers in the market are put on notice if they're interested in that property and then what that property achieves is what the value is.[71]

5.91 Similarly, a passage in the legal textbook *Corporations Legislation 2017* notes the following in regard to establishing a breach of section 420A:

> It is important to note the s420A is primarily focused on the process undertaken by the receiver to sell the property. Judicial consideration of the section has generally focused on whether the receiver was properly informed (i.e. did the receiver obtain independent advice regarding the proposed sale, and if so, did the receiver follow that advice), as well as steps taken to market the property.[72]

5.92 As set out earlier in this chapter, the committee received evidence that indicated that some properties were sold by receivers for significantly under the market value. In the committee's mind, this demonstrates that section 420A is not operating as intended and its application needs to be reviewed.

5.93 The committee was advised by ASIC that there are examples in state legislation (for example in Queensland) that may have a tighter regime than section 420A of the Corporations Act.[73]

5.94 Under section 85 of the *Property Law Act 1974* (Qld), the mortgagee's duty 'to take reasonable care to ensure that the property is sold at market value' also applies to a receiver acting under a power delegated to the receiver by a mortgagee. The relevant section reads:

> **Duty of mortgagee or receiver as to sale price**
>
> (1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument or mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.

5.95 According to a 2009 article published by Cooper Grace Ward Lawyers, extending the mortgagee's duty to 'take reasonable care to ensure that the property is sold at market value' to the attorney of the mortgagor and to the receiver exercising power of sale represented a significant change to the previous requirements:

---

71 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 2.

72 Professor Robert Baxt and Mr Edmund Finnane, *Corporations Legislation 2017*, Thomson Reuters, Sydney, 2017, p. 536.

73 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 2.

> This is significant where the mortgagor is not a company as previously a receiver would not ordinarily have been caught by section 85 PLA [Property Law Act] or subject to any similar duty under the *Corporations Act 2001*. The duty of care under section 420A of the *Corporations Act 2001* only applies to a controller in relation to property of a company.[74]

5.96 Section 85 of the *Property Law Act 1974* (Qld) also sets out a number of prerequisites for the sale, which are designed to ensure that maximum value and at least market value is obtained:

> (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse –
>
> (a) adequately advertise the sale; and
>
> (b) obtain reliable evidence of the property's value; and
>
> (c) maintain the property, including by undertaking any reasonable repairs; and
>
> (d) sell the property by auction, unless it is appropriate to sell it in another way; and
>
> (e) do anything else prescribed under a regulation.

5.97 The Cooper Grace Ward Lawyers article also stated:

> The onus will be on the mortgagee or receiver to establish 'reasonable excuse' if they fail to comply with any requirement listed in section 85(1A)… Complying with the duty under section 85(1) by taking reasonable care to ensure that the property is sold at the market value may not provide a defence if the obligations under section 85(1A) are not satisfied.[75]

5.98 McGrathNicol informed the committee that with respect to the provisions in section 85 of the *Property Law Act 1974* (Qld), comparable legislative requirements apply to the sale of real property in other state jurisdictions.[76]

5.99 McGrathNicol also noted that the term 'market value' is not defined in either the Corporations Act or the *Property Law Act 1974* (Qld).[77]

5.100 KordaMentha advised the committee that the 'market value' of farming property is subject to many factors:

---

74 Cooper Grace Ward Lawyers, '*Further perils for mortgagees exercising power of sale in Queensland*', 28 July 2009, www.cgw.com.au/publication/further-perils-for-mortgagees-exercising-power-of-sale-in-queensland/ (accessed 23 November 2017).

75 Cooper Grace Ward Lawyers, '*Further perils for mortgagees exercising power of sale in Queensland*', 28 July 2009.

76 McGrathNicol, answers to questions on notice, 20 October 2017 (received 13 November 2017).

77 McGrathNicol, answers to questions on notice, 20 October 2017 (received 13 November 2017).

> Farm property values are impacted by international commodity prices, exchange rate, financial markets, oil prices, interest rates, competition for alternative land uses, labour costs and many other factors. The costs of holding a farm property are significant and there is no guarantee that property prices will improve. In fact, farm property prices can move in unexpected directions. Recent experience in Queensland shows that grazing property prices rose significantly during the Millennium Drought…but actually fell when the drought broke in 2010. Clearly it is not just drought and flooding rains that impact on farm property prices. Faced with significant holdings costs and volatile property markets the best, and often only, available strategy will be to realise the property in a timely and efficient manner.[78]

5.101 KordaMentha also emphasised that farm property prices can be volatile and that historic valuations are 'unreliable indicators' of current market value:

> In addition, a valuation is only an opinion as to value and valuers do not guarantee that the value they place on farming property will be achieved. This means that the true test of market value is the value a willing buyer is prepared to pay for the property after appropriate marketing.[79]

5.102 The committee received evidence indicating that receiver-initiated sales often result in lower prices being achieved compared to normal sales for similar properties. As Legal Aid Queensland observed:

> Buyers are aware that the property is being sold on a forced sale basis. News that a farm is under the control of receivers travels very quickly around rural communities.[80]

5.103 Legal Aid Queensland also noted that in depressed markets, an increase in forced sale numbers appears to exacerbate the 'downward spiral' in prices, affecting land values within a region which can then impact on the entire farming community.[81]

5.104 The Corrigin and Lake Grace Zone of the Western Australian Farmers Federation echoed this point:

> The Select Committee on Lending needs to be aware that a forced sale of land at a heavily discounted price can adversely affect the value of other farms in the area and set off a chain reaction that would put other farmers in the area below the banks acceptable equity level in their farming

78 KordaMentha, *Senate Committee: Lending to primary production customers*, p. 3 (tabled 17 November 2017).

79 KordaMentha, *Senate Committee: Lending to primary production customers*, p. 3 (tabled 17 November 2017).

80 Legal Aid Queensland, *Submission 6*, p. 10.

81 Legal Aid Queensland, *Submission 6*, p. 10.

businesses. This could cause foreclosure on other farmers and nobody gains from this.[82]

Committee view

5.105 As mentioned earlier in this chapter, the committee heard accounts from farmers of situations where receivers had sold assets for significantly under their market value.

5.106 The committee acknowledges the evidence from receivers indicating that valuations have limitations in regard to predicting sale prices, and that markets can prove volatile.

5.107 The committee also understands that it is possible that receiver-initiated sales result in lower prices compared to a normal sale for similar properties. However, the committee believes that it is unethical for receivers to sell properties in receivership at well below the market value, which seems to have been the case in several examples before the committee.

5.108 The committee is greatly concerned by the accounts of assets being sold for less than market value. The committee is concerned that section 420A of the Corporations Act is ineffective and not achieving its intended purpose. Although acknowledging that it is the market that ultimately determines what price an asset sells for, the committee considers that more effective safeguards must be implemented to ensure that maximum sale prices are being achieved by banks and receivers when selling assets.

Recommendation 20

5.109 The committee recommends that the Australian Bankers' Association revise its Code of Banking Practice and the Australian Restructuring Insolvency and Turnaround Association revise its Code of Professional Practice to stipulate that every effort be made by banks and receivers (in circumstances where they are appointed) to achieve the maximum sale price of an asset.

5.110 In this regard the committee supports the mechanisms set out in section 85 of the *Property Law Act 1974* (Qld), which are designed to ensure that maximum value is obtained.

5.111 Given that ASIC observed that the current legal view is that no private right of action flows on from when there is a breach of section 420A,[83] the committee considers it necessary that such a right be established in order to allow individuals an opportunity for recourse if required.

---

82 Corrigin and Lake Grace Zone of Western Australian Farmers Federation, *Submission 22*, p. 3.

83 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 2.

Recommendation 21

5.112 The committee recommends that the government establish a private right of action for breaches of section 420A of the *Corporations Act 2001*.

Chapter 6

Bank culture

6.1 This chapter will turn to issues relating to broader bank culture, and provide suggestions on measures to improve the current system.

Importance of bank culture

6.2 During the inquiry the committee received evidence emphasising the importance of allowing farmers to exit with dignity in situations where foreclosure is unavoidable.

6.3 For example, the ABA commented:

> The [banking] industry will continue to work with government and primary producer organisations on what can be done to support business owners to exit the industry with dignity and with as much equity as possible when that is unfortunately the only option.[1]

6.4 The committee also received evidence indicating that the culture of a bank is an important factor in ensuring that farmers are treated with dignity, particularly when they are experiencing financial difficulties. For example, both Westpac and the ANZ informed the committee that the culture of an organisation was important in this respect.[2] Additionally, these two banks were identified by Mr Andrew McLaughlin from his years consulting in the agribusiness space as banks 'leading the way' and making positive cultural changes.[3]

6.5 Mr Ben Steinberg, Head of Lending Services for the ANZ noted:

> Can I say, perhaps with some humility, that we [ANZ] think we're doing everything we can in order to address the concerns that have arisen over the last few years. We're listening to people like Andy McLaughlin and a lot of other people around the concerns out in the industry. Like any good business, we're in a process of continuous improvement. We are looking at our processes and our procedures every single day. We are looking at ways to change those so that we can be better banks every day, so that we can understand the issues that our customers face, so that we can deal with

---

1 Ms Anna Bligh, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 11 August 2017, p. 62.

2 Mr Mark Bennett, Head of Agribusiness, ANZ, *Committee Hansard*, 11 August 2017, p. 11; Mr Gwyn Morgan, Head of Credit Restructuring, Credit Risk, Westpac, *Proof Committee Hansard*, 18 September 2017, p. 48.

3 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 8.

> those issues with respect and, as was pointed out earlier before, so that we can ensure the dignity of our customers is respected.[4]

6.6 Mr McLaughlin provided the committee with a personal insight about how crucial it is to allow farmers to retain their dignity, even when exiting the industry:

> We understand that the bank is entitled to get its money; we understand that the receiver have got the job – but they have an obligation, a duty of care, to ensure they are not only representing the banks but also ensuring that he farmers get a return. Mr Forrest [a former Federal Member of Parliament] used to say to me, 'Andy, if we can go down to that bank and we can do a deal, and that farmer can walk out with a dollar in his pocket and with his dignity, that's a bloody good start'.[5]

6.7 The ABA acknowledged that bank culture can play a pivotal role in addressing behaviour that is less than adequate. As Ms Bligh observed:

> The banking industry acknowledges that bank conduct, culture and communication needs to be improved. Evidence to this inquiry has highlighted this need.[6]

Committee view

6.8 Evidence received by the committee indicates that although the corporate culture of a bank may have improved in some areas, the reflected values demonstrated by individual bank employees at the customer interface has in some instances fallen significantly short of these ideals. In such instances, farmers and their families are not afforded the dignity they deserve.

6.9 As such, the committee believes it is imperative that banks invest in ensuring that the corporate culture, often so eloquently espoused by senior or executive bank leaders, is actually demonstrated by frontline and middle management bank staff during day-to-day interactions with customers.

6.10 Throughout the inquiry the committee heard numerous senior bank representatives champion their institution's cooperative and empathetic approach to dealing with customers, as well as emphasise their understanding of and commitment to their agribusiness customers.

6.11 While the committee was encouraged to hear these sentiments, and also to hear positive third-party reports regarding banks such as Westpac and the ANZ, a

---

4 Mr Ben Steinberg, Head of Lending Services, Corporate and Commercial, ANZ, *Committee Hansard*, 11 August 2017, p. 13.

5 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 4.

6 Ms Anna Bligh, Chief Executive Officer, Australia Bankers' Association, *Committee Hansard*, 11 August 2017, p. 61.

positive corporate culture is of no use to customers if it is not followed or respected by the staff farmers must actually deal with. Primary producers who have been verbally abused, pressured, had their trust violated, or subjected to other intimidating behaviour from bank staff take little comfort from these broad assurances from bank executives.

6.12 The committee considers that it is crucial that banks take more meaningful responsibility for the actions of their middle management and frontline staff in order to ensure that primary production customers are treated with dignity, particularly during financial difficulties. Banks must invest in comprehensively assessing staff behaviour, take complaints seriously, and where necessary, take remedial action against staff who behave inappropriately.

Recommendation 22

6.13 The committee recommends that the Australian Bankers' Association ensure that banks offer better training and more comprehensive supervision of bank frontline and management staff to ensure that they deal fairly and reasonably with farming customers and have a sound understanding of the unique characteristics of primary production enterprises.

Code of Banking Practice

6.14 The ABA Code of Banking Practice (the code) sets standards for fairness, transparency, behaviour and accountability for banks, beyond legislative requirements. [7]

6.15 The code was independently reviewed in 2017 by Mr Phil Khoury, and the ABA informed the committee that it was in the process of redrafting the code, with the aim to publish a new version by the end of 2017. For the first time the Australian Securities and Investments Commission will be approving the code.[8]

6.16 Ms Bligh outlined further details on the first rewrite of the code sine 1993:

> This is a document by which banks need to be held accountable, and it can't function as that unless customers are able to easily understand it and read their rights as customers.[9]

6.17 When queried by the committee on the extent to which the interests of farming or agricultural businesses will be accommodated in the code, Ms Bligh

7 Australian Bankers' Association, *Submission 12*, p. 4.

8 Ms Anna Bligh, Chief Executive Officer, Australia Bankers' Association, *Committee Hansard*, 11 August 2017, p. 63.

9 Ms Anna Bligh, Chief Executive Officer, Australia Bankers' Association, *Committee Hansard*, 11 August 2017, p. 63.

responded that there were a number of new provisions proposed for the code that went directly to small businesses, including farms and agribusinesses.[10]

6.18 The ABA submission set out in more detail the parts of the new code that would assist in creating positive relationships between banks and farmers. For example, under the new code, the banks will:

- provide clearer information to farmers about credit products and lending decisions;
- give farmers more notice when loan contracts change;
- give farmers more time to arrange alternative finance when a facility is not going to be renewed;
- outline how banks will assist farmers experiencing financial difficulty;
- develop better guidelines on valuation practices and how and when they can appoint investigative accountants and receivers, administrators and liquidators;
- reduce the number of non-monetary covenants in loan contracts and credit products for small business and agribusiness customers (including the removal of all general adverse material change clauses and the reduction of the number of specific events of non-monetary default entitling enforcement action); and
- explain remaining covenants in plain language and include a summary of covenants with loan contracts for small businesses.[11]

Committee view

6.19 The committee is of the opinion that the ABA has a significant role to play in setting the tone of bank culture in Australia. To that end, the committee commends the ABA for its work in rewriting the Code of Banking Practice, and looks forward to seeing the above changes reflected in the new, ASIC-approved version.

6.20 The committee urges the ABA adopt all relevant recommendations of this report and take into consideration the unique characteristics of agribusiness and primary production lending when rewriting the code.

10 Ms Anna Bligh, Chief Executive Officer, Australia Bankers' Association, *Committee Hansard*, 11 August 2017, p. 63.

11 Australian Bankers' Association, *Submission 12*, pp. 5–6.

Recommendation 23

6.21 The committee recommends that the Australian Bankers' Association adopt all relevant recommendations of this report when redrafting the Code of Banking Practice.

Recommendation 24

6.22 The committee recommends that the new Code of Banking Practice currently being drafted by the Australian Bankers' Association specifically recognise the operating environment of primary producers.

Recommendation 25

6.23 The committee recommends that the Australian Bankers' Association stipulate that banks must draw customers' attention to the Code of Banking Practice when establishing new loans.

Additional guidance for primary producers

6.24 Throughout the inquiry numerous primary producers expressed disbelief and disappointment that their bank managers had broken their trust, or not acted in their best interests. For example, some farmers were incredulous that they had been pushed to borrow or spend more money than they required or had requested.[12]

6.25 Mr Denis McMahon, a senior lawyer from Legal Aid Queensland provided the committee with an observation around the breach of trust between primary producers and their bank staff:

> In relation to the trust issue, I've had clients say that when they were obtaining their loans they were told by the bank manager that certain things would happen. For example, if they were going to be offered market rate, market facilities, for three to five years, the bank manager had indicated that those would just be rolled over at the time, and the clients, trusting the bank manager, took those facilities. Then, when the facilities came to expire, the banks didn't honour their word.[13]

6.26 Mr McLaughlin noted the demise of the once strong personal relationship between a farmer and his or her local rural bank:

> If you go back to the old system, where the local bank manager had the ability to look at loans, review them and approve them internally, he was

12 See for example comments by Michael Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 1–2; see also Mr Bradley Clark, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 23.

13 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, *Committee Hansard*, 2 August 2017, p. 18.

> very hands-on with the farmer… They had a family relationship, where they went to the farm and sat down to have a coffee and a scone or whatever else. That was very special, because then the farmer trusted his banker and knew he could rely on him tough times.[14]

6.27 Additionally, Ms Scott from the ASBFEO observed that some individuals viewed their banking relationships in a different light to their bank managers:

> They have kind of treated their bank as partners of people that they are in a strategic business relationship with. They have known them for a long time whereas the game has changed; it is not like that anymore. They are not like their doctor or their dentist – somebody that they hold up as a professional in high esteem who is going to guide them. The bank is running its business. It is almost like cutting through that myth of, 'The bank will support me no matter what' to the reality of: 'If you face this situation going forward, will you be able to carry the business through or not?'[15]

6.28 The committee also heard that the geographical dislocation between bank managers and farmers impedes the relationship between the two parties. For example, Mr Colin Nicholl from the Western Australian Farmers Federation submitted:

> At one stage the local bank manager used to be part of our community. He was the man that made a lot of the decisions. He was empowered to lend money up to certain sums, and that varied from bank to bank and from the experience of manager to manager. Anything beyond that he passed higher up to the people further up the bank with a recommendation. Today most of those decision-makers are no longer in the local community – they are based in regional towns – and they have no idea of who their clients are or how their businesses are going.[16]

Committee view

6.29 Due to the changed nature of modern banking, the committee is of the opinion that primary producers would benefit from assistance in regard to financial literacy, business management and resilience training.

6.30 The days where customers could confidently trust their bank manager to always act in their best interests are gone. As such it is even more imperative that farmers are equipped with adequate financial literacy skills to assist them in making informed decisions about their businesses, and allow them to better assess the value of advice given to them from financial institutions and related third parties.

---

14 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 9.

15 Ms Anne Scott, Principal Advisor, Australian Small Business and Family Enterprise Ombudsman, *Proof Committee Hansard*, 18 September 2017, p. 33.

16 Mr Colin Nicholl, Corrigin Lake Grace Zone Councillor, Western Australian Farmers Federation, *Proof Committee Hansard,* 19 July 2017, p. 4.

Recommendation 26

6.31 The committee recommends that the government establish tailored initiatives that provide primary producers with guidance on financial literacy and business management, and resilience training.

Banking royal commission

6.32 As noted earlier in this report, the committee's inquiry unfolded amid growing concerns about alleged misconduct in Australia's banking sector and increasing calls for a royal commission. Recognising that it will be the only way to restore public faith in the sector, the Turnbull Government announced the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 30 November 2017.[17] Draft terms of reference released by the government cover a range of issues, including, in the context of this inquiry:

- culture and governance practices in the sector;
- compensation and redress for consumers who have suffered; and
- the overall efficacy of the current legal and regulatory framework as it relates to banking and financial services.[18]

6.33 The committee notes that had the Turnbull Government not acted to address the misconduct of the banking and financial services industry by establishing the royal commission, the committee would have made a strong recommendation in this report for such an inquiry.

6.34 Although the timing of the royal commission will not enable this committee to be informed by any evidence which may emerge, the committee nonetheless welcomes the announcement and the Prime Minister's commitment to the Australian people:

> The Inquiry [royal commission] will consider the conduct of banks, insurers, financial services providers and superannuation funds (not including self-managed superannuation funds). It will also consider how well equipped regulators are to identify and address misconduct. It will not inquire into other matters such as financial stability or the resilience of our banks.
>
> This will be a sensible, efficient and focussed inquiry into misconduct and practices falling below community standards and expectations. Most Australians are consumers of banking and financial services, and we all

17 The Hon Malcolm Turnbull MP, Prime Minister, *media release*, 30 November 2017, available at: www.pm.gov.au/media/royal-commission-banks-and-financial-services (accessed 30 November 2017).

18 Draft terms of reference available at: www.pm.gov.au/sites/default/files/media/terms-of-reference.pdf (accessed 30 November 2017).

> have the right to be treated honestly and fairly by banking and financial services providers.[19]

6.35 At this early stage, however, it is impossible to say whether any recommendations that may arise as a result of the royal commission will be sufficient to drive positive change for primary producers who have been severely let down by their experience with financial institutions. This being the case, the committee emphasises the importance of the evidence brought to light by this inquiry and urges the government and other stakeholders to consider and implement the recommendations within this report without unnecessary delay.

6.36 Finally, the committee urges the royal commission to fully consider the evidence published by this committee in the context of its inquiry.

Recommendation 27

6.37 The committee recommends that the newly established Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry fully consider the evidence published by this committee in the context of its inquiry.

Senator Pauline Hanson

Chair

Senator John Williams

Deputy Chair

19 The Hon Malcolm Turnbull MP, Prime Minister, *media release*, 30 November 2017.

Labor Senators' Additional Comments

1.1 Labor acknowledges the importance of the issues raised with the committee and that many primary producers have shared difficult stories both in submissions and during public hearings.

1.2 The many issues raised should have been presented at a Royal Commission into the conduct of the Banks as urged by Labor some 18 months ago.

1.3 With the recent announcement by the Turnbull Government that it will establish a Royal Commission into misconduct in the Banking, Superannuation and Financial Services, Labor urges the Government to implement recommendation 27 of the report. That is, that "the newly established Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry fully consider the evidence published by this committee in the context of the inquiry".

1.4 This will ensure that the evidence provided to the committee and the report recommendations can be comprehensively considered and reviewed by the Royal Commission.

1.5 Labor will reserve its position on the recommendations until the Royal Commission has been able to consider the report in full.

Senator Anthony Chisholm

Appendix 1

Submissions and additional information

Submissions

Submission No.	Submitter
1	Northern Territory Government
2	Australian National Audit Office
3	Credit and Investments Ombudsman
4	Australian Restructuring Insolvency & Turnaround Association
5	Rabobank Australia Limited
6	Legal Aid Queensland
7	Department of Agriculture and Water Resources
8	Australian and New Zealand Banking Group Limited
9	Financial Ombudsman Service
10	National Australia Bank
11	Commonwealth Bank of Australia
12	Australian Bankers' Association
13	Westpac Banking Corporation
14	Rural Bank
15	Mr Greg Bloomfield
16	Wheatbelt Integrity Group
17	Australian Small Business and Family Enterprise Ombudsman
18	NSW Farmers
19	Confidential
20	Name Withheld

21	Mr Andrew McLaughlin
22	Corrigin/Lake Grace Zone of the Western Australian Farmers Federation
23	Confidential
24	Confidential
25	Confidential
26	Confidential
27	Confidential
28	Confidential
29	Confidential
30	Confidential
31	Confidential
32	Confidential
33	Confidential
34	Mr Patrick Cusack
35	Dr Kevin Cox
36	Confidential
37	Mr William, Mr Peter and Ms Flora Axford
38	Banking and Finance Consumers Support Association
39	Mr Charlie Starky
40	Citizens Electoral Council
41	Mr Bradley Clarke
42	Mr Tom Fox
43	Ms Nolene and Mr Lloyd Bradshaw
44	Mr Neil Bradshaw

45	Mr Dennis John Fahey
46	Mr Andrew Jensen
47	Mr Sam Sciacca
48	Confidential
49	Mr Greg Kenney
50	Mr Harold Cronin
51	Confidential
52	Mr Rodney Culleton
53	Rural Action Movement
54	Mr John McClymont
55	Mr Craig Caulfield
56	Ms Natasha Keys
57	Mr Brian and Ms Suellyn Webster
58	Mr Robert Yabsley
59	Liberty Works Inc.
60	Ms Ellen Brown
61	Confidential
62	National Farmers' Federation
63	Mr Jim and Ms Sally Barton
64	Tasmanian Small Business Council
65	Confidential
66	Confidential
67	Western Australia Party
68	Mr Paul Topping

69	Mr Lynton Freeman
70	Mr Rodney Boxsell
71	Confidential
72	Confidential
73	Confidential
74	Confidential
75	Confidential
76	Confidential
77	Mr Archer Field
78	Confidential
79	Confidential
80	Mr Charlie Wallace
81	Mr David and Ms Elizabeth Browning
82	Mr Thomas Eisen Jnr
83	Mr Gerard O'Grady
84	Mr Lindsay Dingle
85	Confidential
86	Confidential
87	Confidential
88	Mr Leon Ashby
89	Confidential
90	Confidential
91	Confidential
92	Mr Douglas Vaschina

93	Confidential
94	Mr Ronald Feierabend
95	Confidential
96	Ms Henriette Nielsen
97	Mr Brian Reed
98	Mr Lewis Tomcsanyi
99	Mr Jim Davidson
100	Ms Raelene Strong
101	Mr Brad Ward
102	Mr John Calder
103	Confidential
104	Name Withheld
105	Ms Kathleen Wheeldon
106	Mr Christopher and Ms Claire Priestley
107	Holt Norman Ashman Baker Action Group
108	Confidential
109	Bank Victims Pty Ltd
110	Ms Debra Viney
111	Mr Tony and Mrs Kathryn Graham
112	Mr Michael Sanderson
113	Ms Naomi Halpern
114	Confidential
115	Confidential

Tabled documents

1. Document tabled by Mr Lindsay Dingle at a public hearing in Roma on 2 August 2017.

2. Document tabled by Mr Pat Cusack at a public hearing in Roma on 2 August 2017.

3. Document 1 of 2 tabled by PPB Advisory at a public hearing in Canberra on 20 October 2017.

4. Document 2 of 2 tabled by PPB Advisory at a public hearing in Canberra on 20 October 2017.

5. Document tabled by KordaMentha at a public hearing in Canberra on 17 November 2017.

Answers to questions on notice

1. Answers to written and verbal questions on notice by Legal Aid Queensland, asked at a public hearing in Roma on 2 August 2017 by Senator Roberts and Senator Williams; received 28 August 2017.

2. Answers to verbal questions on notice by CBA, asked at a public hearing in Sydney on 11 August 2017 by Senator Roberts and Senator Smith; received 8 September 2017.

3. Answers to verbal questions on notice by NAB, asked at a public hearing in Sydney on 11 August 2017 by Senator Roberts and Senator Smith; received 5 September 2017.

4. Answers to verbal questions on notice by Rabobank, asked at a public hearing in Sydney on 11 August 2017 by Senator Roberts and Senator Smith; received 5 September 2017.

5. Answers to verbal questions on notice by Rural Bank, asked at a public hearing in Sydney on 11 August 2017 by Senator Roberts; received 5 September 2017.

6. Answers to written questions on notice by ANZ, asked by Senator Georgiou on 22 August 2017; received on 5 September 2017.

7. Answers to questions on notice by Mr Darren Nelson. Asked at a public hearing on 18 September 2017; received 20 September 2017.

8. Answers to verbal questions on notice by the Department of Agriculture and Water Resources, asked at a public hearing in Canberra on 18 September 2017; received 3 October 2017.

9. Answers to verbal questions on notice by Westpac Group, asked at a public hearing in Canberra on 18 September 2017; received 10 October 2017.

10. Answers to questions on notice by the Australian Restructuring, Insolvency and Turnaround Association, asked at a public hearing in Canberra on 20 October 2017; received 3 November 2017.

11. Answers to questions on notice by McGrathNicol, asked at a public hearing in Canberra on 20 October 2017; received 13 November 2017.

12. Answers to written and verbal questions on notice by KordaMentha, asked at a public hearing in Canberra on 17 November 2017 by Senators Hanson, Williams and Georgiou; received 27 November 2017.

13. Answers to written questions on notice by Grant Thornton, asked on 21 November 2017 by Senator Williams; received 27 November 2017.

14. Answers to written questions on notice by Permanent Custodians Limited, asked on 27 November 2017 by Senator Anning; received 1 December 2017.

15. Answers to written questions on notice by KordaMentha, asked on 27 November 2017 by Senator Georgiou; received 5 December 2017.

16. Answers to written questions on notice by Commonwealth Bank of Australia, asked on 22 November 2017 by Senator Georgiou; received 5 December 2017.

Additional information

1. Additional information on Farm Debt Mediation from the Queensland Rural and Industry Development Authority; received 11 October 2017.

2. Additional information on Farm Debt Mediation from the New South Wales Rural Assistance Authority; received 26 October 2017.

3. Additional information on Farm Debt Mediation from the Victorian Minister for Agriculture; received 6 November 2017.

Appendix 2

Public hearings and witnesses

Charters Towers, QLD – 13 July 2017

Witnesses

Mr Lloyd Bradshaw, Private Capacity

Mrs Nolene Bradshaw, Private Capacity

Mr Salvatore (Sam) Sciacca, Major Shareholder, Aussea Holdings

Mr Dennis Fahey, Private Capacity

Mr Andrew John Jensen, Principal, Real Estate Agent, Jensens Real Estate and Livestock

Mr Brett George Fallon, Private Capacity

Mr Andy McLaughlin, Private Capacity

Mrs Debbie Viney, Private Capacity

Perth, WA – 19 July 2017

Witnesses

Mr Colin Jeffery Nicholl, Corrigin Lake Grace Zone Councillor, Western Australian Farmers Federation

Mr Gregory Kenney, President, Rural Action Movement WA and Farmer, Salmon Gums

Mr Kevin Gregory Thomas Kenney, Farmer, Salmon Gums

Mr Bradley Clarke, Private Capacity

Ms Denise Brailey, President, Banking and Finance Consumers Support Association

Mr Rodney Norman Culleton, Private Capacity

Mrs Ioanna Culleton, Private Capacity

Mrs Barbara Cronin, Private Capacity

Mr Harold Cronin, Private Capacity

Mr James Ferguson, Private Capacity

Mr Thomas Fox, Private Capacity

Dr Graham Jacobs, Private Capacity

Mr Nicholas Kelly, Partner, Hollands Track Farm; Chairman, Wheatbelt Integrity Group

Mr William Paul Axford, Private Capacity

Roma, QLD – 2 August 2017

Witnesses

Mr James Barton, Private Capacity

Mr Ian Hugh Hannah, Private Capacity

Mr Charles Edward Bayntun Starky, Private Capacity

Ms Natasha Keys, Private Capacity

Mr Melville Ruddy, Farmer, Private Capacity

Mr Craig Edward Caulfield, Private Capacity

Mrs Moeroa Mili Caulfield, Private Capacity

Mr Ronald Feierabend, Private Capacity

Mr Lindsay Dingle, Private Capacity

Mrs Tanya Dingle, Private Capacity

Ms Dixie Lane, Private Capacity

Mrs Catherine Stewart, Private Capacity

Mr Patrick Cusack, Private Capacity

Mr Anthony Harold Hyde Bailey, Private Capacity

Mr Charles Nason, Private Capacity

Mr Robert Charles Yabsley, Private Capacity

Sydney, NSW – 11 August 2017

Witnesses

Mr Andrew McLaughlin, Private Capacity

Mr Mark Bennett, Head, Agribusiness, ANZ

Mr Ben Steinberg, Head, Lending Services, Corporate and Commercial, ANZ

Ms Alexandra Gartmann, Chief Executive Officer, Rural Bank

Mr Malcolm Renney, General Manager Credit, Rural Bank

Ms Christine Traquair, Chief Risk Officer, Banking and Wealth, Suncorp Group

Mr Christopher Turvey, Manager, Business Customer Support, Suncorp Group

Mr Geoffrey Green, Head of Group Strategic Business Services, Melbourne, National Australia Bank Ltd

Mr Khan Horne, General Manager, Agribusiness, National Australia Bank Ltd

Mr Timothy Williams, General Manager, Group Strategic Business Services, National Australia Bank Ltd

Mr Andrew Graham, Head of Special Asset Management, Rabobank Australia Limited

Ms Lara Gray, Head Counsel, Rabobank Australia Limited

Mr Peter Knoblanche, Chief Executive Officer, Rabobank Australia Limited

Mr Grant Cairns, Executive General Manager, Regional Agribusiness Banking, Commonwealth Bank of Australia

Mr Chris Williams, Chief Risk Officer, Business and Private Banking, Commonwealth Bank of Australia

Ms Anna Bligh, Chief Executive Officer, Australian Bankers' Association Inc.

Mr Tony Pearson, Chief Economist and Executive Director, Industry Policy, Australian Bankers' Association Inc.

Ms Amanda Pullinger, Policy Director, Retail Policy, Australian Bankers' Association Inc.

Canberra, ACT – 6 September 2017

Witnesses

Mr Gerard O'Grady, Private Capacity

Canberra, ACT – 7 September 2017

Witnesses

Mr Lynton Freeman, Private Capacity

Canberra, ACT – 11 September 2017

Witnesses

Mr David Browning, Private Capacity

Mr Charlie (Lee) Wallace, Private Capacity

Canberra, ACT – 14 September 2017

Witnesses

Mr Michael Doyle, Private Capacity

Mrs Cherie Doyle, Private Capacity

Canberra, ACT – 18 September 2017

Witnesses

Ms Ellen Brown, Chair, Public Banking Institute

Mr Darren Nelson, Chief Economist, LibertyWorks Inc.

Mr Phillip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service Australia

Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service Australia

Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investments Ombudsman

Ms Anne Scott, Principal Adviser, Australian Small Business and Family Enterprise Ombudsman

Mr Stephen Hannan, National Manager Agribusiness, Commercial Banking, Westpac Banking Corporation

Mr Gwyn David Morgan, Head of Credit Restructuring, Credit Risk, Westpac Banking Corporation

Ms Kate Brinkley, Acting Assistant Secretary, Farm Business Policy Branch, Department of Agriculture and Water Resources

Mr David Galeano, Acting Assistant Secretary, Agricultural Productivity and Farm Analysis, ABARES, Department of Agriculture and Water Resources

Mr Cameron Hutchison, Acting First Assistant Secretary, Farm Support Division, Department of Agriculture and Water Resources

Mr James Kelly, Principal Adviser, Financial System Division, Treasury

Canberra, ACT – 20 October 2017

Witnesses

Mr Will Colwell, Partner, Ferrier Hodgson

Mr Stewart McCallum, Partner, Ferrier Hodgson

Mr Timothy Michael, Partner, Ferrier Hodgson

Mr Mark Perkins, Rural and Agribusiness Specialist, Ferrier Hodgson

Mr Matthew Caddy, Partner, McGrathNicol

Mr Anthony Connelly, Partner, McGrathNicol

Mr Jamie Harris, Partner, McGrathNicol

Mr Rob Kirman, Partner, McGrathNicol

Mr David Leigh, Partner, PPB Advisory

Mr Stephen Longley, Partner and Head of Restructuring, PPB Advisory

Ms Narelle Ferrier, Technical and Standards Director, Australian Restructuring Insolvency and Turnaround Association

Mr Ross McClymont, President of the Board, Australian Restructuring Insolvency and Turnaround Association

Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association

Mr Scott Couper, Partner, Gadens Lawyers

Ms Susan Forrest, Partner, Gadens Lawyers

Mr Justin Denis Walsh, Partner, Ernst & Young

Canberra, ACT – 17 November 2017

Witnesses

Mr Andrew Behman, Associate, CLH Lawyers, Legal Counsel for Mr Stephen Dixon

Mr Stephen Dixon, Partner, Business Recovery and Insolvency, Grant Thornton

Mr Robert Hutson, Partner, KordaMentha

Mr Mark Mentha, Partner, KordaMentha