

# **Report on 'Shadow Ledgers' and the provision of bank statements to customers**

## **Background to action by the Parliamentary Joint Statutory Committee on Corporations and Securities (PJSC)**

1.1 On 21 June 2000 Senator Grant Chapman, the Chairman of the PJSC, placed before the PJSC allegations which he had received about alleged practices of the Commonwealth Bank in relation to its commercial dealings with a group of rural and regional customers.

1.2 As a consequence the PJSC unanimously decided to hold a one-off hearing, on 16 August 2000, into the following allegations:

- that the bank failed to inform rural customers that their debts had been written-off;
- that the bank used a 'shadow ledger' system to improperly claim tax benefits;
- that the bank wrote off loans as bad debts while still receiving interest payments to service those debts; and
- that the bank refused to issue account statements to customers.

1.3 The PJSC decided to invite as witnesses representatives of the customers, the Commonwealth Bank, the Australian Taxation Office and the Australian Competition and Consumer Commission.

1.4 In undertaking this inquiry the Committee considered the allegations against the Commonwealth Bank in light of what is regarded as the accepted commercial practice under which it is not usual or even prudent for a corporation to inform its customers of the different types of internal accounting entry which reflect the status of their debts.

1.5 The PJSC is cognisant that there may be a number of these entries, which are necessary to comply with accounting standards and reporting for tax purposes but where it would not be commercially advisable for a corporation to inform a customer that its debt had been written-off. The Committee understands that commercial organisations in general do not inform customers of internal accounting procedures.

1.6 The PJSC received 17 submissions in relation to its hearing, a list of which is set out in Appendix 1. A list of witnesses at the hearing is set out in Appendix 2. A set of questions on notice asked by Senator Murray of the Commonwealth Bank are set out in Appendix 3.

## **Allegations against the Commonwealth Bank**

### **Evidence from the complainants**

1.7 At its hearing the PJSC heard evidence from Mr Bruce Ford, Ms Wendy Murray and Mr Bernard Madigan about their experiences as customers of the Commonwealth Bank. These witnesses spoke for two hours, giving very detailed accounts of their individual dealings with the Bank, which they claimed substantiated their allegations. The witnesses also tabled bank statements from other customers. The PJSC is most grateful to those witnesses for their assistance.

1.8 Mr Bruce Ford raised issues of concern in respect to the treatment of his company's loans with the Commonwealth Bank. In particular Mr Ford was concerned that he had not been provided with statements despite requests and that when statements were provided they contained inaccurate information. Mr Ford described the statements as 'fabrications'.

1.9 Mr Ford stated in his submission that there is a lack of transparency and honesty in the bank's practice of withholding statements and that "when these issues are raised with the Commonwealth Bank, the bank deliberately covers up its practice and engages in dishonest conduct."

1.10 In order to gain information, Mr Ford alleges that the Bank told him that he would need to litigate. Mr Ford stated to the Committee that it was "an extraordinary situation where we need to sue them for the truth."

1.11 Mr Bernie Madigan advised the Committee that he was currently in litigation with the Commonwealth Bank over a number of matters, including bank statements.

1.12 Mr Madigan alleged that the Bank had refused to provide him with a closing statement of his account, which it continued to debit even though it had informed him that the account was closed.

1.13 Mr Madigan stated that the Bank continued to keep the account open for improper purposes.

### **Evidence of the Financial Services Consumer Policy Centre**

1.14 The most comprehensive material in relation to the allegations against the Commonwealth Bank was submitted by the Financial Services Consumer Policy Centre, a non-profit consumer research organisation. The FSCPC advised that it had been assisting persons who were having difficulty obtaining account statements. The basic position of the FSCPC was that statements formed the cornerstone of the relationship between bank and customer; full statements should always be provided, regardless of whether a customer has fallen behind in payments.

1.15 The FSCPC advised that their research showed evidence of a potential systemic difficulty involving farmers who have not received bank statements from, in most cases, the Commonwealth Bank, and in some instances from the National Australia Bank and the ANZ.

1.16 The FSCPC indicated that a typical dispute involved the bank sending bank statements less frequently or not at all. Bank staff appear reluctant to provide statements and payout figures are difficult to obtain and are often disputed. Where statements are provided they are often in a changed format. In particular, the statement would show a zero balance, although the bank claimed elsewhere that a large sum was due. As a result, customers were unable to complete tax returns and some found it difficult to budget and carry on business normally. Many experienced refinancing problems and some faced insolvency. These difficulties were not related to legal proceedings, with some customers receiving no statements for years, with no court action commencing.

1.17 The FSCPC noted that the Commonwealth Bank did not deny their use of 'shadow ledgers'. It is the view of the FSCPC that it was formal bank policy not to provide statements once a shadow ledger is opened, and that although the banks denied this, the bank has been inconsistent in its defence.

1.18 The FSCPC then took issue with a number of claims in relation to shadow ledgers which it attributed to the Commonwealth Bank.

1.19 The FSCPC disputed claims by the bank that statements were only withheld after litigation had commenced, stating that numerous complainants had reported not receiving statements despite no litigation being in existence.

1.20 The FSCPC disputed claims by the bank that statements were not issued because the Bank did not wish to inflame any dispute and that in any event the Bank will always issue statements on request. The FSCPC argued that the banks defence that providing statements could inflame a dispute made no sense and gave evidence of instances where it was banking policy not to provide statements once a shadow ledger was opened.

1.21 The FSCPC made eight recommendations in its conclusions. These were that:

- A survey should be conducted to ascertain how many customers have had problems receiving bank statements, and whether or not the problem is limited to the CBA.
- A round table of legislators and regulators, including ASIC, APRA and the ATO could consider whether legislation or accounting procedures need to change, in order to prevent any need or incentive for a bank not to issue statements.
- The Banking Code of Conduct should be amended to require the provision of statements in all circumstances short of litigation, and the provision of statements on request thereafter.

- Undertakings should be sought from the CBA that its internal procedures, instruction manuals and staff training will be amended to ensure that bank statements are issued regularly and on request.
- An independent arbitrator should be appointed to consider relevant cases. The arbitrator should have the ability to obtain statements for consumers, correct inaccurate entries and recommend compensation where appropriate.
- The terms of reference of the Australian Banking Ombudsman Scheme, including its independence, needs to be examined to determine why the scheme was unable to assist many of the complainants.
- A wider inquiry into rural finance should be conducted.
- Further inquiries about bank accounting standards should be made.

### **The response of the Commonwealth Bank**

1.22 At the PJSC hearing the Commonwealth Bank circulated material and answered questions from members in relation to the allegations made against it. The Bank advised that in relation to these matters it continued to refute strongly any allegations of impropriety. The Bank stated that the circumstances in question related only to the very small number of customers who may have difficulty repaying their loans.

1.23 Mr Michael Ulmer, Group General Manager from the Commonwealth Bank provided the following explanation of 'shadow ledgers'.

“Where the bank or, for that matter, any other credit provider has formed the view that all or some of the debt owing will not be repaid, it will, to ensure compliance with accounting requirements, make an accounting entry to reflect provision for the possible loss or write off of this amount as a bad debt. Clearly, just because a credit provider forms the view that a debt is irrecoverable or bad does not extinguish the liability of the borrower to repay the moneys owed under the loan agreement. This would include interest that continues to accrue on the debt. In these instances, the credit provider will need to keep a separate record of the legal debt owed under the contract. It is this separate record that has been referred to as the ‘shadow ledger’.”

1.24 The response of the Bank to the specific allegations is set out below:

- **Allegation:** The Bank failed to inform some rural customers that debts had been written-off.

**Response:** The decision by a lender to write off all or part of a debt recorded in its books is to enable compliance with generally accepted accounting standards and regulatory requirements. A write-off does not reduce the amount legally due and payable by the defaulting borrower.

- **Allegation:** The Bank used a shadow ledger system to improperly claim tax benefits.

**Response:** The accounting system does not result in a taxation benefit, because it merely records the debt legally due and payable. If a lender incurs a loss on a loan, the taxation laws provide for an entitlement to a tax deduction. If the defaulting borrower subsequently repays all or part of the loan, the lender discloses the income in its accounts and pays tax in relation to it.

- **Allegation:** The Bank wrote off bad debts while still receiving interest payments to service those loans.

**Response:** Even where a lender has written off a debt, the borrower is still legally required to make the interest payments under the loan agreement. Tax is payable on any interest so received.

The bank advised that its independent auditors Ernst & Young had specifically reviewed the shadow ledger accounts and confirmed that the activity on those accounts is in accordance with accounting requirements and taxation requirements.

- **Allegation:** The Bank refused to issue statements to customers.

**Response:** The bank stated that “we are unaware of any circumstance where the customer has continued to service their loans in accordance with the loan agreement where the Commonwealth Bank has refused to issue statements, but when dealing with an impaired loan, the relationship between the bank and the borrower may be vexatious. The borrower may dispute the amount owed and the Commonwealth Bank may cease to issue statements as in the past there had been little purpose in providing information that the customer may perceive as incorrect and may further inflame the dispute that may be in place between the customer and the bank.” The bank went on to say, “in dealing with business customers, we are aware of a small number of instances where officers of the Commonwealth Bank Group have refused to issue statements on request to borrowers who are in default of their loan obligations.”

At the hearing the Bank advised the PJSC that it had already announced that it would provide the very small number of affected customers with details of their account indebtedness on request. The Bank also advised that it was now prepared to go further and to issue statements on those loan accounts in accordance with the borrower’s regular statement cycle until there is either a Court judgment or an agreement between the parties, normally signified by a release document. The statement would set out fully the account indebtedness of the borrower, including the principal outstanding, interest, fees and costs, together with any interest rate changes. The Bank would introduce this new arrangement on 1 January 2001, or sooner if possible. Until that date the Bank would honour its commitment to issue statements on request.

## **Evidence of the Australian Taxation Office and the Australian Competition and Consumer Commission**

1.25 The ATO provided the PJSC with a written submission and in addition gave both public and *in camera* evidence. The ATO advised that it was legally precluded from commenting on interaction with a specific taxpayer or from providing details about ATO practice in relation to bad debts. However, the ATO did confirm evidence received from the Commonwealth Bank about writing off amounts considered to be bad debts. The ATO advised that Tax Rulings TR 93/27, TR 92/18 and TR 94/32 covered the taxation of bad debts of banks. The established practice of the ATO for financial institutions is to examine whether the debt is bad, in whole or part. This requires more than a mere writing off in the accounts of a bank. The ATO must be satisfied that the amount is in fact bad; this is a commercial judgment looking at the circumstances of each case. For instance, if a debt was fully secured then the ATO would not accept a writing off as a bad debt.

1.26 The ATO advised that before a debt becomes bad, it may become doubtful or somehow impaired and that there is a banking practice of creating non-accrual line accounts, on which interest no longer accrues. The net effect in tax terms is that once the judgment is made and assuming that it was made on a reasonable basis, the accounting treatment for tax purposes changes from interest being included as assessable income as it accrues over the period of the loan to one where the interest is brought to account only when it is received. In other words it moves from an accrual basis of accounting to a cash basis of accounting. The reason for this is the judgment that there is something impairing the collection of the interest amount.

1.27 The ACCC made written submissions and gave evidence to the Committee, both in public and *in camera*. The ACCC told the PJSC that it was investigating complaints alleging possible contravention of the Trade Practices Act, but that this was still a work in progress. The ACCC stated that it was heartened by the great start of the Commonwealth Bank in that it would provide customer statements, but that the ACCC hoped that solutions would be industry-wide.

1.28 In answer to specific questions the ACCC representative advised that the problem was a consumer problem, which meant ways of trying to get a better outcome for consumers. The ACCC advised that it would not be shaming anyone, because the ACCC only did that if it concluded that there was a breach of the law or that something wrong had been done.

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## Supplementary submissions by the FSCPC and Mr Bruce Ford

1.29 Following the hearing the FSCPS made a supplementary submission to the Committee.

1.30 The FSCPC advised that when it conducted its initial survey it had received 20 responses, but after media attention following the announcement of the parliamentary inquiry, an additional 28 relevant matters had been raised with the group. Mr Chris Connolly stated, “in my opinion I believe that numerous farmers and small businesses have been affected by the withholding of statements, and that more than one hundred would bring their matters forward to an appropriate process established to resolve this issue.”

1.31 The FSCPC believed that the Commonwealth Bank had missed the point in its evidence to the PJSC, with the Bank claiming that the only allegations against it were that it had failed to inform customers about written off amounts and failed to issue statements to customers who were still servicing their debts. The FSCPC advised that in fact consumers suffered loss as a result of the policy not to issue statements when a shadow ledger was opened and of the generally unsympathetic attitude of the Bank.

1.32 The FSCPC raised concerns about whether or not the accounting treatment of some monies resulted in the correct amount of tax being paid to the ATO. Mr Connolly stated, “I am still not sure from CBA’s evidence before the inquiry what tax treatment Tratzee repayments received and how Tratzee should account for its repayments in its own accounting. I doubt very much whether the two returns would match up when the ATO receives tax returns from Tratzee and CBA.”

1.33 In addition to its eight recommendations contained in its previous submission to the Committee, the FSCPC made a further three recommendations:

- That the Committee not ignore the allegations of illegal activity raised in the inquiry.
- That the Committee call for an update on activities resulting from the inquiry.
- That the Committee acknowledge the efforts of bank customers who have been investigating and fighting this issue for many years.

1.34 Mr Bruce Ford also raised a number of issues in response to the bank’s submission to the inquiry. In particular he raised concern about whether the bank had declared \$134,000 in respect to his loans as interest income given the bank’s acknowledgement that applying interest only payments to portion A of the debt was an ‘oversight’. He also raised concern at what he believed to be the numerous contradictions in the bank’s own statements to the inquiry stating, “the bank’s inability to explain to the Committee their own process and provide clear answers as to how large sums of money simply disappear from peoples accounts without plausible justification is unacceptable banking practice.”

### **Additional submission by the Commonwealth Bank**

1.35 In response to the supplementary submission made by Chris Connolly the Commonwealth Bank made a further submission in which they advised the PJSC that due to the short time they had been given to respond, they addressed only the major issues that were relevant to the Committee's terms of reference.

1.36 In limiting its response in this way, the Bank advised the PJSC that it does not accept the wide ranging assertions and allegations made by Mr Connolly which:

- By his own admission, are based on a survey that is not representative nor of a size from which valid conclusions can be drawn. The 'survey' findings are based on responses by 20 borrowers.
- Fails to recognise the legitimate need for lenders to maintain a continuing record of a borrower's legal debt obligation.
- Ignores the regulatory and other safeguards such as the Farm Debt Mediation Act in NSW, the Banking Ombudsman and the Consumer Credit Code, which operates to protect borrowers.

1.37 With respect to the specific terms of reference, the Bank stated clearly in its evidence (CS 36) that "*the Commonwealth Bank Group has over 600,000 business customers and the number of customers at any one time where we may be looking at writing off all or part of their debt would today be of the order of 100*". Thus the CBA concludes Mr Connolly is wrong in his claim that the Bank admitted that perhaps 100 borrowers had been affected by the withholding of statements. The reference quoted relates to an estimate of the number of borrowers in default at any one time where a write off is under consideration – not where statements have been requested and withheld. To the best of the Bank's knowledge, only 3-4 customers have had requests for statements denied following a breach of their contractual agreement with the Bank.

1.38 The Bank also claims that Mr Connolly has failed to acknowledge that the customers to which he refers have had large sums of debt written off by the Bank, typically in situations where the Bank has made numerous attempts to assist the customers with their respective businesses. Thus Mr Connolly gives no acknowledgment to the instances where the Bank has assisted borrowers who are in default of their obligations, to return to financial viability.

1.39 The Commonwealth Bank Group also state that its books and records are maintained in accordance with accepted accounting standards and other regulatory requirements and have been subject to independent audit. The Bank therefore rejects any assertion that there has been any impropriety on the part of the Commonwealth Bank Group in any of the matters referred to.



## Summary

1.40 The Committee believes that as a principle, all bank customers must be able to accurately determine their financial position by receiving regular bank statements. The provision of bank statements is important, not just to customers who are meeting their loan obligations, but also to customers who are in default on their loan obligations.

## *Conclusions and Recommendations*

- 1.41 The PJSC does not find that with regard to the instances before it and with regard to the material provided to it, either through written submissions or oral evidence, that a wrongful use of shadow ledgers occurred or that the failure to provide bank statements could have constituted unlawful behaviour.
- 1.42 The Committee notes that the Australian Tax Office covers the accounting practice of operating shadow ledgers in its tax ruling TR 94/32. This tax ruling allows that when banks classify a loan as non accrual that any interest accruing thereafter will not be derived for income tax purposes until it is received. The Committee concludes that it is unlikely that a case could be made that the use of shadow ledgers by banks are not a proper accounting function.
- 1.43 The Committee notes the bank's advice that independent auditors Ernst & Young had specifically reviewed the shadow ledger accounts and confirmed that the activity on those accounts is in accordance with accounting requirements and taxation requirements.
- 1.44 While the Committee is satisfied by the findings of Ernst and Young, to ensure that any outstanding public concern is addressed about the administrative errors admitted by the bank in relation to Tratzea's accounts, the Committee asks the CBA to confirm the taxation treatment of monies in respect to Tratzea were correct.
- 1.45 The Committee concludes that the Commonwealth Bank by not automatically issuing account statements to some customers who were in default on their loan obligations exacerbated an already difficult situation for the customers, making it difficult for them to budget, re-finance loans and submit taxation returns.
- 1.46 The Committee believes that the Commonwealth Bank's explanation that they did not provide bank statements to customers because they did not wish to 'inflare a dispute' is poor banking practice. Evidence presented to the Committee also demonstrated that the confusion customers faced about the bank's practices in respect to 'shadow ledgers' was unreasonable.

- 1.47 The PJSC therefore concludes that the management practices of the Commonwealth Bank in relation to the non-provision of statements albeit to a small number of customers who had fallen behind with payments, were seriously flawed in terms of best practice customer relations.
- 1.48 The Committee acknowledges the efforts that witnesses to the inquiry such as Mr Bruce Ford have made in order to have their issues properly considered. The Committee notes that the need to hold an inquiry into 'shadow ledger accounts' represents a failure of the Commonwealth Bank to resolve some customer relation disputes internally.
- 1.49 The PJSC recognises that the commitment by the Commonwealth Bank to provide full statements to customers in default is a step forward. However, the Committee is disappointed that this commitment did not eventuate until this Parliamentary Inquiry was initiated.
- 1.50 While the Committee has investigated the practice of the Commonwealth Bank in respect to the treatment of bad debts and the creation of shadow ledger accounts it is evident that this practice is not limited to the Commonwealth Bank. Indeed in its evidence to the Committee the Commonwealth Bank stated that its practices are 'industry standards'. If this is indeed the case then it is appropriate that all banks commit to providing statements to customers who are in default on their loans when requested by the customer.
- 1.51 The PJSC believes that all financial institutions which do not already do so should adopt the announced intention of the Commonwealth Bank to provide full statements to all customers. Therefore the PJSC recommends that the automatic issuing of statements of account in all circumstances short of litigation, be considered for inclusion in the banking code of practice.
- 1.52 The PJSC believes that the statement should set out to the customer the total amount which the Bank believes that the customer owes in respect of the account in accordance with the terms and conditions on the account and should not reflect any write downs which the bank has made for internal accounting or taxation purposes. The Committee will refer the matter to the relevant parties undertaking the review of the banking code of practice.
- 1.53 The PJSC also notes that members of the Committee believe that on the evidence presented it is not possible to determine how many Commonwealth Bank customers have been affected by the bank's decision not to issue bank statements when loans are in default. The PJSC recommends that mediation services be offered by the CBA to affected customers where appropriate.

Labor and Democrat members believe that the Commonwealth Bank should appoint an independent mediator to resolve any outstanding disputes. Labor and Democrat members also believe that the appointment of the mediator should be advertised in the national press and the Commonwealth Bank asked to report back on progress in resolving disputes.

- 1.54 The PJSC recommends that all banks, if they do not do so already, clearly inform customers about the procedures and processes which result in the case of troubled loans.

Senator Grant Chapman  
**Chairman**

