NAB Commits To Being A Model Litigant

Summary:
All four major banks have now committed to becoming Model Litigants. NAB was the last to do so. Acting CEO Phil Chronican who will soon take over as Chairman of the bank's board was in the hot seat at the March 2019 House Economics Committee bank CEO grilling. He made it clear that the bank is committed to acting ethically, morally and fairly when dealing with clients where a dispute exists. This is a critical breakthrough in the quest for justice. Mr Chronican and other bankers have been given cases where the bank's lawyers most certainly did not act as Model Litigants.

Previous CEO Thorburn botched his chance to have the bank do the right thing. The new environment will see legacy cases properly settled and in the future bankers will be less likely to allow abuses to bring in profits.

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NAB's New Leadership Commits To NAB Acting As A Model Litigant

Here we present key extracts from NAB's appearance in front of the House Economics Committee Big Four Bank Review – 27.03.19

Mr Philip Chronican: (acting CEO NAB - opening statement excerpt) - Earlier this month, we said that we would extend the protections of the code of banking practice to small businesses with less than $5 million in total borrowings, up from less than $3 million. NAB has also formally adopted a model litigant policy based on the Commonwealth's model litigant policy. NAB recognises that there is sometimes an imbalance of resources between it and its customers. This policy commits us to act honestly, consistently and fairly and not take advantage of any imbalance.

CHAIR: One of the things that has specifically come out of these hearings is the proposal that banks should adhere to a model litigant standard that a government adopts by itself, against itself, around legal proceedings to make sure that they don't abuse their power, particularly against people who feel that they are unable to fight back. What do you think, materially, that will do in terms of the behaviour of NAB but also, more critically, in terms of those lawyers that they seek to engage from time to time—you obviously have internal lawyers — for external advice to make sure that they're not doing the wrong thing?

Mr Chronican: I announced in my opening statement that we were adopting the model litigant practice unreservedly. We're not carving out any particular sections of litigation for that. I'm advised—and I hope this is to be the case—that in light of our recent actions there shouldn't be a material change. I'm also conscious, from my earlier experience in banking, that there will be some practice involved in loans recovery that may have to change as a result of the adoption of model litigant practice. But I'm told that our actions over recent years should in most cases have conformed.

CHAIR: You say you're told they 'should have' conformed, so obviously there might be a few cases where that's not the case?

Mr Chronican: As you would appreciate, in any large organisation you cannot know every possible thing that's happened.

CHAIR: No. But I guess my question then is: does that mean that you've actually gone through and done an analysis, or is this anecdotal?

Mr Chronican: I think there's been an analysis done. Prior to adopting model litigant practice, we wanted to assess the impact of it. So we've had that work done, and that was the basis of the assurance I got.

CHAIR: Sure, but an analysis has been done which has led you to the conclusion—a judgement call—that about 90 per cent of cases would conform to this practice and 10 per cent maybe wouldn't. Would that be right?

Mr Chronican: I didn't make those numbers up. But the assessment was that if we adopted the model litigant model then it should not unduly impact us, because our practice would largely conform. It was therefore appropriate that we did so.

CHAIR: But I guess that's the question: you've done an analysis, which says 'largely', which obviously means there are some that don't. Based on your evidence so far, you've suggested you're not necessarily familiar with those examples. Would that be fair?

Mr Chronican: Correct.

CHAIR: But you would at least perhaps be familiar with some of the principles about why they didn't conform?

Mr Chronican: Only in that, by reading the model litigant standards, I can understand where they might not have conformed. But I don't have any evidence of cases presented to me.

CHAIR: I'm not talking about the specifics. The principle is where they don't conform, because the volume or weight of the resources available to the bank have been used to do something that's unfavourable to a customer who wants to take action against a bank. Would that be a fair summation?

Mr Chronican: Yes, that's correct. And that can be things like imposing cost orders or restricting access to documents.

Mr JOSH WILSON: I just want to come to the issue of being a model litigant, and you've said today that the bank has committed already to doing that. Would you support, down the track, the existing bank code taking some appropriate legislative form?

Mr Chronican: I think that was a royal commission recommendation and it's one of the ones we've supported, so I think that's okay.

Mr JOSH WILSON: And do you support stronger and clearer obligations in the code and/or explicitly through model litigant principles around the swift provision of key documents? I ask that because every time and in relation to every bank, all of us on this committee and, I think, other parliamentarians are constantly bombarded with instances where the first problem people have is that they can't get documents from banks.

Mr Chronican: Yes, I think that's part of our commitment.

Mr Gary Lennon: (NAB - Chief Financial Officer) That is definitely an intent.

CHAIR: The final line of questioning from me is this. As stated earlier, as a consequence of this process, we have now got banks signing up to a model litigant standard. That includes the National Australia Bank?

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Mr Chronican: Yes.

CHAIR: A lot of the people in the room and elsewhere are concerned about the inability to get access to certain documents from banks, obviously related to their cases, that they feel would provide clarity around their circumstances. It's a common theme that gets raised with me even by constituents. As a model litigant, what is the time frame that you have set and the disclosure regime you have set for the release of documents relevant to people's cases so that they feel they can take action or not?

Mr Chronican: I'm sorry. I understand it's timely, and you're asking me what 'timely' means, and I—

CHAIR: Well, how you interpret it.

Mr Chronican: It's not defined.

CHAIR: No, but how would you define it?

Mr Chronican: I think, depending on the document, it's whatever is a reasonable test, so if it's—

CHAIR: Are you saying a reasonable test is, 'We find it; we hand it over'?

Mr Chronican: We find it and we hand it over. If it's a relatively recent document that we should have at hand, you would expect to get it within a week. If it's a document that has been archived off in a storage centre then it may take two to three weeks to identify it, find the box, extract the document, verify it and send it.

CHAIR: But essentially, once requested and identified, the turnaround is as soon as it's practicably able to—

Mr Chronican: As soon as it's practically reasonable to do so.

CHAIR: So there's not going to be any prolonged—

Mr Chronican: There shouldn't be an artificial time delay in it, no.

CHAIR: That's a standard which I think we can, frankly, hold the NAB against into the future—

Mr Chronican: Correct.

CHAIR: which should, in many cases, remove the obligation to then try and push for access to documents through discovery processes, which are expensive. That would be fair?

Mr Chronican: I think that's fair.

CHAIR: That's fair. Okay.

BRN Comments

BRN and the bank warriors have been working steadily to guide all the banks to commit to becoming Model Litigants. This is how people power works. How wonderful to see the Economics Committee members coming on board to assist the process. The BRN model is below. The banks will need to come pretty close to this to have a meaningful approach. We are not interested in empty promises either. Some of the elements of model litigant requirements can be made to be enforceable with significant penalties for not complying.

Banks Must Become Genuine Model Litigants

How does it look in practice when banks deliberately choose to act ethically, morally and fairly regarding the legal process?

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The bank commits to -

a) Acting honestly, consistently, and fairly in the handling of claims and litigation;

b) dealing with claims promptly and not causing delay. This includes prompt provision of all required and requested documents;

c) making an early assessment of the prospects of a matter;

d) Paying legitimate claims without litigation;

e) keeping the costs of litigation to a minimum by:
(i) not requiring the other party to prove a matter the litigant knows to be true;
(ii) not contesting liability if the real dispute is about quantum;
(iii) using appropriate methods to resolve litigation including settlement offers or alternative dispute resolution; and
(iv) ensuring that a person participating in settlement negotiations can settle on behalf of the litigant.

f) Not taking advantage of a claimant who lacks resources;

g) Not relying on a merely technical defence against a claim;

h) endeavoring to avoid, prevent and limit the scope of litigation (including by participating in alternative dispute resolution where appropriate);

i) Equality of Arms - thereby agreeing to fund their client's legal expenses equal to their own expenditure; and

j) apologising where the litigant has acted wrongfully or improperly.

NAB LEGACY CASES - UPDATE

MP Josh Wilson managed to have NAB finally publicly confirm that the Thorburn/Kennett "experiment" had failed. 27 "Fairness Reviews" were offered and only three had offers made of which only one or two have been accepted. Out of the 24 that Jeff Kennett was working on - 21 pulled out before Kennett completed the task and made his determination. The vast bulk of clients had felt Kennett was out of his depth and harsh in his manner. Totally inappropriate when dealing with victims of serious bank misconduct. Previous CEO Mr Thorburn made an error when given evidence of serious misconduct after the October 2018 hearings. Had his attitude been different he may have had more success during the Banking Royal Commission. His manner and attitude led to his removal. Here is how Phil Chronican handled Josh Wilson's questioning on the day -

Mr JOSH WILSON: Is NAB taking the opportunity to reach back and look at a range of legacy cases—even some cases that might have been previously settled—and its conduct in reaching outcomes and to reconsider whether, on reflection, they were fair in all circumstances?

Mr Chronican: There is a process. What happened is that late last year a fairness review was commenced, and 27 longstanding cases or concerns were raised in that. I think 27 reviews were offered and 24 were accepted. Unfortunately, not as many were settled, as a result of that process, as I would have hoped. I think we ended up with—

Mr Lennon: Three—

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Mr Chronican: three of those being closed out.

Mr Lennon: are still pending.

Mr Chronican: So it certainly hasn't reached the conclusion that either we or the underlying customers would have hoped for, and that's very frustrating.

Mr JOSH WILSON: You're not ruling a line under those; you're saying that some of them are still being considered—they're still legacy cases?

Mr Chronican: They're still legacy cases. These are really difficult cases on two levels. One is that you cannot not be aware of the impact that the underlying issues have had on the customers. I met with a number of them yesterday, and I said hello to them on the way in today. I understand how painful this is. I also understand just how far away we are in terms of what a settlement would look like. But we have the head of our customer resolution group in dialogue with all of these customers, trying to find a way through to get some closure and settlement on it.

Some bankers still have difficulty with what a proper remediation looks like - see our link below. Proper compensation puts the victim into the position they would be enjoying if the misconduct had not occurred. The banks cannot pretend misconduct does not occur .... and once it is identified they should not try to limit their liability.

Also linked below - CBA Admits to poor litigation behaviour
- Thorburn's choice for remediation mediation dumped by bank's victims

Related Links: Banks Hide Genuine Remediation Formula
CBA Was Not A Fair Legal Player
Jeff Kennett Dumped By NAB Victims

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