

5 June 2001

Federal Court Declares National Australia Bank Acted Unconscionably

The Federal Court has today declared that the National Australia Bank acted unconscionably in its dealings with a Tasmanian woman, Mrs Kathryn Ashton.

The declaration follows proceedings taken by the Australian Competition and Consumer Commission. The proceedings were settled after mediation between the parties and today's declaration was made by consent.

"The ACCC alleged NAB sought and enforced a personal guarantee for \$200,000 to cover loans to Mrs Ashton's husband's business, using the couple's Mt Nelson, Hobart home as security, and then withheld \$7,760 over and above the home mortgage amount, realised after the home was sold", ACCC Chairman, Professor Allan Fels, said today.

The guarantee was obtained from Mrs Ashton in June 1998 as security for a business loan to a company of which Mr Mark Ashton was a director. The ACCC alleged that at the time Mr Ashton was seriously incapacitated. Mrs Ashton executed the guarantee in her own name and in her husband's name, exercising a power of attorney. She was not a director or shareholder of the company.

The ACCC alleged that when NAB sought Mrs Ashton's guarantee, it did not explain the nature or effect of the guarantee, or advise her that she should obtain independent legal advice. The ACCC also alleged that NAB knew the company was in serious financial difficulty but did not inform Mrs Ashton. A year later, NAB demanded payment of the company's debts to the bank secured by the guarantee. The ACCC alleged that enforcement of the guarantee resulted in the sale of the Ashton's family home and NAB required the entire sale proceeds to be paid to the bank.

After the ACCC instituted the proceedings NAB annulled the guarantee signed by Mrs Ashton and refunded to the couple with interest the excess money taken from the proceeds of the sale of the Ashton's family home under the guarantee which amounted to \$7,760. The ACCC and NAB engaged in mediation which resulted in agreement on orders to be sought from the Court. As part of the settlement NAB consented to pay \$28,500 to the Ashtons for damages, the claim for which included emotional stress, caused to them by NAB's conduct, and consented to pay the ACCC's taxed legal costs.

"The prohibitions on unconscionable conduct in the Trade Practices Act 1974 will continue to be an ACCC enforcement priority", Professor Fels said. "NAB and other financial institutions should not take unfair advantage of a person in a vulnerable situation by obtaining a guarantee without ensuring the person has full knowledge of its terms and effect.

"It is of particular concern that NAB has been found by the Courts on three previous occasions in 1988, 1998 and 1999 to have engaged in unconscionable conduct in relation to the obtaining and enforcing of personal guarantees, and has now again admitted to the Court to have engaged in such conduct.

"Banks and other financial institutions which obtain guarantees from individuals to meet the debts of others should ensure that the person giving the guarantee understands its terms and effects".

The Court today ordered, by consent, injunctions against NAB and one of its Hobart business banking managers, Mr Carlton Dixon, to restrain them from obtaining personal consumer or business guarantees in Tasmania without properly explaining the nature of the guarantee and the need to obtain independent legal advice before signing the guarantee.

The Court also ordered by consent that NAB include in its internal Lending Manual a statement requiring all the NAB's lending staff throughout Australia to strictly comply with these procedures when obtaining personal consumer or business guarantees. The Court also ordered by consent that NAB circulate to all its lending staff throughout Australia a bulletin to this effect.

The ACCC acknowledges that NAB has consented to orders being made by the Court thereby avoiding the need for a contested hearing.

Further information - Professor Allan Fels, Chairman, (03) 9290 1812 or pager (02) 6285 6170 Ms Lin Enright, Director, Public Relations, (02) 6243 1108 or (0414) 613 520

MR 128/01

5 June 2001 TEXT OF ORDERS MADE IN FEDERAL COURT, HOBART ON 5 JUNE 2001

**IN THE FEDERAL COURT OF AUSTRALIA TASMANIA DISTRICT REGISTRY GENERAL DIVISION
No. T 22 of 2000 BETWEEN:**

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION Applicant and NATIONAL AUSTRALIA
BANK LIMITED (ACN 004 044 937) First Respondent and CARLTON PATRICK DIXON Second Respondent**

MINUTE OF CONSENT ORDERS

1. It is declared that the first respondent, in procuring the signing of the guarantee and indemnity ('the guarantee and indemnity') in respect of Indoor Air Quality Victoria Pty Ltd by Kathryn Patrice Ashton on 17 June 1998 for herself and for Mark William Ashton as his attorney, in relying on, and making demands for the payment of monies pursuant to, the guarantee and indemnity and in retaining for the period from 30 March, 2000 to 30 May, 2000, the monies from the proceeds of the sale of the mortgaged property belonging to the said Kathryn Patrice Ashton and Mark William Ashton additional to the monies required to discharge the first respondent's FlexiPlus mortgage over the said property, engaged in unconscionable conduct contrary to s51AA of the Trade Practices Act 1974.

2. The first respondent, by itself, its servants or agents, or otherwise howsoever, is restrained for a period of two (2) years, commencing 21 days from the date of this order, from:- A obtaining within Tasmania from a natural person any guarantee in respect of lending to a customer or a proposed customer of the first respondent that is either wholly or predominantly for personal, domestic, household or personal investment purposes or wholly or predominantly for business purposes and which is a guarantee of the kind referred to respectively as a 'Consumer Guarantee' or a 'Guarantee and Indemnity' at pages LGU 199 and LGU 200 in the first respondent's Lending Manual as at the date of this order ("a guarantee"); or B enforcing or purporting to rely on within Tasmania a guarantee given by a natural person in the period commencing 21 days from the date of this order in respect of a customer of the first respondent (such natural person in A and B being referred to hereafter as 'the guarantor') without the first respondent having first: (a) obtained from the guarantor either:- (i) a certificate from the guarantor's solicitor stating that the solicitor gave independent legal advice to the guarantor in relation to the guarantee before the guarantor signed the guarantee; or (ii) written acknowledgement from the guarantor acknowledging that the guarantor did obtain independent legal advice in relation to the guarantee before signing the guarantee; or (b) (where paragraph (a) does not apply) (i) explained to the guarantor the nature of the document to be signed; (ii) advised the guarantor that he or she should obtain independent legal advice in relation to the guarantee before signing the guarantee; and (iii) obtained from the guarantor written acknowledgement that the first respondent had advised the guarantor that he or she should obtain independent legal advice prior to signing the guarantee but the guarantor declined or was not reasonably able to obtain such advice and, notwithstanding the absence of independent legal advice, wished to proceed with the giving of the guarantee.

3. The second respondent is restrained for a period of two (2) years, commencing 21 days from the date of this order, as the servant or agent of the first respondent, from being involved within Tasmania in the obtaining or enforcing of any guarantee from a natural person otherwise than in accordance with paragraph 2 of this order.

4. It is ordered that the first respondent shall within 28 days of this order cause to be included and retained for not less than two years in the 'Guarantees' section of its Lending Manual a statement substantially to the following effect - Lending staff must not - A obtain within Australia any "Consumer Guarantee" or "Guarantee and Indemnity" within the meaning of LGU 199 and LGU 200 ("a guarantee") from a natural person in respect of a customer or a proposed customer of the Bank; or B enforce or purport to rely on within Australia a guarantee given by a natural person since the date of this instruction in respect of a customer of the Bank, (such natural person in A and B being referred to hereafter as 'the guarantor') without the Bank having first: (a) obtained from the guarantor either (i) a certificate from the guarantor's solicitor stating that the solicitor gave independent legal advice to the guarantor in relation to the guarantee before the guarantor signed the guarantee; or (ii) written acknowledgement from the guarantor acknowledging that the guarantor did obtain independent legal advice in relation to the guarantee before signing the guarantee; or (b) (where paragraph (a) does not apply) (i) explained to the guarantor the nature of the document to be signed; (ii) advised the guarantor that he or she should obtain independent legal advice in relation to the guarantee before signing the guarantee; and (iii) obtained from the guarantor written acknowledgement that the Bank had advised the guarantor that he or she should obtain independent legal advice prior to signing the guarantee but the guarantor declined or was not reasonably able to obtain such advice and, notwithstanding the absence of independent legal advice, wished to proceed with the giving of the guarantee. Strict compliance with this instruction is required. Non compliance with this instruction may involve the Bank and the officer concerned in a contravention of the Trade Practices Act 1974.

5. It is ordered that the first respondent shall within 28 days of this order circulate to all its lending staff within Australia a bulletin to the effect of paragraph 4 of this order.

6. It is ordered that the first respondent shall within 14 days of this order pay to the applicant, for payment to Kathryn Patrice Ashton in respect of her loss and damage suffered by reason of the contraventions of the Act referred to above, the further sum of \$5,000.00.

7. It is ordered that the first respondent pay the applicant's taxed costs of the proceeding.

Dated: 5 June 2001