



Code Compliance Monitoring Committee

Submission to the review of the Code of Banking Practice

Overview

Background

The Code Compliance Monitoring Committee (the Committee) is the body set up under the authority of Clause 34 of the Code of Banking Practice 2004 (the Code) to:

- Monitor subscribing bank compliance under the Code.
- Investigate, and to make determinations on any allegation from any person that a subscribing bank has breached the Code (but the Committee will not resolve or make a determination on any other matter).
- Monitor any other aspects of the Code referred to it by the Australian Bankers Association (ABA).

The Committee fulfils its role by conducting themed inquiries into bank compliance and requiring banks to submit annual compliance statements, in addition to its investigation of complaints that the Code has been breached. The Committee has proceeded on the basis that the monitoring and investigation functions apply to all the provisions of the Code. With regard to the last function listed above, it is unclear what aspects of the Code are not embraced by the preceding functions. Its meaning has never been tested by any reference from the ABA. If the intention of this provision was to allow the extension of the Code by addition of new elements, the formulation would appear ineffective.

The previously existing Code (the 1993 Code) made no provision for the independent monitoring of compliance by subscribing banks. During that review there was strong support amongst all stakeholders for the creation of an independent body to oversee compliance with the proposed new Code. The result was the establishment of the Committee.

Whilst the composition, function and authority of the Committee are provided for in the Code, the Committee was established under the constitution of the Code Compliance Monitoring Committee Association

(CCMCA), which sets out powers and obligations for the Committee. On the face of it, that constitution imposes some qualification and restrictions on the actions of the Committee. In part, it does that by identifying the ways in which the Committee will carry out its role. These restrictions are explained further in Annexure B.

Governance

The Committee is aware that the review of the Code has been extended to encompass governance issues. The Committee believes such a review is long overdue. The current arrangements, whilst workable, are inadequate. Arguably the single most significant aspect of the new Code was the provision for the establishment of the Committee and hence its governance is directly relevant to the Code review.

Based on the Committee's experience it is essential that any review of the governance arrangements proceed from a clear appreciation of the Committee's role and specifically the difference between compliance monitoring and dispute resolution. It is clear that many stakeholders, including some banks, have difficulty in understanding the significance and consequences of the distinction between those roles. This may be compounded by the fact that Part E of the Code deals with both dispute resolution and code monitoring and sanctions, without distinguishing the roles. Annexure C is a discussion paper which looks at the distinctions and complementarity of the compliance monitoring and dispute resolution roles.

For the sake of clarity, the Committee does not support any merging of the roles of (or blurring of the distinction between) compliance monitoring and dispute resolution. The Committee's view is that it is performing its current functions efficiently and effectively however the body needs to be re-established to revalidate that it is able to perform its current functions as at present. The Committee considers the current sharing of administrative resources with the BFSO works well and should be maintained.

The Committee considers that the existing constitution should be revoked for two reasons. Firstly because the structure suggests that the Committee is less than independent of subscribing banks. Secondly some provisions of the constitution vest unnecessary power in the Chairmen of the Banking and Financial Services Ombudsman (BFSO) and the CCMCA. The appropriateness of the latter issue should particularly be reviewed because:

- These powers have not been used in the four years the Committee has been active;
- They do not reflect current practice, and
- As the BFSO will soon merge to become the Financial Ombudsman's Service (FOS), the position of Chairman of BFSO will no longer exist.

The Committee's view is that the constitution should be replaced with a charter from subscribing banks which inter alia:

- Confirms the importance and centrality of the Code;
- Leaves the Committee as an unincorporated entity, and
- Undertakes that subscribing banks will fund the activities of the Committee.

The Committee believes that this approach is preferable to the following alternatives:

- Establishing the Committee as a company limited by guarantee with subscribing banks as shareholders and the three members as directors;
- Establishing the board of the soon to be formed FOS as the Board of the Committee, and
- Establishing members of the FOS board as the board of the Committee.

If desired the reasons for not favouring these alternatives can be provided.

Code Awareness

Through its bulletins and meetings with stakeholders, the Committee has sought to raise awareness of the Code and of the issues resulting from the difference between external dispute resolution (the role of the BFSO) and compliance monitoring. Awareness of these differing roles is related to the whole issue of promotion of the Code more generally, which by virtue of Clause 8 of the Code is the responsibility of the ABA. It is notable that whilst 13 banks, including the five major retail banks, have subscribed to the Code there are a number of banks, albeit limited in market share, with retail customers in Australia which have not subscribed. The Committee experience would indicate that overall awareness of the Code remains low amongst bank customers.

The Committee notes that the Key Issues in the Terms of Reference for this review include: *"The need for a voluntary code of conduct to enjoy broad membership by industry participants"*. The Committee recommends that in considering the effectiveness of the Code, the review should examine the need to increase awareness of the Code. The mechanisms by which that might be done should also be considered, having regard amongst other things, to overseas experience.

Information sharing

Despite the differences between the compliance monitoring function and the dispute resolution function provided by the BFSO, both the Committee and BFSO play a role in improving standards of banking practice. As a much larger body with significantly higher case load, the BFSO has extensive information about a range of banking practice issues. The Committee has

discussed with the BFSO sharing information (relevant to the Code regarding banking practice) in order to assist and inform compliance monitoring.

As a result, the BFSO currently provide the Committee with six monthly statistics on Code issues as identified by BFSO Case Managers at the investigation stage (that is in 7% of all BFSO cases according to the BFSO's 2006/07 Annual Report). The statistics are accompanied by very brief (1-2 line) and anonymous summaries of the nature of the breach/no breach (copies of the last 2 years statistics are provided Annexure F with BFSO permission). Based on these statistics, 35% of the Code issues raised were classed as not determinative, that is that no decision was made as to whether the Code had been breached. The Committee does not receive a summary of these "not determinative" code issues. Whilst these statistics provide some background to code issues otherwise unseen by the Committee they remain, in the Committee's view, inadequate.

It is the Committee's view that the self regulatory scheme would be better served if the BFSO referred issues relating to the Code to the Committee for determination. If however it is considered necessary for the BFSO to make findings of breach in relation to the Code, the Code should enable the Committee to have access to BFSO findings on the Code including the name of the Bank, which was found to have breached the Code. The Committee would not necessarily need to know the identity of the Customer. Also once a determination had been made by the BFSO, the Code should refer the matter to the Committee to recommend remedial action and perform ongoing monitoring of the bank's compliance in that area. Code issues identified but not determined (the "not determinative issues") should be referred to the Committee for investigation.

Similarly it would be desirable if information obtained by the BFSO through its systemic issues function was able to be shared with the Committee for a more complete approach to compliance monitoring. Currently where the BFSO identifies a systemic issue relating to Clause 25.2 of the Code the BFSO suggests to some banks, that they submit their policies and procedures for review by the Committee. However the Committee is not advised of that recommendation and is dependant on the Bank to be made aware of the nature of the systemic issue and of any BFSO recommendations. The Committee notes that other than in relation to these systemic issue referrals, the Committee has only received one case in the past year which was identified as being referred from the BFSO.

The Committee has appreciated the BFSO's willingness to discuss these issues and accepts that the BFSO must adhere to its terms of reference and has privacy obligations to both its members and customers. The Committee considers that the Code should facilitate the sharing of information between

the Committee and the BFSO to assist both functions to be performed in a complementary manner.

Bank's obligations in the Code

Overall the Committee's view is that the Code has worked well in practice. Generally subscribing banks have demonstrated a genuine commitment to meeting their obligations under the Code and have responded positively where monitoring activities or investigations have suggested the need for change. Thus far, the Committee has not had need to use its ultimate sanction of naming a bank.

Issues relating to the general application of the Code which the Committee considers could be usefully reviewed are:

- The weight to be given to the general commitment, to continuously work toward improving the standards of practice and service in the banking industry (Clause 2.1) in interpreting the Code.

The Committee accepts that its role is to measure compliance against the specific requirements of the Code. It has taken the view that consistent with the provisions of Clause 2.1, the Committee's remit includes for it to identify what it sees as best practice in giving effect to the provisions of the Code. That view is not consistently shared within the sector.

- The effect of the substance of Clause 2.2.

The Committee has had cases where it has been satisfied that a bank has not acted fairly and reasonably having regard to the conduct of both parties and the contract. In some of these cases the Committee has found a breach of Clause 2.2 even though there may not have been a breach of any other clause of the Code. The availability of the clause to found a breach has been questioned. The Committee believes this issue needs to be resolved.

- The absence of any requirement in the Code that banks should observe the terms and conditions of their contract with their customers.

The Committee acknowledges that this matter relates to the legal rights of the parties under contract law. However at least in so far as it raises systemic issues, it would seem to be a matter that should be covered by the Code.

- The suggestion by some banks that they have an option to choose which provisions of the Code they will observe whilst maintaining a position that they will subscribe the Code.

The Committee has taken the view that that is not an option. Banks must either accept the obligations of the Code as a whole or they

cannot be regarded, or hold themselves out, as subscribing banks. The view of the Committee is that this position should be formally adopted in the Code and that to do otherwise would be contrary to the clear intent of the Code and administratively unworkable.

Conclusion

The Committee considers that whilst the Code is working well and existing governance and organisation structures are workable, there is room for improvement. The Committee looks forward to discussions about how the Code can be improved, both in relation to bank's obligations to its customers and greater issues affecting the self regulatory scheme, such as the Committee's governance and the distinctions and complementarities between its role and that of the BFSO.