



Code Compliance Monitoring Committee

Supplementary submission to the review of the Code of Banking Practice

Non compliant banks - Limits and Powers of the Code Compliance Monitoring Committee

The Overview and Annexure B of the Code Compliance Monitoring Committee's submission to the Code review outlined some difficulties presented by the Code Compliance Monitoring Committee Association's constitution. Particularly, these documents highlighted:

- Whilst the composition, function and authority of the Committee are provided for in the Code, the Committee is established under the constitution of the Code Compliance Monitoring Committee Association ("CCMCA").
- The constitution sets out powers and obligations for the Committee;
- The constitution imposes some qualifications and restrictions on the actions of the Committee;
- The constitution provides the BFSO Chair and the CCMCA Chair with oversight powers which the Committee views as inappropriate and inconsistent with the Committee's independent role, and
- Clause 11 of the constitution purports to limit the manner in which the Committee can use its power to name a bank following a finding of serious or systemic non compliance with the Code.

Committee powers and obligations

The Committee has obtained advice which confirms that although the Code constitutes a commitment by banks to establish the Committee, it is the constitution that governs the Committee's functions. The Committee accepts that position. However it has serious concerns that the constitution, which affects Code interpretation and administration, is not a public document and has not been made available to community and customer advocacy groups. The Committee considers this inconsistent with the spirit of the Code's promise to provide for meaningful monitoring of bank compliance.

Restraints on the Committee's power to name a bank

In addition to the restraints on the Committee's ability to make public statements (as outlined in Annexure B of the Committee's submission to the Code review), the constitution also limits the Committee's power to name publicly a non compliant bank. The Committee understands that it is bound by section 11 of the constitution,

dealing with naming, despite that provision being more limited than the relevant provisions of the Code itself.

Clause 11 of the CCMCA's constitution states:

11.2 Manner of naming Association Member

Subject to this Constitution, the CCMC may name an Association Member by:

- (a) notifying ASIC that it intends to name the Association Member and the reasons for naming that Association Member; and*
- (b) naming the Association Member, and specifying the reasons for which it is naming the Association Member, in its Annual Report.*

The relevant section of Clause 34 of the Code (Clause 34(i)) states that the subscribing banks agree:

To empower the CCMC to name us [the banks] in connection with a breach of this Code or [emphasis added] in the CCMC's report, where it can be shown that we have::

- I. Been guilty of serious or systemic non compliance;*
- II. Ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time;*
- III. breached an undertaking given to the CCMC; or*
- IV. Not taken steps to prevent a breach reoccurring after having been warned that we might be named.*

Whereas the Code proposes that the Committee could name a bank in its annual report, the use of the word "or" in Clause 34(i) envisages the Committee being able to name a bank through other means. The Constitution, as the Committee has been advised, is however clear that where the Committee uses its discretion to name a bank, it must do so only in the manner prescribed in the constitution; through the Committee's annual report. As the Committee's annual report is published only once a year (within 6 months of 31 March), in some instances serious Code breaches would not be reported until considerable time after the breach occurred. If the naming power might in part serve to warn customers of a bank's non-compliance, limiting the Committee to naming a bank in its annual report could significantly diminish the value of such a warning if it comes almost 12 months after the conduct has taken place. In the Committee's view, this unnecessary fetter on its single significant sanction is contrary to the intention of the Code and the expectations of those involved in the consultation of the Code. It has the potential to undermine the value and credibility of the voluntary self regulatory scheme.

On going refusal to mediate the breach

Neither the constitution nor the Code consider what action the Committee may take if a Bank, having been named, refuses to remediate the breach and continues to conduct its business in serious non compliance with the Code. The Committee has accepted that the extent of its power in those circumstances is to continue to name that bank. However it is the Committee's view that this would fundamentally alter the nature of the Code, as banks could in effect pick and choose the parts of the Code to which they wish to subscribe and comply provided they accepted that they would

be named in respect of specific provisions where they remained non-compliant. Such a development would make the Code effectively untenable.

The Committee strongly suggests the Code reviewer consider the need to clarify what action can be taken in the event of serial and serious non compliance post naming. In this context, the Committee notes by way of example that the UK's Banking Code Standards Board is empowered to unsubscribe a subscribing bank and make any such action public.

Conclusion

As was proposed in the Committee's earlier submission to Code review, it is the Committee's view that the constitution should be replaced with a document, such as a charter, which provides an appropriate governance structure for the Committee. Such a document should be the subject of public consultation. The charter could elaborate the Committee's power to name banks for serious non compliance with the Code. Any consideration should include the manner in which the Committee may name a bank (which should not be limited to its annual report) and provide adequate power to deal with serial serious non compliance post naming, so that the Code remains an effective alternative to more prescriptive forms of regulation.