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A message from the CEO:

Welcome to this new look edition of the Code Compliance Monitoring Committee (CCMC) Bulletin.

Well, “we do live in interesting times” and I would like to share some thoughts and observations after my first few months with the CCMC.

As many will know, the CCMC is responsible for monitoring compliance with the Code of Banking Practice.

The purpose of the CCMC is to provide independent monitoring, investigation and revision of:

- a. Compliance with the Code of Banking Practice
- b. Complaints relating to breaches of the Code and
- c. Any other aspects of the Code that are referred to the CCMC by the ABA.

The CCMC monitors compliance with the code through the completion of an annual self assessment which is currently under way. This program, together with an onsite review program, has for the first time provided reliable performance data derived from banks’ internal compliance oversight and breach identification processes.

The CCMC also investigates allegations of non-compliance with the Code and can receive complaints from any person in relation to conduct they feel has resulted in a breach of the Code.

The outcome of this type of investigation is the identification and determination of the code subscriber’s performance in relation to the Code’s requirements rather than the resolution of an individual complaint.

The CCMC reviews Code compliance across the Industry, by conducting themed campaigns designed to test compliance with specific requirements of the Code.

These themed reviews provide an opportunity to get a real sense of what consumers are experiencing as we often use mystery or shadow shopping techniques to base our reviews on real concerns and issues.

Collectively these activities are now starting to provide us with a larger set of compliance performance data which will enable us to analyse and actively assess compliance related issues.

It is my hope that over the next twelve months our approach will be more risk- based, underpinned by good data analytics and active monitoring of key compliance indicators.

New Chair:

The ABA is currently looking for a suitable candidate to Chair the CCMC.

We would like to take this opportunity to publically thank Anthony S Blunn AO (aka Tony) the CCMC inaugural Chair for all his hard work, dedication and support for the CCMC, fellow Committee members, and the staff.

So what of the future:

I have a hypothesis for you to consider in relation to self regulation:

“Self-regulation may fail if it does not meet the current challenges in a proactive and innovative way.”

The debate in the US regarding the re-regulation of the financial industry reveals the failings of both self regulation and regulation. However in Australia the opportunity exists for industry to lead in the formulation of a self-regulatory framework.

The questions on my mind are:

“Can industry take the lead with the opportunity that presents itself with respect to the Code of Banking Practice?”

“Can the Code evolve at this point in time, in the face of these circumstances, when consumers and industry alike require solutions based on good practice?”

Take the new credit reforms for example. The timing of the Code Review and credit reforms provides an opportunity for Industry to demonstrate how self regulation can take the initiative.

The consequences of not doing so may make self-regulation irrelevant in the wake of potentially more prescriptive legislation.

The UK Banking Code Standards Board (“BCSB”) is currently experiencing similar pressures and there are some interesting insights with the FSA assuming responsibility for deposit taking activities and payment services, previously part of the self-regulatory framework as part of the UK Banking Code.

It is our understanding that the catalyst for this move was the lack of industry commitment to strengthen the definition and application of “fairness” in the general provisions of the Code to the satisfaction of consumers and the regulator. The fairness provision is outlined in the UK Banks “Fairness Commitment” (section 2 of the UK Banking Code) and in many ways reflects Section 2 of the Code of Banking Practice in Australia.

My personal view on self-regulation is well reflected in the quote from the Self Regulation Task Force in 2000.

“Self-regulatory schemes tend to promote good practice and target specific problems within industries; impose lower compliance costs on business....”

Effective self-regulation can also avoid the often overly prescriptive nature of regulation and allow industry the flexibility to provide greater choice for consumers and to be more responsive to changing consumer expectations.”¹

Ultimately it will be up to industry to determine whether it waits for regulatory change or leads change proactively through evolution of the Code.

Regards

Damian Paull

**New Committee Member:
Nicola Howell.**

Nicola is an Associate Lecturer in the School of Law, Queensland University of Technology, where she currently teaches contract law and insolvency law, and researches consumer law and consumer credit law.

Nicola is well versed in the Code of Banking Practice, having prepared the joint consumer submission to the review of the Code of Banking Practice in 2008. Nicola is also Deputy Chair of the Consumers Federation of Australia.

Prior to her appointment at QUT, Nicola was the Director of the Centre for Credit and Consumer Law at Griffith University. She has also previously worked in consumer law and policy in the community, government, and private sectors.

An update from the Committee

Update from the Code Compliance Monitoring Committee, March 2009

The Code Compliance Monitoring Committee ('CCMC') was established to monitor compliance with the Code of Banking Practice, and is made up of an independent chair (currently vacant), a person with relevant experience at a senior level in retail banking – Julie Abramson and a person with relevant experience and knowledge with respect to consumers and small businesses – Nicola Howell.

Damian Paull commenced as the CCMC's new CEO earlier this year, while Michael Kane, Tara McInnes and Rebecca Baohm continue as the CCMC's Case Manager and Case Officers respectively.

Firstly amidst all the changes, the Committee would like to record its thanks to both Mr Anthony Blunn (AO), Mr David Tennant and Ms Kirsten Trott. Tony has been the inaugural Chair for the past five years and has devoted a lot of personal energy and passion into making the CCMC an effective code monitoring function. David has done a sterling effort as the inaugural consumer and small business representative on the CCMC.

We would also like to thank our former CEO Kirsten Trott who had the challenging task of being our first CEO. Kirsten's drive, enthusiasm and commitment has been fundamental in giving us a really solid organisation to build on as we go forward.

We wish all of them the best for the future.

This year will be an exciting and challenging one for the CCMC, with changes in personnel and changes in structure and operations likely if the recommendations of the Code of Banking Practice Review are implemented.

As readers may be aware, the Code of Banking Practice review has recommended that the CCMC:

"be established as a separate independent unit within the FOS reporting directly to and accountable to the FOS Board for the performance of its prescribed functions under the Code" (recommendation 9).

Subsequent recommendations deal with issues such as separate terms of reference for the CCMC, mechanisms for referral of Code issues to the CCMC by FOS, and clarification that individuals and advocates would retain the right to bring a Code issue direct to the CCMC.

From the consultations that Nicola conducted whilst preparing the joint consumer submission to the Code review, it was clear that consumer advocates were very concerned to see CCMC maintain its independent operation, and also that there be appropriate sharing of information between CCMC and FOS so that each organisation can fulfill its mandate.

While the Code reviewer acknowledged the concerns, and the distinction between dispute resolution and code compliance, she did not recommend complete independence of CCMC. However, her recommendations were directed to ensuring that the CCMC was able to operate, as a practical matter, independent of the dispute resolution functions of FOS.

The CCMC itself is also very conscious of the distinction between code compliance and dispute resolution functions, and will be ensuring that this distinction is maintained as we move into the new environment.

**Committee
Guidance:**

The Committee has reviewed the ABA Branch Closure Protocols and has provided some guidance as to how it will interpret the definitions of “rural and/or or remote”

For further information please refer to the article in this edition of Accomplish.

Although the Australian Bankers Association has not yet formally responded to the Code review report, the CCMC staff and committee, together with FOS have begun scoping the issues that will need to be addressed in order to implement the review recommendations.

Whatever changes are made to the Code and or the CCMC, are of course a matter for the code subscribing Banks.

The CCMC has also commenced an 'own initiative' review of subscribing bank compliance with clause 19 of the Code (direct debits). This involves a shadow shopping exercise, with both telephone calls and branch visits.

The results of the review should be known next month.

Also relevant is the review of the CCMC itself, conducted by Mr Richard Viney in 2008 and 2009.

Overall, the review concluded that the CCMC has been working well, and that the CCMC's compliance monitoring and techniques are effective and are being performed diligently and efficiently.

The report of the review is now available on the CCMC's website
<http://www.bankcodecompliance.org/documents/CCMCReviewReport02122008.pdf>

With so much happening, a number of Banks and Consumer groups have requested that we create an opportunity to bring industry and consumer representatives together to discuss Code matters. We will be working on a number of ideas over the next couple of months and we look forward to talking to Industry and Consumer representatives in relation to the Code and the operations of the CCMC.

If you have any queries in relation to the work of the CCMC, or the proposed changes under the recommendations of the Code review, please don't hesitate to contact the Committee members or our CEO Damian Paull at: dpaul@bankcodecompliance.org

Regards

Julie and Nicola.

Looking in the rear-view mirror –2008/2009

The activities of the CCMC over the past twelve months has been characterised by “change”.

The initial focus of the CCMC has been the completion of the annual compliance statements. This program resulted in on site reviews with each Code Subscriber and individual reports in relation to the CCMC analysis.

In relation to complaints, The Committee has noted the themes arising from the complaints received. These have related to issues such as hardship, maladministration of credit, debit collection activities and guarantors. There is a growing concern over break fees and we note that FOS has recently released their thoughts on break fee calculation. (Bulletin 60).

The CCMC has conducted one themed review in relation to Direct Debits following a number of concerns raised by financial counsellors.

The review included a desk top review of policy and procedures and a comprehensive shadow shopping exercise across call centres and branches.

This issue continues to be a source of concern for financial counsellors and has implications for customer hardship when transaction accounts have low or nil balances.

In some instances, a failure to act as instructed and cancel a direct debit has resulted in dishonour fees, compounding customer concerns and frustrations.

The results of this exercise will be finalised in the next month or so. Upon completion, we will discuss the findings with the relevant Banks and publish our report via our website.

The CCMC had also planned a review in relation to Internal Dispute Resolution. It is likely that this review will be conducted later in 2009.

Clause 34 – Independent Review of the CCMC.

In addition to the Code Review, The CCMC operations were independently reviewed by Mr Richard Viney in accordance with the requirements of clause 34 of the Code.

While the report identified that the CCMC had been operating effectively in discharging its obligations under the Code, it was disappointing to see the lack of submissions to the published terms of reference.

The operation of clause 34 of the Code and the review of the CCMC is designed to be contemporaneous with the Code Review. This ensures that any operational aspects of the CCMC can be addressed during any Code redrafting.

It is also disappointing from a CCMC perspective that the two reviews do not appear to have been considered holistically with respect to the effectiveness of the Code.

Update: The Code Report (Dec 200*)

The Code Report (Dec 2008) was released. This report has a number of recommendations in relation to the way that the CCMC is structured.

The CCMC and FOS have had discussions regarding CCMC governance and integration.

A proposal from The Navigator Company to manage the consultation process has been settled by the CCMC and forwarded to the ABA for consideration.

The Committee now waits the ABA response from the Code Subscribers and in the meantime continues to work with the ABA and FOS to understand the impacts and opportunities that the recommendations provide.

During 2008 the Committee has gone through a number of changes.

- Sep 08** Kirsten Trott (CEO) resigned and departed.
- Nov 08** David Tennant (Consumer and Small Business representative) resigned from the Committee to take up a secondment with ASIC.
- Jan 09** Damian Paull (incoming CEO) joined the CCMC.
- Jan 09** Nicola Howell (incoming Consumer and Small Business representative) joined the Committee
- Jan 09** Tony Blunn AO resigned as Chair of the Committee.

FOS - Banking and Finance Division Bulletins

We urge all subscribers to carefully review and take account of the guidance contained in Bulletins issued by the Banking and Finance Division of FOS.

“The Banking and Finance Division of FOS provide good guidance to Industry through the publication of their bulletins.”

The Bulletins include guidance on expected standards of banking practice pertinent to the conduct of FOS investigations and decisions. We expect that the Committee would take this guidance into account when considering matters of compliance with the Code.

Discounts and Rebates

Bulletin 57 (June 2008) includes reference to the decision in the Victorian Supreme Court (St George Bank Limited v Bowman Irani Pty Ltd.) It notes that a financial services provider is only entitled to seek recovery of the costs it incurred. If a financial services provider receives a discount or rebate for the costs of services rendered, when seeking reimbursement from its customers it must account for such discounts or rebates.

Justice Hargrave found:

“The conduct of the bank in seeking to retain the volume rebates for itself was wrongful and unjust. If the guarantors had paid all of the legal costs demanded of them, I can see no good reason why they could not have recovered the excessive costs from the bank as monies paid by mistake on principles of unjust enrichment [para 56]....

It is incumbent upon the bank, and other banks and financiers which have similar arrangements in place...to ensure that they establish a system which ensures that customers, their guarantors and other third parties who are liable to indemnify them for their legal costs are given the appropriate credits forthwith upon the receipt of any volume rebate or like discount [para 59]”.

Boman Irani Pty Ltd & Ors v St George Bank Limited [2008] VSCA 246

The Committee notes that subsequent to the December decision in the Victorian Supreme Court of Appeal, the treatment of rebates and concerns relating to industry practices had been referred to ASIC.

Direct Debits Inquiry - Clause 19

During 2008, we commenced an inquiry into clause 19 of the Code of Banking Practice (Code).

Clause 19 of the Code of Banking Practice requires banks to take and promptly process:

- a) An instruction to cancel a direct debit request; and
- b) A complaint that a direct debit was unauthorised/irregular,

And the bank will not suggest that the customer should first contact the debit user, but may suggest that they also contact the debit user.

Clause 19 does not apply to credit cards.

Background to the Inquiry

We have received information from consumers and financial counsellors regarding customer's experiences when:

- endeavouring to cancel a direct debit and
- being referred to the debit user or service provider in order to cancel the direct debit request.

The initial inquiry into Clause 19 established whether subscribing banks have the necessary frameworks, policies, procedures training – to ensure compliance with Clause 19.

A second phase to the review was introduced when we noted continued concerns regarding direct debits.

We have focused on the “voice of the customer” concerning the banks obligation to promptly process a customer instruction to cancel a direct debit request without the need to first raise the request with the service provider.

In addition to this being a customer service issue for the Banks, it is now compounded by increasing hardship. We are now starting to see instances where transaction accounts with nil or negative balances are being charged a dishonour fee, for direct debits that the Bank has failed to cancel as instructed.

In order to test compliance with the provisions of the Code and assesses that banks have adequate policy, procedures and training in place to deal with direct debits, we have engaged the services of a market and social research firm to conduct a mystery shopping exercise across all banks' call centres and a selection of branches.

We will be raising the findings of our review with Code Subscribers over the next few weeks and then a summary of our findings and conclusions will available on our website.

Further Information
on Direct Debits
can be found at:

[ASIC - Direct
Debits: How to
make them work for
you.](#)

[FOS - Banking and
Finance: Cancelling
Direct Debit
Authorities](#)

[The Code of
Banking Practice](#)

ABA Transaction Services and Branch Closure Protocols:

Over the past two years the major banks have focused on expanding branch networks with an increase of 304 new branches (source APRA).

However, it has not always been the case and the issue of branch closures has always been a sensitive one for both communities and the banking sector.

In order to guide and assist banks and communities, the Australian Bankers Association ('the ABA') published and maintains a Branch Closure Protocol.

The Code of Banking Practice (clause 32) obliges subscribing Banks to comply with the ABA protocols on branch closures.

Background

Given the current economic circumstances, comparisons could be drawn between now and the 1990's recession, following which there was an increase in rural branch closures by the banks.

In the late 1990's, a number of economic and technological developments resulted in a trend of branch closures and the exploration of alternative means of meeting customer service requirements. The impact of branch closures became a community concern resulting in a number of banks providing positive assurances that they would maintain their local branches. The impact of the closures was more significant in regional, rural and remote areas and the concerns regarding branch closures remained. (Money Matters in the Bush – January 2004).

In 1999, the continuing concerns resulted in a recommendation from the House of Representatives Standing Committee on Economics, Finance and Public Administration, that the banks establish a branch closure protocol. (This was called "*Regional Banking Services: Money too far away* (the "*Hawker Report*")").

In 2000 the ABA undertook to revise the Code of Banking Practice ('the Code') with a view to (among other things) incorporating procedures to be followed when considering branch closures. The protocol was subsequently developed and referenced in the new Code.

Clause 32 Branch Closure Protocol

The Code's current provisions regarding branch closure protocol are contained in clause 32 of the Code, which specifies that subscribing banks will "comply with the Protocol.

Recently the Committee has considered the suitability of Section 32 of the Code and the ABA's Branch Closure Protocol particularly with respect to the interpretation of the Protocol.

The issue under consideration relates to section 3 of the Protocol, which deals with notification periods when closing a branch and the requirement that a bank consult with the local community.

The Protocol provides that where a bank intends to close a rural 'and' remote branch, it will give a minimum of 24 weeks written notice to customers and relevant community organisations.

It has been brought to the Committee's attention that there may be some potential ambiguity with how the Protocol can be interpreted. If strictly read, it is open to interpretation that section 3 of the Protocol, requiring the branch closure notification period of 24 weeks only applied when the branch in question was both rural 'and' remote. The ambiguity arises as the remainder of the Protocol deals with banks which are either rural 'or' remote.

In determining whether a bank has in fact breached the Code, in failing to provide the requisite notice period, the Committee has considered a different approach, after reviewing the background behind the implementation of the Protocol and the circumstances at the time of the inquiries.

The Committee concluded that the Protocol was established following the "Hawker Report" and mainly as a response to the changing circumstances at the time.

Following its research, the Committee concluded that its interpretation of section 3 of the Protocol is that it applies when banks are closing branches whether they are rural 'or' remote as opposed to the more literal interpretation of being both rural 'and' remote. This is contrary to the wording used in the Protocol itself but in keeping with the ambit of the Hawker Report and subsequent "Money Matters in the Bush" report published in 2004.

The Committee therefore considers that this interpretation will be the approach that the Committee adopts when considering any future allegations of breaches in relation to Clause 32.

Following the Committee's consideration of these issues, the CCMC has contacted the ABA to request that it amend the wording of the protocol to avoid any confusion. In the meantime banks should ensure that a 'commonsense approach' is taken when considering the closure of rural or remote branches to ensure that suitable notice and assistance is provided to the affected communities.

Financial Hardship

As the global financial crisis intensifies, the number of people being impacted increases – with growing unemployment and the downturn in the housing market causing concern for most. The spectre of “financial hardship” now looms large for a much wider cross section of the population and FOS and the CCMC are expecting an increased number of complaints from bank customers in financial hardship. To add to the difficulties of the general economic climate, Australia is also coping with the financial fallout from a series of natural disasters – the Queensland floods and Victorian bushfires.

Progress so far

It is pleasing to see that the banks’ commitment to help customers in financial hardship has improved dramatically in the last few years. Prior to the inception of the new Code of Banking Practice in 2003/2004, hardship policy was regulated by the Uniform Consumer Credit Code. The banks’ decisions were not reviewable by the FOS or the CCMC, and customers had recourse only where they had a claim in law, which had to be taken to court. The introduction of the Code expanded upon the obligations under the UCCC, and gave FOS and the CCMC jurisdiction to deal with complaints about the banks’ handling of hardship cases. Clause 25.2 of the Code provides:

With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan. If, at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them.

The December 2008 Report on the Review of the Code of Banking Practice recommended that a freestanding and much more comprehensive Clause on financial hardship be included in the Code, to build on the progress that has already been made over the last few years. The proposed Clause inserts a number of detailed provisions in addition to the subscribers’ current obligations. These duties relate to:

- **Communications with the customer.** Including commitments to: deal with financial counselors or other representatives; contact the customer if the bank discovers signs of potential financial difficulty; provide a prompt and courteous response to applications for assistance. The customer would also be obliged to contact the bank as soon as possible if experiencing financial difficulty.
- **Provision of information.** This would obligate banks to provide information on their financial difficulty processes and relevant contacts, on request from the customer and whenever a default notice is sent. Information on processes would also have to be made available on the banks’ websites.
- **Procedural commitments.** To take into account the information available and determine the nature and extent of assistance to be provided (if any); To give written notice of decisions and reasons, and if applicable, the arrangements agreed between the bank and the customer; Not to commence or proceed to judgment on enforcement action, or to assign the debt whilst a hardship application is under consideration.
- **Superannuation.** The banks would agree not to require customers to access superannuation funds in order to pay off their debt.
- **Staff training.** Relevant staff would have to be trained in the Code and relevant consumer credit legislation.

The additional burden of natural disaster

Against the background of the global financial crisis, the fallout from the recent Queensland floods and Victorian bushfires had the effect of crystallizing the concept of financial hardship.

As is often the case in these times of crises, the response of all subscribing banks to these tragedies has been encouraging, and hardship policies generally have come under the spotlight.

A range of measures were implemented by some banks, specific to the bushfires, including:

- Cash grants for damaged and destroyed properties;
- Waivers of interest, fees for withdrawal of term deposits and early mortgage redemption;
- Repayment holidays;
- Fast-tracking of insurance claims and waiver of excess; and
- Extended credit limits.

Other banks reiterated their commitment to assist affected customers via their existing Code obligations and hardship policies.

Responses to hardship – at home and abroad

On 5 April 2009 the Australian Bankers' Association announced that the four major banks had, after consultation with the Federal government and the ABA, adopted a set of common principles designed to help borrowers who face financial hardship, particularly as a consequence of unemployment. The measures that will be available to customers include repayment holidays of up to 12 months on mortgages, interest-only repayments, interest rate reductions, extension of loan periods to reduce each repayment, fee waivers and temporary overdraft facilities. The principles also set out a number of commitments in relation to staff training, providing dedicated hardship teams and free hotlines, availability of information and access to external financial counseling services.

Hardship – going forward

In many ways the ABA common principles and Code Review Recommendations are similar, particularly on the issues of communicating with customers, staff training and provision of information. In some respects the principles (which have already been adopted by the major banks, as we noted above) go further than the Code recommendations and provide more in the way of specific commitments to customers by the banks.

In addition, from 1 July this year, credit co-operatives and building societies will adopt a new Mutual Banking Code of Practice. This Code contains similar provisions in respect of hardship to the Banking Code of Practice Recommendations and the recently announced "principles". In the long term any move to a consistent approach in relation to dealing with hardship is a positive outcome.

It is obvious that under current economic conditions, the issue of financial hardship is of increasing relevance, and the CCMC is committed to working with subscribing banks to ensure that improvements in both policy and practice are maintained and developed.

Accomplish

Contacting the CCMC:

If I have a complaint?

If you believe that a Bank has breached the Code of Banking Practice and they have subscribed to the Code, then you can:

1. Telephone the FOS General Enquiries on 1300 780 808
2. Write to the CCMC care of:
CEO
CCMC
P.O. Box 14240
Melbourne City Mail Centre
Melbourne VIC 8001
3. Lodge a complaint via our online complaint form at www.codecompliance.org

If I have a general enquiry?

You can contact us in writing or directly, using the address and telephone details outlined above.

You can also email your inquiry to us at info@codecompliance.org

If I want to pass on some feedback?

Please give us your feedback. You can call us on 1300 780 808 between 9am and 5pm (Melbourne time) or use our email address info@codecompliance.org.

If I want to know more about the Code of Banking Practice?

If you want to know more about the Code you can have a look on our website or alternatively have a look at the Australian Bankers Association website at www.bankers.asn.au.

If I have a media enquiry?

Any media inquiries regarding the Committee's work should be addressed to the Chief Executive Officer, dpaul@bankcodecompliance.org or by telephone 1300 780 808.

General information about our work is contained on our website and in our Annual Report.