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15 July 2016

Mr Phil Khoury
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By email to: phil@cameronralph.com.au

Dear Mr Khoury,

Review of the Code of Banking Practice and the Code Compliance Monitoring Committee Mandate

The Code Compliance Monitoring Committee (CCMC) welcomes the opportunity to make a submission to this review.

The CCMC is the independent compliance monitoring body established under clause 36 of the 2013 version of the Code of Banking Practice (the Code). It is comprised of an independent chair, a person representing the interests of the banking industry and a person representing the interests of individual and small business customers. This is consistent with the model for self-regulatory governance under ASIC's [Regulatory Guide 183](#) 'Approval of financial services sector codes of conduct'.

The CCMC's Mandate (which is an attachment to the Code) sets out its powers and functions, which include:

- monitoring banks' compliance with the Code's obligations
- investigating an allegation from any person that a bank has breached the Code, and
- monitoring any aspects of the Code that are referred to the CCMC by the Australian Bankers' Association (the ABA).

In accordance with clause 3.1 of the Mandate, the Financial Ombudsman Service (FOS) Australia provides staffing and administrative support to the CCMC.

Our submission to the Code review

The CCMC is making this submission to the review of the Code having operated under the CCMC Mandate since 1 February 2013 and having monitored the 2013 version of the Code since it was adopted by subscribing banks on 1 February 2014.



Issues identified by the CCMC are outlined in Appendix A for your consideration. We would also like to note the various CCMC publications which refer to banks' compliance with the Code, good industry practice and areas for improvement, such as Annual Reports, Inquiry Reports and Guidance Notes. These are all available on the CCMC's [website](#).

In March 2015, the CCMC chair wrote to the ABA to reflect on the CCMC's experience of the first twelve months of the operation of the 2013 Code and the CCMC Mandate. The issues identified in this letter are included in Appendix A.

Further items of note

The CCMC is of the view that this review should also consider the benefits of the Code becoming more aligned with the requirements of ASIC's RG183 and the ABA seeking approval of the Code by ASIC under this regulatory guide. Such approval would:

- make sanctions available to the CCMC including the referral of serious or systemic code breaches to the ABA. The ABA could then consider possible action under RG183.78(e) and (f), and
- include a referral mechanism for systemic code breaches and serious misconduct to ASIC, where that breach is likely to be a breach of the Corporations Act, the ASIC Act or other relevant legislation.

RG183 also requires a code to be independently reviewed at intervals of no more than three years. Clause 6.1 of the Code currently requires the ABA to commission an independent review of the Code every five years.

We would also like to note two reports published in recent years which made recommendations to add protections for small businesses under the Code. In November 2014, the Financial Systems Inquiry Report included Recommendation 34, which encouraged the banking industry to adjust its code of practice to address non-monetary default covenants:

“The [Code]...could require banks to give borrowers sufficient notice of changes to covenants and of an intention to enforce – which could give a borrower reasonable time to obtain alternative financing. Such adjustments to industry practice would also provide greater scope and guidance for [CCMC] and [FOS] to deal with relevant complaints.”

Additionally in late 2015, the CCMC was invited to make a submission and attend the Parliamentary Joint Committee (PJC) on Corporations and Financial Services inquiry into Impairment of Customer Loans. The CCMC noted that there are no specific provisions in the Code which relate to, or deal with, the revaluation or impairment of loans. Nor does the Code require banks to provide copies of valuations relied upon by the bank to commence enforcement action.



In May 2016, the PJC report was published and made a number of recommendations for revisions to the Code relating to revaluation, non-monetary defaults and impairment.

If you have any questions or would like to discuss any aspect of this submission or the CCMC's role, please do not hesitate to contact me c/o the CCMC's CEO, Sally Davis on 03 9613 7341 or by email at SDavis@codecompliance.org.au.

Yours sincerely,



Chris Doogan AM
Independent Chairperson
Code Compliance Monitoring Committee (CCMC)



Appendix A – Issues for consideration

Item	Issue	Comments for the Code Review
<p>1 (A) – The ‘12 month rule’</p> <p>Clause 6.2 (a) (iv) of the CCMC Mandate states:</p> <p><i>“The CCMC must not commence a compliance investigation in the following circumstances if the person making the allegation was aware of the events to which the allegation relates, or would have become aware of them if they had used reasonable diligence, more than 1 year before the person making the allegation first notified the CCMC in writing (unless the person making the allegation had lodged within that 1 year period a dispute with FOS about those events and FOS considered there may have been a breach of the Code).”</i></p>	<p>The CCMC has previously raised concerns regarding the ‘12 month rule’ in its 2012–13 and 2013–14 Annual Reports. In a letter sent to Ian Gilbert at the ABA in March 2015 we stated:</p> <p><i>“The 12 month rule restricts the CCMC’s ability to investigate bank’s compliance with the Code. This rule may also impact on stakeholders’ perceived independence of the CCMC.”</i></p> <p>There is a concern that the Code is not promoted sufficiently and consumers and small business are not sufficiently aware of their rights under the Code for them to access the CCMC’s functions within the timeframe.</p> <p>The time limits for lodging a dispute with the Financial Ombudsman Service (FOS) Australia are set out in its Terms of Reference, namely:</p> <p><i>“a) Where a Dispute relates to a variation of a Credit Contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the National Credit Code, FOS will not consider the Dispute unless it is lodged with FOS before the later of the following time limits:</i></p> <ul style="list-style-type: none"> <i>i. within two years of the date when the Credit Contract is rescinded, discharged or otherwise comes to an end; or</i> <i>ii. where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider - within 2 years of the date of that IDR Response.”</i> <p><i>b) In all other situations, FOS will not consider a Dispute unless the Dispute is lodged with FOS before the earlier of the following time limits:</i></p> <ul style="list-style-type: none"> <i>i. within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and</i> <i>ii. where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider - within 2 years of the date of that IDR Response.”</i> 	<p>The time limits set out in the Mandate for a person to make an allegation should be amended to align with those set out in the FOS Terms Of Reference, including the ability to still consider an allegation after a time limit if the CCMC considers that exceptional circumstances apply.</p>

Item	Issue	Comments for the Code Review
<p>1 (B) – The ‘12 month rule’</p> <p>Notably, clause 6.2 (a) (vi) of the Mandate states:</p> <p><i>“.....if the person making the allegation was aware of the events to which the allegation relates, or would have become aware of them if they had used reasonable diligence, more than 1 year before the person making the allegation first notified the CCMC in writing (unless the person making the allegation had lodged within that 1 year period a dispute with FOS about those events and FOS considered there may have been a breach of the Code).”</i></p>	<p>A reading of this clause suggests that, for the ‘12 month rule’ to be set aside, two conditions need to be met:</p> <ul style="list-style-type: none"> • an allegation has been raised with FOS, and • FOS has considered if a code breach has occurred. <p>In many cases, FOS will not consider a code breach, particularly where it is outside its Terms of Reference. Cases may then be excluded from the CCMC’s jurisdiction if FOS has not considered a breach of the Code.</p>	<p>The sentence <i>‘and FOS considered there may have been a breach of the Code’</i> should be removed from the Mandate clause (subject to the comments in 1 (A) above).</p>

Item	Issue	Comments for the Code Review
<p>2 – Breaches of clauses 3 and 4</p> <p>Clause 36(b) of the Code states:</p> <p><i>“The CCMC’s compliance monitoring, investigation and reporting functions and powers do not extend to clauses 3 and 4 of the Code unless a breach of clause 3 or 4 is also a breach of another provision of the Code.”</i></p>	<p>This restriction prevents the CCMC from monitoring and investigating compliance with the Code in its entirety.</p> <p>When conducting the CCMC’s 2013-14 Annual Compliance Statement program, only a handful of banks were able to report breaches of clauses 3 and 4 which correspond to breaches of other clauses.</p> <p>The CCMC is also prevented from determining that a bank has breached clauses 3 or 4 unless another clause has been breached, regardless of the circumstances or evidence related to the investigation.</p> <p>The CCMC has previously raised concerns regarding this restriction in the 2013–14 Annual Report and in a letter sent to Ian Gilbert at the ABA in March 2015.</p> <p>The obligations to act fairly, ethically and reasonably in the provision of banking services and to comply with all relevant laws are seen by the CCMC and others as critical obligations within the self-regulatory framework.</p> <p>Also, feedback the CCMC has received from some banks, both at our annual onsite visits and at our Annual Bank Forum, indicates that they would prefer to report breaches of these clauses separately.</p>	<p>The Code should be amended to allow the CCMC to monitor compliance with clauses 3 and 4 alone. In addition, the CCMC should be able to investigate allegations that the Code has been breached, where the CCMC forms a view that there may be broader or systemic issues to be considered.</p> <p>Any restrictions or clarifications regarding the CCMC’s powers would be better placed in the CCMC Mandate rather than in the Code alone.</p>
<p>3 – Publishing details of investigations and breaches</p>	<p>When developing Guidance Note 12, which outlines the CCMC’s likely approach to the classification, recording and reporting of non-compliance with the Code, the CCMC considered that some of the processes outlined in the guidance note should be embedded into the Code. This includes formal confirmation of the CCMC’s ability to proactively publish de-identified code breach information and CCMC Determinations on the CCMC website.</p>	<p>The Code or Mandate should be amended to include formal confirmation of the CCMC’s ability to proactively publish de-identified code breach information and de-identified CCMC Determinations on the CCMC website.</p>

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<p>4 – Confidentiality and record keeping</p> <p>Clause 14.1(b) of the Mandate states the CCMC:</p> <p><i>“must return or, with the consent of the relevant party, permanently delete, any item containing confidential information as soon as practicable after an investigation is resolved, withdrawn or concluded. If an allegation is sent to another forum then the CCMC must, unless the CCMC is compelled by law to provide the information, obtain the consent of the relevant party before forwarding any information to the new forum.”</i></p>	<p>In practice the CCMC does not always return or destroy information once an investigation has been completed. The CCMC may require access to this information in future activities or may be required to produce them at another forum, such as a court or a regulator if a notice is served to produce documents under the Corporations Act.</p> <p>There are numerous requirements related to record keeping under both commonwealth and state legislation. However, the CCMC understands that standard record keeping requirements (including those of FOS and the banks) are that records are maintained for seven years once a relevant activity has been concluded.</p>	<p>The Mandate should be amended to reflect standard record keeping requirements.</p>
<p>5 – The absence of the term ‘Banking’ and the use of ‘Committee’ in the name of the CCMC</p>	<p>ASIC RG183 (<i>Approval of financial services sector codes of conduct</i>) refers to a ‘code administrator’ which is an independent person or body that is empowered to administer and enforce the code.</p> <p>It is the Committee’s view that the word ‘committee’ has some negative connotations and that ‘panel’ would be a more appropriate name for the ‘code administrator’.</p> <p>In addition, the CCMC believes that the name of a code monitoring body should reflect a relationship to the particular industry to which the code relates. This will help to distinguish it from other codes and their monitoring bodies.</p>	<p>The name of the code compliance monitoring body should be amended to ‘Banking Code Compliance Panel’ with a tag line of ‘Promoting good banking practice’, or ‘Code of Banking Practice Compliance Panel’.</p>

Item	Issue	Comments for the Code Review
<p>6 (A) – Promotion and availability of the Code</p> <p>Obligations related to the promotion and availability of the Code are included under clauses 10 and 11 of the Code.</p>	<p>The CCMC understands there are concerns regarding the awareness of the Code amongst individual and small business bank customers, and subsequently whether the Code is sufficiently promoted by the ABA on behalf of the banks.</p>	<p>Consider the obligation on banks to require the ABA to promote the Code and the methods by which the ABA can implement this effectively.</p>
<p>6 (B) – Promotion and availability of the CCMC</p>	<p>All subscribing banks have links to copies of the Code on their websites. The CCMC is aware of only two banks that provide links to the CCMC website.</p>	<p>To improve accessibility to the CCMC, consider extending existing obligations to require banks to provide information on websites regarding how to contact the CCMC, including a link to the CCMC website.</p>

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<p>7 – Copies of documents</p> <p>Clause 13.1 of the Code states:</p> <p><i>“If you request a copy of a document, you may have rights in respect of that request under the National Consumer Credit Protection Act 2009 or Chapter 7 of the Corporations Act 2001, which are greater than those which apply under this Code. We will comply with the relevant law when it applies. Otherwise this clause 13 applies.”</i></p> <p>Clause 13.2:</p> <p><i>“At your request, we will give you a copy of any of the following documents that we have retained in accordance with relevant legislation for the retention of documents, relating to a banking service you have, or had, with us:</i></p> <ul style="list-style-type: none"> <i>(a) a contract (including terms and conditions, standard fees and charges and interest rates);</i> <i>(b) any mortgage or other security document;</i> <i>(c) a statement of account; and</i> <i>(d) a notice previously given to you relevant to us exercising our rights.”</i> 	<p>Through clause 4 (compliance with laws) and clause 24 (privacy and confidentiality) of the Code, banks must comply with the 13 Australian Privacy Principles (APPs) from Schedule 1 of the Privacy Amendment (Enhancing Privacy Protection) Act 2012.</p> <p>Part 5, APP 12.1 states:</p> <p><i>“If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.”</i></p> <p>It appears there may be a duplication of obligations for banks to meet when providing a customer access to their personal information. Clause 13 appears to limit the bank’s obligation to a list of documents. The APPs take a broader approach.</p> <p>As the CCMC noted in its 2014–15 Annual Report , banks’ policies for providing copies of documents are geared towards requirements stipulated under the Privacy Act 1988 (Cth) rather than under the Code. In most instances these two obligations are compatible. However, the timeframes for information to be provided to customers differ, with the Code requiring some documents to be provided within 14 days. The Privacy Act sets out a timeframe of 30 days. The CCMC found that the shorter Code timeframes are not reflected in banks’ procedures. The CCMC has encouraged banks to ensure, where applicable, the shorter timeframe of the Code is complied with when providing documents to customers.</p>	<p>Consider amending clause 13 of the Code to make specific reference to the Privacy Amendment (Enhancing Privacy Protection) Act 2012 and the APPs.</p> <p>Clause 13 should continue to stipulate the ‘generic’ documents related to a consumer’s contract which the consumer can request a copy of, such as terms and conditions.</p>

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<p>8 (A) – Code Definitions – Financial difficulty</p>	<p>As part of its financial difficulty own motion inquiry Report, the CCMC included a definition of financial difficulty which was consistent with the definition provided in its Annual Compliance Statement (ACS). The CCMC noted that the Code currently does not provide a definition for financial difficulty. In Guidance Note 13, the CCMC provided further guidance regarding what constitutes financial difficulty.</p>	<p>The Code should include guidance or a definition of financial difficulty.</p>
<p>8 (B) – Code Definitions – Complaint</p>	<p>There is currently no definition of ‘complaint’ within the Code. The CCMC provides a definition of complaint within the ACS that is consistent with <i>AS/IC Regulatory Guide 165 - Licensing: Internal and external dispute resolution</i>.</p> <p>The definition of complaint under the key terms in RG 165 states:</p> <p><i>“Has the meaning given in AS ISO 10002–2006”</i></p> <p>The definition under section 3.2 of AS ISO 10002–2006 is:</p> <p><i>“expression of dissatisfaction made to an organization, related to its products, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected”.</i></p> <p>The CCMC collects data regarding complaints and disputes on an annual basis from banks and is aware of inconsistencies in reporting between them. We are currently working with banks towards a more consistent data reporting framework which will assist with root cause analysis of complaints data across the industry.</p>	<p>The Code should include a definition of ‘complaint’, which is consistent with RG165/ AS ISO 10002–2006.</p>
<p>8 (C) – Code Definitions – Remote Indigenous communities</p>	<p>There is currently no definition of ‘remote’ in the Code and the term may be open to interpretation. There may also be inconsistencies between banks in terms of what they consider to be a ‘remote’ community.</p> <p>The term ‘member of’ under clause 8 of the Code may suggest that being part of a remote community is an option, choice, or something that an individual can subscribe to.</p>	<p>Consider whether there is an appropriate definition of ‘remote’ that can be included in the Code.</p> <p>Consider whether another term such as ‘resident’ or ‘people who live in a’ is a more appropriate term than ‘member of’.</p>

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<p>8 (D) – Code Definitions – Serious, systemic and significant</p> <p>Code clause 36(j) states:</p> <p><i>“.....to empower the CCMC to name us on the CCMC’s website, in the next CCMC annual report, or both, in connection with a breach of this Code, where it can be shown that we have:</i></p> <p><i>i. been guilty of serious or systemic non-compliance”</i></p>	<p>There are no definitions within the Code for ‘serious’ or ‘systemic’ non-compliance. In addition, the Code does not refer to ‘significant’ non-compliance, a term used in S920D of the Corporations Act and widely used within the industry. The term ‘significant’ has been adopted by the CCMC in its monitoring and investigating functions.</p> <p>The CCMC has produced a Guidance Note (GN12) which sets out its interpretation of the terms and how they interact.</p>	<p>The Code should include definitions of ‘serious’, ‘systemic’ and ‘significant’ non-compliance.</p> <p><i>(See also Item 11 below)</i></p>
<p>8 (E) – Code Definitions – Small Business</p> <p>The current definition under the Code states:</p> <p><i>“small business means a business having:</i></p> <p><i>(a) less than 100 full time (or equivalent) people if the business is or includes the manufacture of goods; or</i></p> <p><i>(b) in any other case, less than 20 full time (or equivalent) people,</i></p> <p><i>unless the banking service is provided for use in connection with a business that does not meet the elements of (a) or (b) above.”</i></p>	<p>On several occasions, the CCMC has been advised by banks that they are unable to identify ‘small business’ customers (as defined by the Code) from other business customers.</p> <p>Some banks do not record the number of employees within a business, however they may assess the relative size of a business based on turnover or other financial measure. The ABA has indicated that some banks are likely to class business as ‘retail’ and ‘commercial’.</p> <p>This could potentially mean that code obligations for small businesses (as defined by the Code) are not being applied appropriately.</p> <p>For further information, please refer to information provided by ASIC, the Corporations Act, Australian Taxation Office and the Australian Bureau of Statistics.</p>	<p>Consider whether the definition of small business in respect of the provision of banking services is the most appropriate and the practical implications of the current definition on banks.</p>

Item	Issue	Comments for the Code Review
9 (A) – ‘Robo-advice’ and other IT outcomes	While the Code is technology neutral, there is no current provision within the Code that banks should ensure outcomes from IT systems are appropriate and consistent with Terms and Conditions or stated objectives, other than the general obligations of clause 3.2.	Consider the inclusion of a provision that requires outcomes from IT systems to not only be fair and reasonable but consistent with the Terms and Conditions of a product or the stated objective of a service.
9 (B) – Technology neutral	<p>While the Code is largely technology neutral, in some particular instances it does not fully take into account changing consumer behaviour and bank practice with regard to technology.</p> <p>For example, clause 25.1 of the Code refers to ‘<i>payment instruments such as credit and debit cards, cheques and passbooks</i>’. There are now alternative payment instruments available, often related to mobile phones and apps.</p>	Consider the changing use of technology related to the provision of banking services and ensure the ongoing technology neutral nature of the Code.

Item	Issue	Comments for the Code Review
10 – Garnishee orders	<p>The CCMC has been made aware of issues relating to the removal of funds by banks from Centrelink customer accounts as a result of garnishee orders.</p> <p>There is currently no specific obligation in the Code that banks should comply with the Dept. of Human Services’ Code of Operations. This Code was developed with the assistance of, and is endorsed by, the ABA.</p>	Consider amending the Code to include an explicit obligation that banks comply with the Dept. of Human Services’ Code of Operations.

Item	Issue	Comments for the Code Review
<p>11 – Timeframes for reporting serious and systemic breaches</p> <p><i>(See also Item 8 (D) above)</i></p>	<p>There are currently no specific obligations requiring a code subscriber to report serious or systemic breaches of the Code to the CCMC.</p> <p>In Guidance Note 12 (paragraphs 38-50) which covers the classification, reporting and remediation of non-compliance with the Code, the CCMC has provided guidance on its expectations with regard to the reporting of significant breaches to the CCMC.</p> <p>The 2014 General Insurance Code of Practice requires a subscriber to report a significant breach to the Code Governance Committee within ten business days, where the subscriber identifies a significant breach of the Code.</p>	<p>The Code should require a subscriber to report a serious/ systemic/ significant breach of the Code to the CCMC. This report should be made within a reasonable timeframe (for example, within 30 days) of the serious or systemic breach being identified by the subscriber or regulator.</p>
<p>12 – Family violence, financial abuse and elder abuse</p>	<p>The CCMC notes that there is currently a high awareness of matters related to family violence and financial abuse.</p> <p>The Royal Commission into Family Violence (Victoria) Report was tabled in the Victorian Parliament on Wednesday, 30 March 2016 and made 227 recommendations for dealing with all aspects of family violence.</p> <p>Recommendations 107 to 121 cover ‘Recovery: Financial security’. Under Recommendation 111, the Victorian Government encourages the ABA, through its Financial Abuse Prevention Working Group, to develop a family violence–specific industry guideline within 12 months. The Royal Commission stated that it should be supported by training and education for relevant banking staff, to help them understand, identify and deal with economic abuse associated with family violence.</p> <p>In November 2015, the ABA announced that it was reviewing its financial hardship and financial abuse guidelines to recognise customers affected by domestic and family violence.</p> <p>There are currently no specific obligations in the Code regarding financial abuse and family violence.</p>	<p>Consider the ABA’s work related to family violence and financial abuse and whether it would be appropriate to add additional code obligations related to these issues.</p>

Item	Issue	Comments for the Code Review
<p>13 – Direct debits</p> <p>Under clause 21 of the Code, banks are required to take and promptly process:</p> <ul style="list-style-type: none"> • a request to cancel a direct debit when it relates to a “banking service”, and • a complaint that a direct debit was unauthorised or otherwise irregular. 	<p>In CCMC Guidance Note 10 (Direct Debits), the CCMC explains that:</p> <p><i>“A direct debit request is an authority given in writing by a consumer to a merchant or service provider to debit payments from their account, to another specified account, usually at regular intervals or on specified occasions. These “debits” are processed through the Bulk Electronic Clearing System (BECS).</i></p> <p><i>The obligations under the Code related to direct debits only apply to payments processed through BECS and must be linked to a transaction account number.</i></p> <p><i>Recurring payment arrangements using credit card accounts or scheme debit cards are not direct debits as defined in the Code.”</i></p> <p>The current definition of direct debit within the Code does not clarify the issue of recurring card payments, and it may be misunderstood by both bank staff and consumers.</p>	<p>The Code should include guidance that recurring payment arrangements using credit card accounts or scheme debit cards are not direct debits.</p> <p>Consider whether the Code provides adequate consumer protections for consumers wanting to cancel recurring card payments.</p>