



OPEN LETTER TO GOVERNMENT

The CCMC Story: Banking in Australia Part 12

It is alleged that banks, prior to 2014, acted *“dishonestly using their position of power to gain an advantage especially for money”*. Regulators have not disputed these facts despite this being the Cambridge dictionary’s definition of corrupt.

This letter explains that the government regulators failed to investigate issues the CCMC published on 11 March 2008. The issues were prepared for the Code Reviewer, Jan McClelland, and extracts from the issues paper are set out below.

“ANNEXURE A: Overview

Background

The CCMC [was] set up under the authority of Clause 34 of the Code of Banking Practice 2004 ... 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.
- Monitor any other aspects of the Code referred to it by the ABA.

The CCMC 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 CCMC has proceeded on the basis that monitoring and investigation functions apply to all the provisions of the Code.

The Constitution of the CCMC Association (“the banks Chief Executives”) ... sets out powers and obligations for the CCMC. On the face of it, the constitution imposes some qualification and restrictions on the actions of the CCMC.

Constitution should be revoked

[The CCMC claim] the constitution should be revoked for two reasons:

Firstly, because the structure suggests that the CCMC is less than independent of subscribing banks.

Secondly, provisions of the constitution vest unnecessary power in the Chair of the FOS and the banks Chief Executives.

The appropriateness of the latter [banks Chief Executives] issue should particularly be reviewed because:

- These powers have not been used in the four years that the CCMC has been active:
- They do not reflect current practice ...

Code Awareness

The CCMC has sought to raise awareness of the Code and of the issues resulting from the difference between external dispute resolution (the role of the FOS) and compliance monitoring.

The CCMC recommends that in considering effectiveness of the Code, the review should examine the need to increase [the code's] awareness.

Bank's Obligations in the Code

Generally subscribing banks have demonstrated a genuine commitment to meeting their obligations under the Code... Thus far, the CCMC has not had need to use its ultimate sanction of naming a bank. Issues relating to the general application of the code that the CCMC considers could be usefully reviewed [by code reviewer Ms McClelland] are:

- The weight to be given to the general commitment, to continuously work toward improving standards of practice and service in the banking industry (Clause 2.1) in interpreting the Code (CCMC emphasis).
- The effect of the substance of Clause 2.2

The CCMC has had cases where it has been satisfied a bank has not acted fairly and reasonably having regard to the ... contract.

- The absence of any requirement in the code that banks should observe the terms and conditions of their contract with their customers
- Suggestion by some banks that they have an option to choose provisions of the Code they will observe whilst maintaining a position that they subscribe to the Code.

The CCMC has taken the view that that is not an option. Banks must either accept obligations of the Code as a whole or they cannot be regarded, or hold themselves out, as subscribing banks.

The view of the CCMC 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 CCMC looks forward to discussions about how the Code can be improved, both [also] in relation to bank's obligations to its customers and greater issues affecting the self-regulatory scheme ...

ANNEXURE B

Governance issues arising under the constitution ...

The CCMC's firm view is that the constitution is problematic.

The CCMC has never met the banks' Chief Executives, [their] Chair, or the FOS Chair and to the CCMC's knowledge, the banks' Chief Executives only met once to approve the constitution and agree on the Chair of [their group].

The CCMC notes that to the best of its knowledge, the constitution has never been made public despite its apparently intended impact of the provisions of the Code, which was itself subject of very wide public consultation.

The constitution provides the FOS Chair and the banks Chief Executives ... with oversight powers. In the CCMC's view these powers are inappropriate and not consistent with CCMC's independent role.

They do not affect the current working practices of the CCMC, and are, in the opinion of the CCMC, unworkable in practice.

The constitutional requirement for involvement of banks Chief Executives' Chair in setting and approving the CCMC's funding and remuneration has given rise to concerns that the CCMC is not independent from bank subscribers. This perceived or technical, lack of independence has been suggested as the reason why the FOS is unable to share information with the CCMC.

The CCMC notes that ... the constitution purports to limit the manner in which the CCMC can use its power to name a bank when guilty of serious on-going non-compliance with the Code. The constitution states that the CCMC may name a bank in its annual report. Such a limitation would seem unreasonable, having regard to the broader wording of Clause 34(i) of the Code.

Also, any such limitation would not be, in the CCMC's view, in the best interests of the self-regulatory scheme the Code seeks to achieve, or of the subscribing banks as a whole.

ANNEXURE G

Restraints on the CCMC's power to name a bank

The Overview and Annexure B of the CCMC's submission to the Code review outlined some difficulties presented by the banks Chief Executives' constitution.

CCMC's powers and obligations

The CCMC has obtained advice, which confirms that although the Code constitutes a commitment by banks to establish the CCMC, it is the constitution that governs the CCMC's functions. The CCMC 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 CCMC considers this inconsistent with the spirit of the Code's promise ...

Constraints CCMC's power to name banks

In addition to restraints on the CCMC's ability to make public statements (as outlined in Annexure B of [this] submission to the Code review), the constitution also limits the CCMC's power to name publicly a non-compliant bank.

The CCMC strongly suggests the Code reviewer [Jan McClelland] consider the need to clarify what action can be taken in the event of serial or serious non-compliance post naming. In this context, the CCMC 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

It is the CCMC's view the constitution should be replaced with a document ... that provides an appropriate governance structure for the CCMC. Such a document should be the subject of public consultation.

Any consideration should include the manner in which the CCMC 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 the Code remains an effective alternative to more prescriptive forms of regulation."

This review was available to ASIC, ACCC and Treasury in 2008, yet they failed to require the banks Chief Executives to provide full disclosure in loan contracts.

Should you require any further information please contact the writer.

Yours sincerely,



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