



**Code Compliance  
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Ms T Matulick  
Secretary  
Parliamentary Joint Committee on  
Corporations and Financial Services

**By email to:** [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Ms Matulick,

**Parliamentary Joint Committee on Corporations and Financial Services inquiry into the impairment of customer loans**

Thank you for your email of 23 October 2015, enclosing the additional question from Ms Ann Sudmalis MP.

In response to this question I would re-iterate that the Code Compliance Monitoring Committee (CCMC) is an independent body, established by Mandate to give effect to the Code of Banking Practice (the Code). This Code is developed, reviewed and amended from time to time by the Australian Bankers' Association (ABA) following consultation by the ABA with relevant stakeholders. Therefore, if the ABA decided to expand the Code to include matters relating to property valuations and loan impairments then, in accordance with its Mandate, the CCMC would monitor such additional provisions in the same way it currently monitors existing Code provisions

Please find attached the following documents, which Senator Fawcett and other members of the Committee asked us to provide:

- a copy of opening statement
- a copy of the document we handed up to the Committee concerning the submission made by the Tasmanian Small Business Council
- our summary of recent court case decisions which deal with the applicability of the Code of Banking Practice
- a breakdown of the complaints received by the CCMC in 2014–15 and
- a copy of our Own Motion Inquiry Report into banks' compliance with the financial difficulty obligations under the Code.



The CCMC's Annual Report for 2014–15 is due to be issued in early December 2015 and we will forward a copy of this report to the Committee when it is released. In the meantime should you require any further information, please do not hesitate to contact the CCMC's Chief Executive Officer, Sally Davis on .

Yours sincerely,

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



## Purpose

The purpose of this paper is to provide a summary of cases where the court has made a finding regarding the contractual enforceability of the Code of Banking Practice (the Code). This paper forms part of the documents provided to the CCMC in anticipation of the upcoming Parliamentary Inquiry on the impairment of loans.

## Case law

### *National Australia Bank Limited v Rice* [2015] VSC 10

Facts	Court's findings
<p>In this case NAB sought \$6,184,593.48 plus interest and costs from Mr. Rose under five guarantees he had entered following a business arrangement with his partner Rice.</p> <p>Rose disputed liability on the basis NAB failed to comply with the guarantee provisions (clause 28) of the Code (2004).</p> <p>Specifically, Mr. Rose contended that NAB had failed to inform to obtain independent legal advice.</p>	<p>The Court was satisfied that Rose had established NAB failed to comply with the Code and such conduct amounted to a breach of a contractual warranty. The breach by NAB caused the potential for loss to Rose in the amount now claimed by NAB. Accordingly, Mr. Rose succeeded in his defence of non-compliance with the Code. NAB's claim against Mr. Rose was set off by the loss suffered by him as a result of NAB's breach of warranty and NAB's claim was subsequently dismissed. The principal findings were based upon the failure of NAB to inform Rose that he should obtain independent legal and financial advice.</p> <p>When the case was opened on behalf of NAB, counsel stated NAB did not accept the Code was promissory or contractual. It was contended the Code imposed no contractual obligation but merely provided "a desirable code of practice". Not only was it stated the Code did not provide a contractual precondition required to be satisfied before a guarantee could be enforceable, but it was submitted it provided no basis, of itself, to found a claim for loss. In short, it was stated the Code was of no legal effect.</p> <p>Contrastingly, in closing, and for the purposes of this proceeding only, NAB accepted the Code was contractually binding as between NAB and Mr. Rose. Therefore, the terms of the Code of Banking Practice were to be treated as "contractual terms of each of the Guarantees" [para 144].</p> <p>Justice Elliott held that regardless of NAB's change of position, he would have found "that the relevant provisions of the banking code relied upon in this proceeding applied with contractual force" [para 145].</p>

**NAB v Smith [2014] NSWSC 1605**

<b>Facts</b>	<b>Court's findings</b>
<p>In this case, the issue in relation to the Code was whether NAB had failed to "exercise the care and skill of a diligent and prudent banker" in forming its opinion about Statewide's [the borrower] "ability to repay" the loan for which it had applied (clause 25.1 of the 2004 version of the Code) and which was guaranteed by the defendants, the Smiths.</p>	<p>In order to ascertain the standard against which NAB's conduct, in assessing Statewide's [the borrowers] application, should be compared, the Court was provided with the assistance of several expert witnesses: Mr. John Bartle (engaged by Mr. Smith), Mr. John Brewster (engaged by Mr. Smith's parents) and Mr. Brian Super (engaged by the Bank).</p> <p>Justice Slattery stated that the Code means what it says in clause 25, that before offering a credit facility the Bank "will exercise the care and skill of a prudent banker", and that an objective contractual standard of prudent conduct is being set, one that may be incorporated into finance facilities [para 193].</p> <p>The Smiths' cross-claim sought to use the Code to find causes of action both in contract and negligence as a result of the Code being expressly incorporated into each of the guarantees. NAB admitted that Code clause 25 applied to the Smith's guarantees. As a result of the operation of the Code, NAB was under a contractual obligation before it offered or gave a credit facility to the Smiths to exercise the care and skill of a diligent and prudent banker in selecting and applying the Bank's credit assessment methods and informing the Bank's opinion about their ability to repay it.</p> <p>In addition to breach of contract, the Smiths contended that the provisions of the Code (i.e. clauses 25 and 2.1) define the scope of the relevant duty of care owed by the Bank to them and that the Court's earlier findings (i.e. that NAB had not acted prudently) demonstrated that the Bank did not act in accordance with the Code and thereby breached its duty of care. The relevant loss and damage the Smiths complained of is entry into the guarantees. This in turn is said to result in their liability on the guarantees and the loss of their equity in the Oyster Bay property.</p> <p>NAB argued that the Code is not enforceable, relying upon <i>Sam Management Services Australia Pty Ltd v Bank of Western Australia</i> [2009] NSCWA 320. In <i>Sam Management Services</i>, the appeal judge, Justice Young, was required to examine whether the trial judge had erred in failing to find a breach of clause 2.2. In that case, Justice Young found the Code was not a term to be included in a contract.</p> <p>In this case Justice Slattery found in regards to NAB's counter argument:  <i>But in my view clause 25.1 of the Code about exercising the care and skill of a diligent and prudent banker is sufficiently certain to be enforceable. The Bank failed to meet that standard in this case, which led to the transaction proceeding.</i> [para 314]</p> <p>The Court found that the Smiths, the second cross-claimants, were able to set aside the mortgages and guarantees they signed as part of the Statewide transaction which they entered in December 2004 on several grounds, including misleading and deceptive conduct by the Bank through its bank officer, Mr. Shackleton, for breaches of fiduciary duty, for contraventions of the ASIC Act and under the Contracts Review Act.</p>

**Commonwealth Bank of Australia v Doggett [2014] VSC 423**

<b>Facts</b>	<b>Court's findings</b>
<p>In this case, the Court had to determine whether CBA owed the defendants, Doggett and Sullivan, an obligation as guarantors to exercise care and skill in accordance with clause 25.1 of the Code when assessing the borrower's, ability to service the loan.</p>	<p><i>For the reasons appearing below, I accept that a contractual obligation to exercise care was owed to the defendants, under clause 25.1 of the Code, as a term of their guarantee [para 101]. His Honour stated from para 114 to 116:</i></p> <p><i>In Brighton v Australia &amp; New Zealand Banking Group Ltd, the Court of Appeal in New South Wales again accepted that provisions of the Code were incorporated into banking documents. In that case, the statement in the relevant guarantee, that '[t]he applicable provisions of the Code of Banking Practice apply to this Guarantee', was enough to incorporate the relevant provisions of the Code into the guarantee. For the following reasons, clause 25.1 was incorporated into the guarantee:</i></p> <p><i>(1) Clause 1.1 of the Code provides that the Code applies to the Bank's dealings with persons 'who are or who may become our ... customers and their guarantors.'</i></p> <p><i>(2) Clause 28.1 of the Code defines a 'guarantee' for the purposes of the Code. In summary, clause 28.1 provides that the Code applies to every guarantee obtained from an individual for the purpose of securing financial facilities provided by the Bank to another individual or a small business. The defendants are individuals and Dogvan was a 'small business' within the meaning of the Code. Accordingly, the defendants' guarantee was a guarantee within the meaning of the Code.</i></p> <p><i>(3) Clause 39.1(a) of the Code provides that the Bank will be bound by the Code in respect of any guarantee (as described in clause 28) 'except as provided for below'. None of the exceptions provided for in the balance of clause 39 [sub-paragraphs 39.1(b)-(h)] excludes 25.1 from applying to guarantees.</i></p> <p><i>(4) Clause 28.3 of the Code provides that a guarantee 'must include a statement to the effect that the relevant provisions of this Code apply to the Guarantee but need not set out those provisions.' The defendants' guarantee included a statement to that effect.</i></p> <p><i>(5) In my opinion, clause 25.1 was a 'relevant provision' of the Code for the purposes of guarantees within the meaning of clause 28.1. A promise by the bank to the customer (who is the principal debtor) to exercise care, or that it has exercised care, in the terms set out in clause 25.1 is obviously relevant to a guarantor, or a proposed guarantor. Any guarantor has a material interest in whether the bank, exercising the care and skill of a diligent and prudent banker, has formed an opinion that the borrower will be able to repay the loan sought.</i></p> <p><i>(6) The above reasoning is supported by the decision of the Court of Appeal in New South Wales in Brighton. In that case, Campbell JA (Giles and Hodgson JJA agreeing) stated that one of the guarantees in issue would have incorporated clause 22 of the Code, which imposes a duty of confidentiality, if it had been established that it was a guarantee within the meaning of clause 28.1 of the Code. In that case, however, the principal debtor was neither an individual nor a small business, and so the guarantee did not fall within clause 28.1 of the Code. For the reasons given below, I do not accept the Bank's contention that the decision in Brighton is distinguishable because clause 22 is capable of being relevant to guarantors while clause 25.1 is not.</i></p>

**Brighton v Australia and New Zealand Banking Group Ltd [2011] NSWCA 152**

Facts	Comments by the Court
<p>The Appellants, Mr. and Mrs. Brighton, were seeking an appeal against possession orders given at the Supreme Court of NSW in favour of ANZ.</p> <p>The Appellants argued that a disclosure of confidential information by ANZ to a commercial rival of the Appellants had the effect of discharging their liability under various guarantees which ANZ had sought to enforce.</p> <p>ANZ did not dispute the disclosure. However, subsequent to the disclosure occurring, the Appellants signed a Deed with ANZ for an advance to pay their legal fees. The Deed released ANZ from any liability arising from the disclosure.</p>	<p>The Appellants contended that the guarantees contained an obligation of confidentiality or secrecy on the part of ANZ, that the obligation had been breached, that the breach was a breach of a condition of the guarantee and thus the guarantor was discharged by operation of the law. The court found that the Code was incorporated into the terms of the guarantees [para 33]:</p> <p><i>There is no express obligation of confidentiality in the standard form of guarantee document itself. Further, insofar as the Code is incorporated by reference into the terms of the guarantee, that Code does not contain a duty of confidentiality that is owed to a guarantor, in the capacity of guarantor. The express obligation of confidentiality in Clause 22 of the Code is owed to "you"... Mr and Mrs Brighton and AFC were customers of ANZ. Mr and Mrs Brighton are individuals. It is true that they were customers by virtue of a different contract to the contract of guarantee, but the definition of "you" in the code hinges on the status of being a customer of the bank, not on the manner in which or document under which that status arises. Thus, in my view, the general duty of confidentiality arising under Clause 22 of the Code was a term of the guarantees given by Mr and Mrs Brighton. [paras 44-46]</i></p> <p>Clause 22, in effect, applies a duty of confidentiality to a person who is an individual or small business customer of the bank. In this situation, the duty of confidentiality arising under Clause 22 was a term of the guarantees given to two of the Appellants, Mr and Mrs Brighton, as they held a banker/customer relationship with ANZ:</p> <p><i>If the contract of guarantee had not included Clause 4 I would have construed those contracts of guarantee that were entered with a customer of the bank (i.e., the guarantees with Mr and Mrs Brighton) as containing a condition in the terms of Clause 22 of the Code, breach of which would entitle those guarantors to terminate the guarantees. ANZ takes no point in the present case that any guarantor has failed (at the least by the guarantors' pleading in the court below) to exercise any right it had to terminate the guarantees, or that any right to terminate that had once existed had been lost. [para 84]</i></p> <p>In assessing the type of information to which the duty of confidentiality under Clause 22 attaches, his Honour stated:</p> <p><i>...construing the contract in a sensible commercial fashion, I would take it [Clause 22] to apply to any information that was itself of a confidential nature, the disclosure of which could affect the interests of the guarantor that related to the guarantee. [para 85]</i></p> <p>In these circumstances, his Honour concluded that the disclosure by ANZ was a breach of Clause 22. However, the guarantees contained a clause (clause 4) which provided that the guarantors' obligations under the guarantee were unconditional. In light of this, the Court held that:</p> <p><i>In my view, were it not for Clause 4 of the guarantees that breach [the disclosure] would have given rise to a right for Mr and Mrs Brighton to terminate their respective guarantees. [para 85]</i></p>

**Tasmanian Small Business Council (TSBC) Updated Submission to the Parliamentary Joint Committee (PJC) on Corporations and Financial Services Inquiry into the impairment of Loans (Submission 61)**

The table below highlights inaccuracies or other incorrect statements related to the Code of Banking Practice (the Code) or the Code Compliance Monitoring Committee (CCMC) as at 16 October 2015. It does not deal with any other aspects of the submission.

Ref	Statement	CCMC Response
<b>Document entitled 'The Australian Bankers Problematic Code'</b>		
Page 10	<p>"The Code was again revised in 2013. The Code currently purports to provide the consumer with three regulatory services: a code compliance monitor; an internal dispute resolution mechanism; and an external dispute resolution mechanism."</p>	<p>The Code does not provide either internal or external dispute resolution mechanisms. It places an obligation on banks to have in place both internal dispute resolution (IDR) and external dispute resolution (EDR) arrangements.</p>
Page 16	<p>"... where a bank chooses to escalate a complaint to another 'forum', the consumer is stripped of the right to have the matter referred to the CCMC. Further, as the constitution is not disclosed to the customer, they are stripped of this right without being informed that this is the case."</p> <p>"Complainants are not given any explanation as to why the CCMC will not investigate a complaint, other than that it has a 'conflict of interest'."</p>	<p>The CCMC's Mandate, which is made in pursuance of the Code of Banking Practice, sets out the terms that govern the functions and operations of the CCMC. It became effective on 1 February 2013, when it replaced the CCMC Association constitution and is published alongside the Code.</p> <p>Clauses 6.2(a) (ii) and (iii) of the Mandate state that where an allegation is concurrently before another forum (as defined in the Mandate), and that forum determines whether a breach of the Code has or has not occurred, the CCMC must adopt those findings.</p> <p>Accordingly, where the CCMC receives an allegation that is concurrently before another forum, it will not commence an investigation until such time as it has been notified of the outcome of those proceedings.</p> <p>Complainants are kept fully informed and receive an explanation of why a matter is not investigated until the other forum has made a decision.</p>

Ref	Statement	CCMC Response
Page 16	<p>“Specifically, the CCMC members revealed that its ability to “name and shame” banks who breach the Code is limited, since it must receive approval from the ABA Chair before making any public statements, other than in its annual report...”</p> <p>“...The CCMC also noted it can <i>only</i> name banks which have repeatedly breached the Code and failed to rectify issues raised by the CCMC. This significantly undermines the core role of the CCMC as envisioned by the Martin Review.”</p>	<p>Footnote 43 of the TSBC submission indicates that this information relates to 2008. It is not correct. Under the terms of the Constitution, which ceased to be effective on 1 February 2014, or the Mandate which replaced it, the CCMC is not required to seek the Australian Bankers’ Association Chair’s approval to name a bank.</p> <p>Footnote 44 of the TSBC submission indicates this also dates back to 2008.</p> <p>CCMC Guidance Note 12 sets out the CCMC procedures followed in these circumstances (copy attached).</p>
Page 17	<p>“The CCMC has also questioned the authority the ABA Chair has over its funding, and the fact that – due to budget constraints – its annual reports have very limited circulation.”</p>	<p>Code-subscribing banks are required under the Code to ensure the CCMC is fully resourced. The Australian Bankers’ Association does not approve the CCMC budget.</p> <p>The Annual Report is:</p> <ul style="list-style-type: none"> <li>• Distributed in hard copy to approximately 70 stakeholders including bank CEOs, government ministers, regulators and financial counselling organisations.</li> <li>• Distributed in soft copy to approximately 50 stakeholders and 130 subscribers to the CCMC website.</li> <li>• Available to the general public on the websites of the CCMC and Financial Ombudsman Service (FOS) Australia.</li> </ul> <p>Also, each year, key findings from the CCMC Annual Report are featured in FOS’s e-newsletter, <i>The Circular</i>, which is distributed to 14,800 subscribers throughout Australia.</p>
Page 17	<p>“The major Australian banks claim that they are bound by a ‘world class’ Code, monitored by the CCMC, supported by the FOS, and approved by ASIC...”</p>	<p>The Code is not approved by the Australian Securities and Investments Commission (ASIC). There are currently no voluntary industry codes of conduct approved under ASIC Regulatory Guide 183.</p>



Ref	Statement	CCMC Response
<p><b>Letter dated 14 November 2014 addressed to Mr Geoff Fader, Chairman, TSBC, regarding ‘Australian Banking Code’</b>            (This document refers to the superseded 2004 version of the Code. This was replaced by the 2013 Code on 1 February 2013 and adopted by code-subscribing banks by 1 February 2014.)</p>		
Ref	Statement	CCMC Response
<p>Pages 19–20</p>	<p>“5.3 We will require the ABA to establish, and we will support, a forum (including consumer, small business and banking industry representatives) for the exchange of views on:</p> <p>(a) banking issues; and</p> <p>(b) the effectiveness of this Code...</p> <p><b>PROBLEM</b></p> <p>There is no information that states who “we” are. Who will be supporting the ABA? If it is the Code complying banks, their CEOs are members of and responsible for the ABA. The ABA is responsible for the writing of the Code.</p> <p>So the Code is, in reality, written by the Code complying banks...”</p>	<p>‘We’ is defined in the Code as “the bank that you deal with that has subscribed to this Code”.</p> <p>This is normal for a self-regulatory Code and is consistent with Codes adopted by the Customer Owned Banking Association (COBA), the National Insurance Brokers Association (NIBA) and the Insurance Council Australia (ICA).</p>
<p>Page 21</p>	<p><b>“PROBLEM</b></p> <ul style="list-style-type: none"> <li>• Even if the ABA did promote this Code and make public which banks subscribe to the Code and how a customer can get a copy of the Code, there is no information that clearly</li> </ul>	<p>Clause 12.3 of the Code states “Any written terms and conditions will include a statement to the effect that the relevant provisions of this Code apply to the banking service but need not set out those provisions”.</p>

Ref	Statement	CCMC Response
	<p>explains to a customer that some of the clauses of the Code a (sic) contractually binding, and thus should be read alongside the facility offer and General Standard Terms.”</p>	<p>In addition clause 41.2 of the Transitional arrangements states ” <i>On and after the 2013 transition date, we will be bound by this Code in respect of any ongoing banking service we were providing to you at the 2013 transition date and continue to provide afterwards</i>”</p>
Page 22	<p><b>30 Advertising</b>  <i>30.1 We will ensure that our advertising and promotional literature drawing attention to a banking service is not deceptive or misleading.</i></p> <p><b>PROBLEM</b></p> <p><input type="checkbox"/> Once again, it is left to the banks’ ethics as to what it seems deceptive or misleading. It has already been shown that the bank is willing to act unethically, thus such a statement is not consumer protection.</p> <p><input type="checkbox"/> The bank has ensured it cannot be held accountable for any deceptive or misleading banking services, as it removes its responsibility for any customer decision based on its advertising.</p>	<p>The 2013 Code does not contain obligations in relation to advertising.</p> <p>Banks would, however, be required to comply with ASIC’s Regulatory Guide <i>234 Advertising financial products and advice services including credit: Good practice guidance.</i></p>
Page 28	<p>References are made to the problems of the <b>CCMC Association</b></p>	<p>The CCMC Association ceased to exist when the Mandate replaced the Constitution on 1 February 2013.</p>
Page 29	<p><b>“PROBLEM...</b></p> <p>The CCMC drafted and implemented the constitution, however, from its start was not consistent with the Code of Banking</p>	<p>The CCMC did not draft the Constitution. In any event, it no longer exists.</p>

Ref	Statement	CCMC Response
	Practice nor was it established pursuant to the banking contracts.”	
Page 30	<p><b>“PROBLEM</b></p> <ul style="list-style-type: none"> <li>• The Constitution is seemingly establishing procedural requirements for the CCMC members.</li> <li>• It also reduces the independence of the CCMC as widely promoted by the ABA and not corrected by the CCMC or subscribing banks...”</li> </ul>	The CCMC is an independent body, operating within the terms of its Mandate.
Page 33	“...there is evidence that the subscribing banks’ contracts with individuals and small businesses promote a commitment to investigate all complaints and a dispute resolution package that does not exist.”	Each bank is required under the <i>Corporations Act 2001</i> S912A (1)(g) and S912A(2) (see ASIC’s regulatory Guide RG165) and clauses 37 and 38 of the Code to have in place an IDR and EDR process.

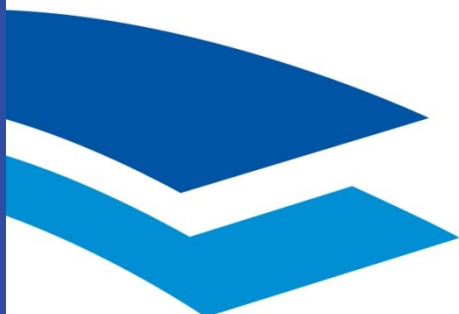


Code Compliance Monitoring Committee

# Financial Difficulty Own Motion Inquiry

Examining banks' compliance with clause 28 of the  
Code of Banking Practice

November 2015



# ABOUT THE CODE AND THE CCMC

## The Code

The Code of Banking Practice (the Code) is a voluntary code of conduct which sets standards of good banking practice for subscribing banks to follow when dealing with persons who are, or who may become, an individual or small business customer of a code-subscribing bank or a guarantor. There are 13 banking groups which subscribe to the Code, covering 95% of the Australian retail banking market.

## The CCMC

The Code Compliance Monitoring Committee (the CCMC) is an independent compliance monitoring body established under clause 36 of the Code.

The CCMC's purpose is to promote compliance with the Code and thereby contribute to the improvement of standards of practice and service by banks. Its aim is to be a trusted and valued partner, helping the code-subscribing banks to comply with their code obligations, ultimately creating a better banking experience. To achieve this, the CCMC and its Secretariat adopt a responsive, focused and collaborative approach to working with the code-subscribing banks.

The CCMC's powers and functions are set out in its Mandate. The Mandate is published by the Australian Bankers' Association (the ABA) along with the Code. By adopting the 2013 version of the Code, code-subscribing banks endorsed this Mandate.

The CCMC conducts a compliance program that reflects the objectives of the Code and comprises three core activities, namely monitoring, investigating and engaging. Under clause 5.1 of its Mandate, the CCMC's monitoring role includes conducting inquiries for the purposes of monitoring compliance with a particular requirement or requirements of the Code.

The CCMC is able to use a range of investigative and monitoring techniques when conducting these inquiries including:

- requests for information from code-subscribing banks
- compliance visits to the premises of code-subscribing banks
- consultation with consumer advocates
- market research activities such as mystery shopping, surveys and forums, and
- engaging external experts.

The findings of these inquiries are provided to all participating banks to influence and encourage positive change in code compliance monitoring frameworks and to share experience of good industry practice and areas requiring improvement.

The CCMC publishes reports of all completed inquiries on the CCMC website at [www.ccmc.org.au](http://www.ccmc.org.au).

## How to read this report

For ease of reference:

- 'bank' means a bank which subscribes to the Code
- 'Code' is a reference to the 2013 version of the Code, unless otherwise stated, and
- 'consumer' or 'customer' means an individual or small business that is either a customer or potential customer of a bank.

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## 1. EXECUTIVE SUMMARY

This report has been prepared by the Code Compliance Monitoring Committee (the CCMC) following its Own Motion Inquiry into code-subscribing banks' compliance with their financial difficulty<sup>1</sup> obligations under clause 28 of the Code of Banking Practice (the Code).

The CCMC determined to undertake an inquiry in this area as it continues to receive allegations from consumers that banks have breached these obligations and self-reports of breaches by banks.

Financial difficulty remains one of the most significant and sensitive areas of engagement between banks and their customers. The obligations under the Code demonstrate banks' commitment to assisting customers who are or may be experiencing financial difficulty.

In conducting the inquiry, the CCMC:

- Engaged with all banks to better understand the processes and procedures they have in place to assist customers experiencing financial difficulty.
- Surveyed consumer advocates including financial counselling groups, community legal centres and small business representatives to gain insight into customers' experiences when dealing with their bank.
- Reviewed bank websites and visited bank branches to establish the information about financial difficulty assistance that is available to customers.

The inquiry was conducted in accordance with clause 5.1 of the CCMC's Mandate.

The CCMC thanks all stakeholders for their contributions and the time and commitment taken to respond to this inquiry.

### 1.1 Overview

All subscribing banks have in place procedures to try to help customers overcome their financial difficulties with credit facilities they have with their bank, as required by the Code. In addition, banks have confirmed it is their policy to engage actively and co-operatively with customers to ensure effective outcomes.

The results of the survey completed by consumer advocates suggest that, overall, banks have made improvements to the way in which they deal with customers experiencing financial difficulty. This is consistent with the findings of the 2015 'Rank the Bank' survey conducted by Financial Counselling Australia which also highlighted improvements.

The responses to the surveys of consumer advocates and small business representatives, however, suggest that issues still occur for both individual and small business customers, particularly where the customer's situation is unique or requires longer-term solutions.

The CCMC acknowledges that banks have worked to improve outcomes for customers experiencing financial difficulty. The CCMC has however identified the following ways in which banks could increase their level of compliance with the Code:

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<sup>1</sup> Financial difficulty refers to a customer's inability to meet obligations under a credit facility due to an unexpected change in circumstances such as illness, unemployment or other reasonable cause.

- Ensure that their processes and procedures are applied consistently for all customers, including those who are not represented by a consumer advocate.
- Ensure their processes are appropriate for customers with particular issues, for example those related to poor mental health or family violence.
- Ensure they can identify when a customer requests financial difficulty assistance a second or subsequent time.
- Consider whether their procedures are adequate to avoid making unnecessary or inappropriate requests for information that may be difficult or time consuming for customers to fulfil.
- Continue to identify areas where further improvements can be made.

## 1.2 Key findings

A summary of the CCMC's key findings are found in Table 1 below.

**Table 1: The CCMC's key findings**

Area of assessment	Key findings
<p>Access to information about financial difficulty assistance (code clauses 28.10 &amp; 28.5)</p>	<ul style="list-style-type: none"> <li>• Banks use a range of channels to provide information to customers about financial difficulty assistance.</li> <li>• Banks' websites are a good source of information, however in a small number of cases, locating this information was not straightforward.</li> <li>• Most bank branches provide access to appropriate information and guidance to customers who may be experiencing financial difficulty.</li> <li>• Six small business representatives informed the CCMC that knowledge of the financial difficulty assistance available from banks is low among small businesses.</li> </ul>
<p>Methods to identify customers who may be experiencing financial difficulty (28.4, 28.11 &amp; 9 - training)</p>	<ul style="list-style-type: none"> <li>• Banks have a range of methods to identify customers who may be experiencing financial difficulty.</li> <li>• For most banks, training is available to staff to assist them to identify triggers from conversations with customers.</li> </ul>
<p>Banks' processes and procedures to assist customers to overcome their financial difficulties &amp; banks' engagement with customers requesting financial difficulty assistance more than once (28.2)</p>	<ul style="list-style-type: none"> <li>• Requests for assistance are assessed on a case-by-case basis.</li> <li>• Generally the process for dealing with subsequent requests for assistance is the same as for dealing with initial requests.</li> <li>• Banks review a customer's profile when assessing an application to identify whether an individual customer has requested assistance more than once.</li> <li>• Data provided by some banks suggests a significant proportion of customers in financial difficulty (&gt;30%) seek subsequent assistance.</li> </ul>



Area of assessment	Key findings
	<ul style="list-style-type: none"> <li>• Customers who request assistance for themselves directly may not receive the same outcome as those who are represented by a consumer advocate.</li> <li>• Providing short-term assistance initially may provide customers with time to recover their situation or prepare for a longer-term solution.</li> <li>• Banks should consider the appropriateness of their approaches when dealing with customers experiencing more challenging circumstances, such as mental health issues and family violence.</li> </ul>
Requests for information to support a request for financial difficulty (28.6)	<ul style="list-style-type: none"> <li>• Most requests for information to support applications for financial difficulty assistance are appropriate and consistent across the industry.</li> <li>• Some requests for information to support applications for financial difficulty assistance may be inappropriate or difficult for consumers to satisfy, especially where a customer is experiencing illness, family violence, mental health issues or where the request may impose significant costs on the customer (for example for small businesses).</li> </ul>
Suspension of debt collection activities when considering applications for financial difficulty assistance (32.1 - debt collection)	<ul style="list-style-type: none"> <li>• Banks confirmed that they have processes in place to suspend debt collection activity on a customer's account while that customer's request for financial difficulty assistance is being considered.</li> </ul>
Monitoring of code obligations to train staff and act fairly and reasonably towards customers in a consistent and ethical manner (3.2 - key commitments & 28.11)	<ul style="list-style-type: none"> <li>• Banks undertake a range of monitoring activities to ensure compliance with the financial difficulty and key commitment obligations under the Code.</li> </ul>
Availability of copies of the Code (11)	<ul style="list-style-type: none"> <li>• Copies of the Code are available on all bank websites, however, they were not readily visible or available in all bank branches visited by the CCMC.</li> </ul>

### 1.3 Recommendations

The CCMC has made a number of recommendations to banks on what it considers to be good industry practice and to assist with improved compliance with the Code, which can be found in Table 2 below.

**Table 2: The CCMC's recommendations to banks**

#### Access to information about financial difficulty assistance

- R1** Ensure that information about financial difficulty assistance is prominent on bank website home pages and is readily found using obvious search terms.
- 
- R2** Ensure that information is made readily available on websites about:
- the bank's specialised financial difficulty team and how to contact it
  - the types of arrangements which may be available
  - the types of documentation that a customer may need to provide to support an application
  - a customer's rights under legislation and the Code, including relevant timeframes
  - internal and external dispute resolution in the event that a customer is not satisfied with the financial difficulty assistance offered
  - special relief packages on offer, such as emergency support for customers and communities following a natural disaster, and
  - other sources of information, such as the *Doing It Tough* and Financial Counselling Australia websites.
- 
- R3** Consider the effective delivery of information regarding financial difficulty assistance via new technologies such as mobile phone applications and ensure that a customer who interacts with a bank primarily through such technologies has equivalent access to financial difficulty information.
- 
- R4** Enhance the availability of brochures and the display of posters throughout banks' branch networks.
- 
- R5** Ensure staff are able to provide at least basic information regarding financial difficulty assistance or know where to refer customers when enquiries are made within a branch, particularly where only one branch staff member is able or permitted to discuss such matters with a customer.

#### Methods to identify customers who may be experiencing financial difficulty

- R6** Ensure frontline staff are trained to identify common causes of financial difficulty from conversations with customers as early as possible. Staff should also be trained so that they have an adequate knowledge of the provisions of the Code, including the financial difficulty obligations, and can discharge their functions in compliance with the Code.
- 
- R7** Monitor the effectiveness of all methods for identifying customers who may be in difficulty and improve processes where they are not successful.

#### Assisting and engaging customers in financial difficulty & those requesting assistance more than once

- R8** As part of internal monitoring processes, capture and analyse data regarding which customers request assistance more than once and complaints related to financial difficulty assistance.

**R9** Ensure that any assistance offered to customers is appropriate to their circumstances and that a longer-term offering is considered where it is evident that a short term solution will not contribute to the customer overcoming their financial difficulty.

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**R10** Ensure that the outcomes of requests for financial difficulty assistance are effective for both those made by consumers alone and those made with the assistance of a consumer advocate. This can partly be achieved by using simple language in correspondence with customers and considering the communication needs of individual customers.

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**R11** Banks should have staff who are trained to deal with customers who are experiencing particularly sensitive circumstances, such as mental health issues and family violence. All staff should be trained to refer relevant cases to these staff members.

#### Requests for information

**R12** Banks should be flexible in their requirements for information to support a request for financial difficulty assistance, particularly where they are aware a customer is experiencing illness, family violence, mental health issues, or where the request may impose significant costs on the customer (for example for small businesses).

#### Suspension of debt collection activities

**R13** Monitor processes for the suspension of debt collection activities when considering applications for financial difficulty assistance to ensure they are adhered to, addressing any deficiencies in practice or staff knowledge.

#### Staff training and acting fairly and reasonably towards customers

**R14** Continue to monitor compliance with the Code to support the ongoing improvement of standards of practice and service when dealing with customers experiencing financial difficulty.

#### Copies of the Code

**R15** Review the availability of the Code to ensure that it is accessible in all bank branches.

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In addition to making these recommendations, the CCMC will:

- Develop a Guidance Note related to financial difficulty to ensure stakeholders are aware of the CCMC's likely approach to financial difficulty matters.
- Continue to monitor banks' compliance with the financial difficulty obligations under the Code through its investigations into alleged code breaches and its Annual Compliance Statement program.

## 2. INTRODUCTION

### 2.1 Why did the CCMC undertake the inquiry?

The CCMC conducted an inquiry into how effectively banks comply with their financial difficulty obligations to individual and small business customers under clause 28 the Code.

In its *2014–15 Annual Work Plan*<sup>2</sup>, the CCMC identified financial difficulty as a key area of focus. The inquiry was conducted:

- To verify information received from banks in their Annual Compliance Statements<sup>3</sup> to the CCMC that they have effectively transitioned to the revised financial difficulty obligations under clause 28 of the 2013 version of the Code.
- In response to feedback from stakeholders that financial difficulty remains one of the most significant and sensitive areas of engagement between banks and their customers.
- As a result of the volume of allegations made by consumers to the CCMC that banks had breached their financial difficulty code obligations and the number of breaches of these obligations self-reported by banks in recent Annual Compliance Statement programs.
- As financial difficulty remains one of the primary areas of disputes lodged with external dispute resolution schemes, such as the scheme provided by the Financial Ombudsman Service (FOS) Australia.

The inquiry was conducted between April and September 2015. Further information about the background to the inquiry is located in Appendix 2.

### 2.2 What was the CCMC's objective?

The objective of this inquiry was to assess whether banks:

- Provide appropriate and accessible information for customers experiencing financial difficulty on their websites and by other means.
- Have adequate methods to identify customers who may be experiencing financial difficulty.
- Have appropriate processes and procedures in place to assist both individual customers and small businesses to overcome their financial difficulties with credit facilities.
- Engage effectively with customers who request financial difficulty assistance more than once.
- Request only relevant and appropriate information to support a request for financial difficulty assistance.
- Have effectively trained staff on the obligations within the Code and meet their key commitment to act fairly and reasonably towards customers in a consistent and ethical manner in meeting their obligations under clause 28.

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<sup>2</sup> The full work plan is available at [www.ccmc.org.au/2014/07/23/ccmc-work-plan-2014-to-2017/](http://www.ccmc.org.au/2014/07/23/ccmc-work-plan-2014-to-2017/)

<sup>3</sup> The Annual Compliance Statement program allows banks to self-report to the CCMC on areas of good practice as well as non-compliance to highlight areas for priority attention or follow up and identify any significant breaches and systemic failures in meeting their Code obligations.

The CCMC sought to benchmark current industry practice in this area and identify both good practice and less effective approaches.

### 2.3 What does ‘financial difficulty’ mean?

The CCMC notes that in the absence of a specific definition within the Code, the term ‘financial difficulty’ within clause 28 should be interpreted in a manner consistent with its ordinary meaning and its common use within the financial services sector. In this regard the CCMC believes the guidance provided by FOS and the Australian Bankers’ Association (the ABA) and included in Appendix 2 should be noted.

Accordingly, for the purposes of its monitoring activities, the CCMC provides banks with the following definition for financial difficulty:

*“An inability to meet obligations under a credit facility due to an unexpected change in circumstances such as illness, unemployment or other reasonable cause. It may require assistance such as a short term variation to a customer’s repayment obligations but is unlikely to include overlooked or late payments, in the absence of evidence that the consumer is unlikely to be able to pay.”*

### 2.4 What are the code obligations?

Clause 28 of the 2013 version of the Code introduced enhanced obligations for banks towards individual customers and small businesses<sup>4</sup> who are experiencing financial difficulties with their credit facilities. Certain obligations under clause 28 were not considered as part of this inquiry as they are consistent with other legislation and regulation or questions directly related to these obligations were asked in the 2013–14 CCMC Annual Compliance Statement.

There are also related obligations under:

- Clause 32 of the Code – debt collection, where banks have agreed not to assign a debt while considering an application for financial difficulty assistance under clause 28.
- Clause 3.2<sup>5</sup> – banks’ key commitment to act fairly and reasonably towards customers in a consistent and ethical manner.
- Clause 9 – staff training and competency and clause 11 – availability of copies of the Code.

The financial difficulty obligations are listed in full under Appendix 1 and are summarised throughout this report.

### 2.5 What laws / guidelines apply?

In addition to the code obligations, there are numerous laws and regulatory guidance that apply to the handling of financial difficulty matters, including:

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<sup>4</sup> Small business is defined under the Code.

<sup>5</sup> Code clause 36(b)iii states that the CCMC’s compliance monitoring functions and powers do not extend to clause 3 of the Code unless a breach of clause 3 is also a breach of another provision of the Code.

- The National Credit Code<sup>6</sup>, which is a Schedule to the *National Consumer Credit Protection Act 2009* (NCCP).
- The Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission's (ACCC) *Debt Collection Guideline*.<sup>7</sup>
- ASIC Regulatory Guide 165<sup>8</sup> regarding internal and external dispute resolution.

Further information regarding these can be found on ASIC's website<sup>9</sup> and ASIC's *Moneysmart* website.<sup>10</sup>

In June 2013, the ABA released an industry guideline, which it has encouraged banks to incorporate into their programs for dealing with customers experiencing financial difficulty. This guideline<sup>11</sup> was updated in March 2015, and the ABA has confirmed that it provides banks with guidance on how they should meet their code obligations.

Since April 2013, FOS has released four documents outlining its approach<sup>12</sup> to financial difficulty.

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<sup>6</sup> [www.asic.gov.au/regulatory-resources/credit/credit-general-conduct-obligations/national-credit-code/](http://www.asic.gov.au/regulatory-resources/credit/credit-general-conduct-obligations/national-credit-code/)

<sup>7</sup> [www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors](http://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors)

<sup>8</sup> <http://download.asic.gov.au/media/3285121/rg165-published-2-july-2015.pdf>

<sup>9</sup> [www.asic.gov.au](http://www.asic.gov.au)

<sup>10</sup> <https://www.moneysmart.gov.au/borrowing-and-credit/consumer-credit-regulation>

<sup>11</sup> [www.bankers.asn.au/Media/Media-Releases/Media-release-2015/New-guidance-to-enhance-support-for-people-in-financial-hardship](http://www.bankers.asn.au/Media/Media-Releases/Media-release-2015/New-guidance-to-enhance-support-for-people-in-financial-hardship)

<sup>12</sup> [www.fos.org.au/publications/our-approach/the-fos-approach-to-financial-difficulty/](http://www.fos.org.au/publications/our-approach/the-fos-approach-to-financial-difficulty/)

## 3. METHODOLOGY

### 3.1 Reviews of code-subscribing banks' websites and branch visits

#### Website reviews

The CCMC reviewed 22 websites belonging to the various divisions and brands of the 13 banking groups which subscribe to the Code. This consisted of a desk-top review of:

- the information available to customers on banks' full websites based on the criteria outlined in Appendix 6, and
- whether there were links or contact information related to financial difficult assistance on mobile versions of these websites.

#### Branch visits

The CCMC visited a sample of 44 branches across the 11 banking groups that have a branch network to identify what information was available for customers about financial difficulty assistance. Two banking groups were excluded from this part of the inquiry as they provide online services only.

The distribution of the sample for the visits to each bank was based on the size of the bank<sup>13</sup> and the number of requests for assistance that the bank reported in the CCMC's 2013–14 Annual Compliance Statement. The visits were conducted throughout April in Melbourne and Brisbane.

### 3.2 Questionnaires to code-subscribing banks

The CCMC distributed a questionnaire to all banks to complete. This questionnaire covered the objectives outlined in Section 2.2 and a copy is provided in Appendix 3.

### 3.3 Engagement with consumer advocates and small business representatives

The CCMC consulted with financial counselling groups, community legal centres and small business representatives via a survey administered during April 2015 to gain insight into the experiences of individual and small business customers when seeking financial difficulty assistance.

The CCMC received 75 responses, including:

- 55 from financial counsellors
- seven from community legal centres
- seven from staff at other organisations such as family services and welfare agencies, and
- six from representatives of small businesses.

Copies of the survey instruments are included at Appendices 4 and 5.

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<sup>13</sup> Using the Australian Prudential Regulation Authority's monthly banking statistics for February 2015: [www.apra.gov.au/adi/publications/pages/monthly-banking-statistics.aspx](http://www.apra.gov.au/adi/publications/pages/monthly-banking-statistics.aspx)

### **3.4 Analysis and assessment of the data**

The CCMC collated, analysed and assessed the information gathered as part of the inquiry and considered other available information that could provide it with insights into matters related to financial difficulty. All information was assessed to establish:

- Whether code-subscribing banks have appropriate processes and procedures to comply with clause 28 of the Code.
- Whether these processes and procedures are being applied in practice.
- Examples of good industry practice.
- A broader understanding of trends and issues regarding compliance with the financial difficulty obligations within the Code.

### **3.5 Consultation and reporting**

The CCMC discussed the key findings arising from the inquiry with all participants and reported individual results to each code-subscribing bank. These results included benchmarked performance and comparative data analysis.



## 4. KEY FINDINGS AND RECOMMENDATIONS

### 4.1 Do banks provide appropriate and accessible information for customers experiencing financial difficulty?

Many consumers now rely on the internet and web-based material as an essential source of information. Others have 'moved beyond' the Internet and rely significantly on other technology to engage with their bank, in particular smartphone applications. For those customers who do not have access to the internet, it is important that information can be provided by other means.

#### What are the code obligations?

Under clause 28.10 of the Code, banks have agreed to make information about their processes for dealing with customers in financial difficulty available on their websites and in another format if a customer does not have access to the bank's website.

Clause 28.5, encourages a customer who considers they are, or expect to be, experiencing financial difficulties to make contact with their bank.

The ABA industry guideline<sup>14</sup> provides practical guidance on what banks can do to meet their obligations under the Code when dealing with customers who may be experiencing financial difficulty and promotes best practice across the banking industry.

This guideline states that banks should provide information on their websites that is suitable, prominent, easily identifiable, and accessible and available directly from the homepage, which includes at a minimum:

- basic facts about financial difficulty
- an explanation about the bank's approach to financial difficulty, and
- information about the availability of financial difficulty assistance and how to get it.

It also states that banks will ensure this information is available at branches including through displays such as industry posters, counter cards and brochures, to raise awareness about the availability of financial difficulty assistance and provide contact details for the bank's dedicated financial difficulty team.

#### What did the CCMC do?

The CCMC assessed whether:

- Banks provide appropriate and accessible information for customers experiencing financial difficulty on their websites and by other means, including branches.
- Appropriate and accessible information is available to customers so that they can contact the bank.

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<sup>14</sup> [www.bankers.asn.au/ArticleDocuments/113/Financial\\_Hardship\\_Guidelines\\_March\\_2015\\_Final.pdf.aspx](http://www.bankers.asn.au/ArticleDocuments/113/Financial_Hardship_Guidelines_March_2015_Final.pdf.aspx)

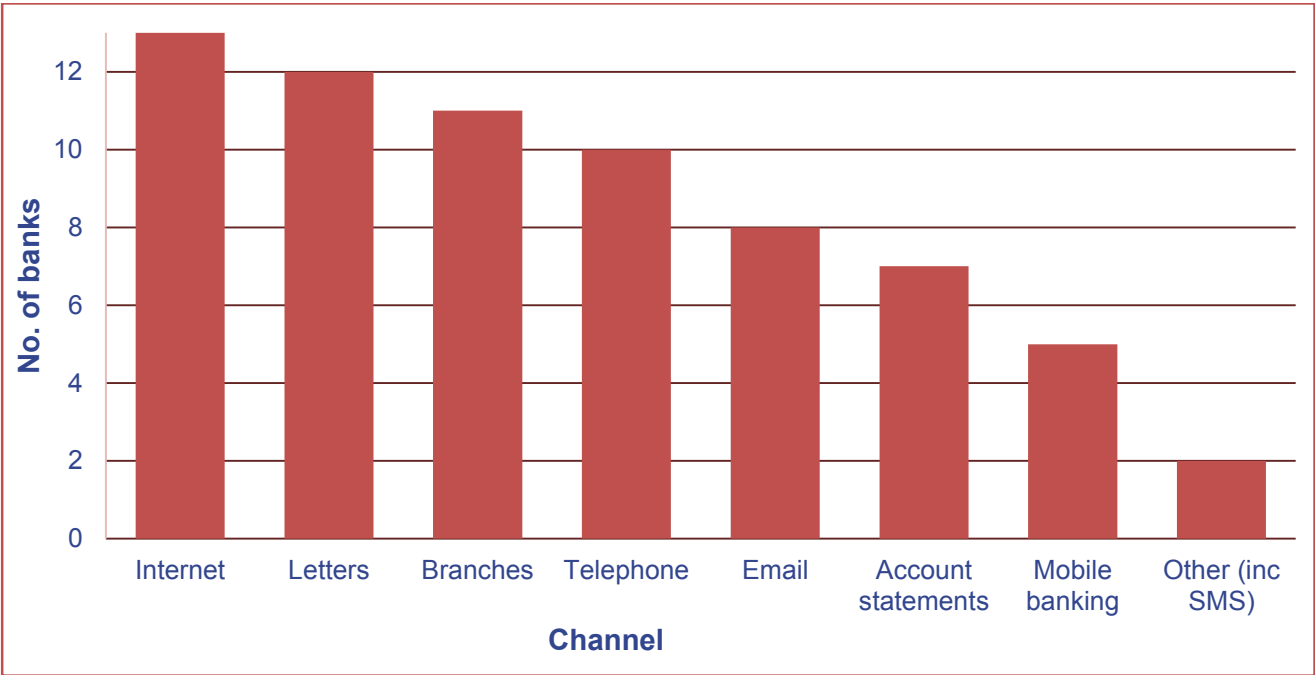
**What did the CCMC find?**

**Banks use a range of channels to provide information to customers about financial difficulty assistance**

In response to the questionnaire distributed to the 13 banking groups, the banks have indicated to the CCMC that the internet, letters, branches and call centres are the most common channels for providing information regarding financial difficulty assistance to customers.

The breakdown of the channels banks use to inform customers that they can contact the bank if they are experiencing financial difficulty is displayed in Chart 1 below.

**Chart 1: Channels used by banks to inform customers about financial difficulty assistance**



The CCMC has found that for the five banks which referred to mobile banking in their response, information regarding financial difficulty assistance tends to be available through links to mobile friendly versions of websites rather than being embedded within an application.

Banks reported they use these channels to provide information to customers about how they can contact the bank if they are experiencing financial difficulty and banks’ processes for dealing with customers in financial difficulty (see Table 3 below).

**Table 3: Information provided by banks across various channels**

Channel	Information provided
Websites	General information, guides, FAQs, application forms and information advising customers to contact the bank when in financial difficulty.
Product disclosure documents and brochures	General information – available online or in branches.

<b>Account statements</b>	Suggestions to contact the bank if the customer is having difficulty making payments.
<b>Default notices / collections letters</b>	Advising that financial difficulty assistance is available.
<b>Branches / call centres</b>	Facilitate phone calls from a branch to the dedicated financial difficulty team; staff in branches and call centres who are trained to identify trigger statements and refer customers to the dedicated financial difficulty team.
<b>SMS</b>	Messages to customers in areas affected by natural disasters.

### **Banks' websites are a good source of information for consumers about financial difficulty assistance**

The CCMC reviewed 22 full websites and found that:

- All of the websites have a link to information regarding financial difficulty assistance available on the homepage.
- The information available to customers ranged from simply providing contact details and a brief explanation of what financial difficulty means to those which had comprehensive 'Frequently Asked Questions', an outline of a customer's legal rights and an indication of documents a customer may need to provide to support an application for assistance.
- 21 websites provided links to further relevant information including the ABA's *Doing It Tough* website and Financial Counselling Australia's website.
- 20 websites provided phone numbers for specialised financial difficulty teams, while one bank stated a customer should refer to their branch manager and one provided the generic customer service phone number.
- 20 websites provided details of methods of contacting their bank including postal address, email address or online form submission.
- 19 websites provided information about the types of assistance which may be available.

However, the CCMC also found that:

- On some websites the link to financial difficulty information from the homepage was less prominent than on others.
- While all of the websites have search functionality, for five, basic search terms did not always produce results that direct the user to relevant information.
- On five websites, locating information about internal and external dispute resolution (IDR and EDR) – in the event that financial difficulty assistance was not provided – was not straightforward.
- Across the industry there is only limited information about financial difficulty assistance available in terms and conditions and financial services guides. Further, these documents are also not always easy to locate on websites.

In addition, for the 22 full websites reviewed, there are 17 versions of these sites that are specifically adapted for use on mobile devices. 12 of these contain links or contact

information related to financial difficult assistance. The others provide access to the full website which, as noted above, all have homepage links to financial difficulty information.

**Most bank branches provide appropriate information and guidance to customers who may be experiencing financial difficulty**

Staff in 34 of the 44 branches visited by the CCMC stated that they would discuss a customer’s circumstances with them privately, then call the bank’s specialised financial difficulty team and assist a customer with the call where appropriate. The CCMC considers this to be good practice.

The CCMC notes that staff in 35 branches confirmed it was rare to find customers requesting financial difficulty assistance in a branch and websites may now be the most common source of information.

However, in eight cases, staff did not appear to be aware of the relevant bank process or the only staff member who could assist the customer was not available at the time of the visit. In these instances, therefore, a customer may not be able to access information about what steps to take next regarding their situation from the branch. This lack of awareness may be non-compliant with clause 9 of the Code regarding staff training and competency.

This issue may be exacerbated by the absence of posters and leaflets/brochures promoting financial difficulty assistance in most branches. While the ABA industry guideline states that the provision of such materials within branches is good practice, only three branches of one bank had posters and 17 branches overall had brochures.

**Knowledge of financial difficulty assistance available is low among small businesses, according to the six survey responses received by the CCMC**

The CCMC acknowledges the limited number of responses to its survey from small business representatives. However, the six responses received suggest there may be a lack of knowledge among small business about their right to financial difficulty assistance under the Code.

**Conclusions and recommendations**

As noted by consumer advocates and acknowledged by the ABA in its industry guideline, it should be recognised that customers may be reluctant to seek assistance due to a number of factors, including embarrassment, denial, or fear. With this in mind, the CCMC considers it is good practice for banks to ensure that access to information about financial difficulty assistance is straightforward for all customers.

As such the CCMC makes the following recommendations to banks:

Recommendation	Rationale
<b>R1</b> Ensure that information about financial difficulty assistance is prominent on bank website home pages and is readily found using obvious search terms.	This ensures that customers in financial difficulty can easily find the relevant information.
<b>R2</b> Ensure that information is made readily available on websites about: <ul style="list-style-type: none"><li>the bank’s specialised financial difficulty team and how to contact it</li></ul>	The CCMC views the provision of such information as good practice and largely consistent with the ABA’s industry guideline.

- the types of arrangements which may be available
- the types of documentation that a customer may need to provide to support an application
- a customer's rights under legislation and the Code, including relevant timeframes
- internal and external dispute resolution in the event that a customer is not satisfied with the financial difficulty assistance offered
- special relief packages on offer, such as emergency support for customers and communities following a natural disaster, and
- other sources of information, such as the *Doing It Tough* and Financial Counselling Australia websites.

<p><b>R3</b> Consider the effective delivery of information regarding financial difficulty assistance via new technologies such as mobile phone applications and ensure that a customer who interacts with a bank primarily through such technologies has equivalent access to financial difficulty information.</p>	<p>In light of the changing use of innovative mobile technology, banks should consider how important information is effectively delivered to customers.</p>
<p><b>R4</b> Enhance the availability of brochures and the display of posters throughout banks' branch networks.</p>	<p>This is good practice, ensuring a consistent message is delivered to customers in financial difficulty. It is also consistent with the ABA's industry guideline.</p>
<p><b>R5</b> Ensure staff are able to provide at least basic information regarding financial difficulty assistance or know where to refer customers when enquiries are made within a branch, particularly where only one branch staff member is able or permitted to discuss such matters with a customer.</p>	<p>This is consistent with clause 9 of the Code regarding staff training and competency.</p>

## 4.2 Do banks have adequate methods to identify customers who may be experiencing financial difficulty?

Early and effective identification of customers in financial difficulty may lead to more effective outcomes for those customers.

In addition to the obligations of the Code, the ABA industry guideline states that training should be provided to frontline staff regarding referring customers to the bank's dedicated financial difficulty team and that the training should include tips on identifying customers who may benefit from financial difficulty assistance.

## What are the code obligations?

Under clause 28.4, if the bank identifies that the customer may be experiencing financial difficulties, the bank may decide to contact the customer and discuss available assistance.

Under clause 28.11, banks must ensure that relevant staff who are responsible for dealing with customers about their financial difficulties are trained in the provisions of the Code and the National Credit Code.

Under clause 9, banks must ensure that staff are trained to work competently and efficiently in compliance with the Code and have adequate knowledge of the provisions of the Code and its application.

## What did the CCMC do?

The CCMC sought to assess:

- How banks identify customers who may be experiencing financial difficulty and whether processes are appropriate.
- Whether banks effectively train staff to assist adequately with this identification.

## What did the CCMC find?

### **Banks have a range of methods to identify customers who may be experiencing financial difficulty**

The main methods banks use to identify customers who may be experiencing financial difficulty are:

- when customers indicate they are experiencing financial difficulty themselves
- automated reports of accounts overdrawn or credit facilities in arrears
- staff identifying triggers from their conversations with customers over the phone or face to face, including collections calls when establishing why the customer has missed a payment
- from reviews of customer complaints, and
- from monitoring external events such as natural disasters.

The CCMC considers that if these methods are employed effectively and consistently, banks are well placed to identify customers who may be experiencing financial difficulty.

### **Staff are trained to identify triggers from conversations with customers**

A range of training materials were provided to the CCMC by the banks. Banks also indicated that some training was applicable to all frontline staff, while more specific training may be provided to specialist financial difficulty teams and collections staff.

Most of the banks have demonstrated that they conduct appropriate training to assist staff to identify triggers for financial difficulty from conversations with customers.

Training is delivered to staff through a broad range of channels including:

- operating procedures
- face to face / workshops
- online learning facilities
- through the use of call scripts, and
- by ongoing coaching and conducting ad hoc performance reviews.

One bank noted training regarding financial difficulty is mandatory for all staff before having conversations with customers, including undertaking an accreditation test. The CCMC considers this to be good practice.

Most of the examples of training provided indicated that staff are encouraged to listen 'actively' to customers and recognise trigger statements which may relate to the following areas:

- addiction
- bereavement
- medical conditions
- reduced income / unemployment
- business downturns
- natural disasters
- over-commitment regarding finances, and
- relationship issues such as separation or divorce.

Depending on their role, staff are then encouraged to contact the financial difficulty team within the bank.

## Recommendations

The CCMC encourages banks to:

Recommendation	Rationale
<b>R6</b> Ensure frontline staff are trained to identify common causes of financial difficulty from conversations with customers as early as possible. Staff should also be trained so that they have an adequate knowledge of the provisions of the Code, including the financial difficulty obligations, and can discharge their functions in compliance with the Code.	Early identification of financial difficulty is more likely to assist the customer in meeting their financial obligations and more effectively resolve their situation before it deteriorates any further.
<b>R7</b> Monitor the effectiveness of all methods for identifying customers experiencing financial difficulty and improve processes where they are not successful.	Improved processes will result in better outcomes for customers.

### **4.3 Do banks have appropriate processes and procedures to assist customers to overcome their financial difficulties?**

In the CCMC's view, the financial difficulty obligations within the Code require the banks to take a positive and active approach to 'working with' a customer to overcome their financial difficulties and imply engaging in genuine dialogue.

In addition, FOS's approach<sup>15</sup> notes that subsequent requests for assistance may happen because the original assistance was not realistic or robust enough for the circumstances, or that an anticipated positive change in circumstances has not eventuated. FOS considers that banks should review any subsequent requests for assistance with fresh eyes, independently of any previous agreements.

#### **What are the code obligations?**

Under clause 28.2 of the Code, with customers' agreement and cooperation, banks will try to help them overcome their financial difficulties with any credit facility they have with the bank by, for example, working with a customer to develop a repayment plan.

#### **What did the CCMC do?**

The CCMC assessed whether:

- Banks have appropriate processes and procedures in place to assist both individual customers and small businesses to overcome their financial difficulties with credit facilities.
- Banks engage effectively with customers who request financial difficulty assistance more than once.

In order to make this assessment, the CCMC asked banks several questions about financial difficulty applications where a customer has requested assistance more than once. The CCMC also asked consumer advocates and small business representatives about their experiences where customers who requested assistance more than once had outcomes that were and were not fair, reasonable and/ or appropriate.

#### **What did the CCMC find?**

**Requests for assistance are assessed on a case-by-case basis, and generally the process for dealing with subsequent requests for assistance is the same as for dealing with initial requests**

The banks reported that all requests for financial difficulty assistance are assessed on a case-by-case basis depending on the individual circumstances of the customer. The same procedure will be followed to assess the customer's subsequent request for assistance as an initial request. As part of this process banks will consider if anything has changed for the customer since the first assistance was provided and what is likely to change in the future.

This is consistent with the CCMC's view of banks engaging in a positive and active way and with the guidance published by the ABA and FOS.

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<sup>15</sup> <https://www.fos.org.au/publications/our-approach/the-fos-approach-to-financial-difficulty/>



Ten banks confirmed that, in the case of second or subsequent requests, the information customers previously supplied would be updated and/or they would seek additional information, depending on the lapse of time and whether the customer's situation had materially changed.

Banks listed examples of the types of assistance offered to every customer when making a request for assistance, which include:

- deferred payments
- reduced payments
- moratoriums or postponement of repayments
- capitalisation of arrears
- interest adjustments
- interest and fee waivers
- settlements, and
- debt waivers (full & partial).

Banks also confirmed that the points at which they determine they can no longer provide assistance would be on a case-by-case basis. Generally, assistance would not be provided where the bank believes it is unlikely to have a positive long-term effect on the customer's circumstances. Examples provided by banks include where:

- a mutually beneficial solution cannot be agreed
- a customer has not provided appropriate information for assessment
- a customer has failed to meet approved hardship agreements
- a customer is no longer contactable
- a customer has sufficient financial capacity to meet the minimum monthly repayment but will not commit to a payment
- the bank does not think there is genuine hardship, and
- there is evidence that the customer's circumstances are not going to improve in the future.

Consumer advocates noted in their responses to the survey that elements of good practice by banks include:

- being proactive and demonstrating a willingness to assist
- being empathetic and showing genuine consideration for the customer's circumstances
- providing prompt responses for a timely resolution, and
- demonstrating more consideration for providing long-term solutions for customers.

Several consumer advocates also noted the improvements that banks have made in recent years when dealing with customers experiencing financial difficulty and commented that the debt waiver programs initiated by some banks have been particularly successful.

**Banks have adopted a consistent method of identification of individual customers requesting assistance more than once**

Banks identify whether a customer has had more than one repayment arrangement or has made more than one request for assistance consistently across the industry. Details of previous requests and outcomes are manually recorded in banks' systems under the customer's profile as file notes and system codes or field entries. When the customer's request for assistance is assessed, that assessment includes a review of the customer's profile. Staff members review this information on a case-by-case basis.

**A significant proportion of customers request assistance more than once, however, not all banks can quantify this**

The CCMC requested banks to report on the:

- Number of new requests for financial difficulty assistance received between 1 October and 31 December 2014 from customers who had previously been granted assistance.
- Number of those requests which resulted in further assistance being provided.

Table 4 outlines the total data provided along with the total numbers of requests for financial difficulty assistance reported by banks under the 2014–15 Annual Compliance Statement (ACS) program. The total industry figure for requests for assistance for 2014–15 was 296,071 over a 12-month period.

During the sample period of October to December 2014, 10 banks reported that there were 17,122 requests for assistance, where assistance had previously been provided. Three banks were unable to extract the data requested from their systems.

The inconsistencies in reporting make producing an accurate figure difficult. However, the data provided suggests a considerable proportion of customers (more than a third) request further assistance from their bank with their financial difficulties.

**Table 4: Data regarding the number of customers requesting assistance more than once**

Total no. of requests for assistance in 2014–15 <sup>16</sup>	12-month reporting period	296,071
Total no. of requests for assistance granted in 2014–15		207,714
% of 2014–15 requests for assistance granted		70%
No. of requests for assistance, where assistance had previously been granted for the customer <sup>17</sup>	3-month sample reporting period	17,122
No. of these subsequent requests for assistance which were granted		12,547
% of subsequent requests where assistance was granted		73%

<sup>16</sup> Covers 13 code-subscribing banking groups.

<sup>17</sup> Covers the 10 code-subscribing banking groups which were able to provide the data.

Variance in % of granted requests between 2014–15 total and sample period for subsequent requests	+3%
% of 2014–15 requests for assistance which were subsequent requests from customers that had been previously granted assistance on a pro rata basis	51%
Subsequent requests for assistance as % of total 2014–15 requests on a pro rata basis	33%

### **Customers who request assistance for themselves directly may not receive the same outcome as those who are represented by a consumer advocate**

Consumer advocates reported that a customer may not have received as good an outcome when they initially contacted the bank themselves. However, once a consumer advocate was acting on their behalf, and providing the same information, they were able to negotiate a better solution for the customer. This is consistent with a finding highlighted in the 2015 Financial Counselling Australia *Rank the Bank* report.<sup>18</sup>

Some consumer advocates who completed the survey stated that customers may feel intimidated by their bank or do not understand jargon used. Consumer advocates are, therefore, better placed to communicate with and explain issues to bank staff. This is likely to result in better outcomes for the customer.

### **Providing short-term assistance initially may provide customers with time to recover their situation or prepare for a longer-term solution**

Several consumer advocates noted that in their experience banks may provide short-term assistance in the first instance and then customers may request additional and longer-term assistance after this initial period of assistance has ended.

Having received short-term assistance initially from a bank, such as a three-month moratorium, a customer was then given the time for the situation to improve (e.g. finding employment) or provide further information for a longer-term solution.

When consumer advocates contacted the bank subsequently, they noted they were able to negotiate solutions for their clients including:

- Debt waivers or reductions for customers with long-term hardship including the elderly who may have no increasing income or no assets.
- Extended time to sell property.
- Longer-term arrangements (6 to 12 months) with no interest, fees and charges and a possibility for further assistance if employment was not secured.

<sup>18</sup> <http://www.financialcounsellingaustralia.org.au/getattachment/Corporate/News/Rank-the-Banks-Survey-Shows-Improvements-Across-th/Rank-the-Banks-2015-Final.pdf>

## Banks should consider the appropriateness of their approaches when dealing with customers experiencing more challenging circumstances

Consumer advocates noted some concerns about how banks deal with sensitive customer issues such as family violence and mental health. They also suggested banks could provide more training for staff in how to deal with these types of customer issues.

### Conclusions and recommendations

When assessing initial requests for assistance, the CCMC considers that banks may best help customers by thoroughly considering the most appropriate assistance for their circumstances.

While a three-month moratorium may be appropriate in many cases, it should not be a 'default' option and should only be offered where there is a likelihood that a customer will recover their position or when it is part of a longer-term offering. There is likely to be a range of engagement that a bank can undertake with a customer that may make best use of the initial provision of assistance.

The CCMC makes the following recommendations to banks:

Recommendation	Rationale
<b>R8</b> As part of internal monitoring processes, capture and analyse data regarding which customers request assistance more than once and complaints related to financial difficulty assistance.	This will assist banks to: <ul style="list-style-type: none"><li>• assess the effectiveness of assistance provided</li><li>• identify causes of customers failing to meet financial difficulty arrangements, and</li><li>• improve the process for providing assistance in the future.</li></ul>
<b>R9</b> Ensure that any assistance offered to customers is appropriate to their circumstances and that a longer-term offering is considered where it is evident that a short term solution will not contribute to the customer overcoming their financial difficulty.	While short term solutions will assist in many cases, they may not be appropriate for others. In some cases more challenging circumstances will mean that short term solutions will not be effective, resulting in prolonged difficulty for the customer. This analysis of a customer's circumstances can also result in more effective and efficient processes for banks.
<b>R10</b> Ensure that the outcomes of requests for financial difficulty assistance are effective for both those made by consumers alone and those made with the assistance of a consumer advocate. This can partly be achieved by using simple language in customer correspondence and considering the communication needs of individual customers.	Clause 3.2 of the Code requires banks to act fairly and reasonably towards a customer in a consistent and ethical manner. Effective outcomes for customers should be available, regardless of whether an advocate is involved in the process.
<b>R11</b> Banks should have staff who are trained to deal with customers who are experiencing particularly sensitive circumstances, such as	Effective and regular training will ensure customers deal with staff with the skills to provide an adaptable and sensitive service to

Recommendation	Rationale
mental health issues and family violence. All staff should be trained to refer relevant cases to these staff members.	customers whose circumstances may be unique and challenging.

#### 4.4 Do banks request only relevant and appropriate information to support a request for financial difficulty assistance?

FOS's approach<sup>19</sup> to requests for information states that requests made by the bank for information should not be so complex or large that it is overwhelming for the consumer.

The ABA industry guideline also states that banks recognise that the financial difficulty process should minimise the effort required from customers, and therefore, banks will minimise the amount of information requested, especially if this information is contained in, or can be derived from, other provided documentation.

#### What are the code obligations?

Under clause 28.6, banks will take into account the information available, including the information the customer provides about their financial situation, in determining whether or not they are able to provide assistance and the nature and extent of any assistance.

#### What did the CCMC do?

The CCMC sought to assess:

- The method and content of banks' requests for information to support a request for financial difficulty assistance.
- Whether banks request only relevant and appropriate information.

#### What did the CCMC find?

##### Most requests for information to support applications for financial difficulty assistance are appropriate and consistent across the industry

The banks reported that generally there is a similar base level of information requested for both individual and small business customers and across different types of credit facilities.

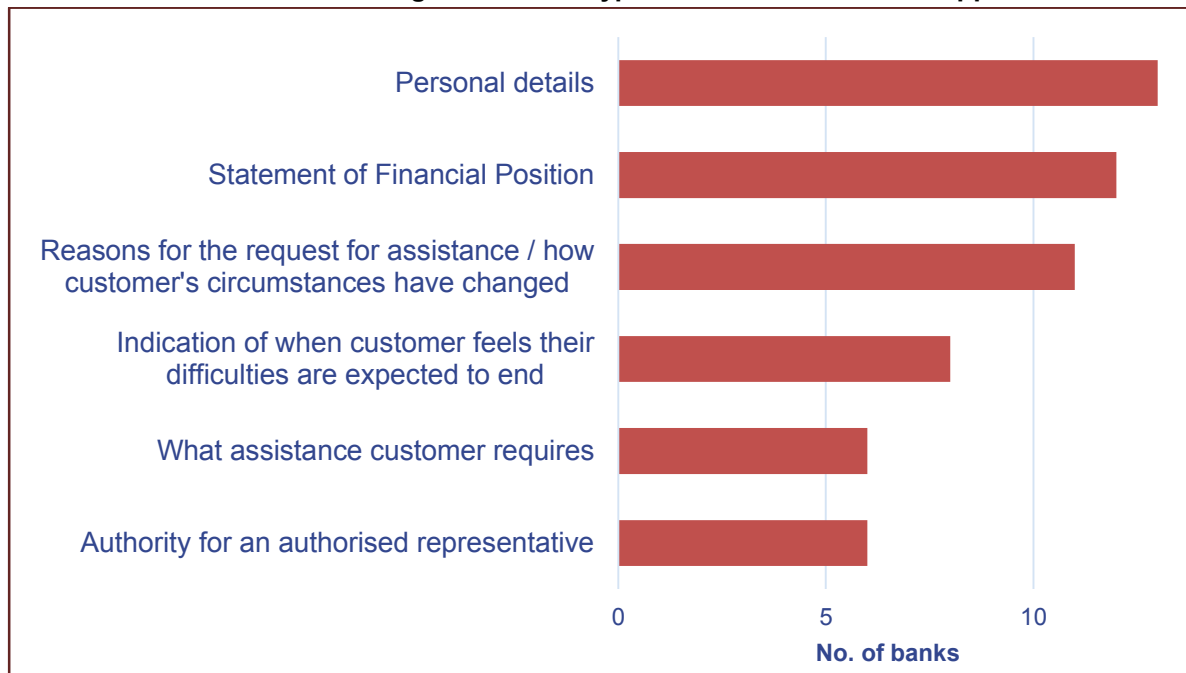
This consists of an application form which is broadly consistent across the banks. Chart 2 indicates the number of banks asking for different types of information on the application form.

Banks provide a range of options for submitting information including email, mail and in a branch, however only six banks confirmed customers can submit documentation online.

<sup>19</sup> <https://www.fos.org.au/publications/our-approach/the-fos-approach-to-financial-difficulty/>

Most banks confirmed that it is acceptable for a customer to provide information verbally over the phone, but noted that some supporting documents would always need to be provided.

**Chart 2: Number of banks asking for different types of information on the application form**



All banks confirmed they would take a holistic view of all the information they have available to them, including other accounts held at the bank, when assessing applications for assistance.

Most consumer advocates (80%) responding to the CCMC's survey found information requests from banks were usually appropriate.

### **Some requests for information to support applications for financial difficulty assistance may be inappropriate or difficult for consumers to satisfy**

Banks confirmed that they may request additional information (including medical documentation and Centrelink statements) on a case-by-case basis to support an application and when further assessment is required.

Many consumer advocates (51 out of 69) responded that there were particular requests for information that were difficult to satisfy or unnecessary, and of these:

- 21 advised that medical certificates and reports from GPs, specialists and any other health professionals can be difficult to provide.
- 13 confirmed that clients struggle to provide bank account statements and receipts of personal expenses such as bills and rent.
- Seven confirmed that clients that are subject to family violence and mental health issues have difficulties providing information.
- Seven confirmed that some clients struggle to provide a Statement of Financial Position.

Three banks noted that specific financial information may be requested from small business customers.

Respondents to the survey of small business representatives noted that it can be costly for small businesses to provide some of the requested information as they may need to employ the expertise of external consultants such as an accountant. It was also suggested that the timeframes to provide information can be too short.

One small business representative stated that those in the greatest difficulty have very little knowledge of their own financial position.

**Banks will follow-up with a customer when information is not provided within required timeframes**

The CCMC noted in its 2012–13 Annual Report that several banks had commented that they were experiencing some cases where customers were failing to provide further information to allow the bank to decide whether or not to provide assistance. These cases were subsequently being declined, based on a lack of information from the consumer.

Three banks confirmed they follow up after 21 days in line with the required timeframes under the National Credit Code and may rely only on the information available at that stage to make a decision about whether to provide assistance.

Other banks confirmed they would follow up within this timeframe including making courtesy calls after seven days. One bank noted that if the information was provided after the required timeframe and the request for assistance had been declined, they would reassess the application.

**Recommendations**

Recommendation	Rationale
<b>R12</b> Banks should be flexible in their requirements for information to support a request for financial difficulty assistance, particularly where they are aware a customer is experiencing illness, family violence, mental health issues, or where the request may impose significant costs on the customer (for example for small businesses).	Banks should consider the difficulties customers may face when requesting information to support an assistance request. A customer’s situation may mean that they are unable to provide information in the form requested by the bank. A flexible approach, identifying alternative documents, may result in the bank being able to make a decision on assistance sooner.

**4.5 Do banks suspend debt collection activities when considering applications for financial difficulty assistance?**

The suspension of debt collection activity is not only a requirement of the Code, but also of the debt collection guidelines published by ASIC and ACCC.

**What are the code obligations?**

Under clause 32.1, banks have agreed to comply with ACCC and ASIC’s *Debt Collection Guideline*. This guideline states that:

- Banks should not contact the debtor for the purpose of collection until a decision has been communicated regarding the application for financial hardship assistance (section 14(c)).
- When a payment arrangement is in place the debtor or their representative should not be contacted unless:
  - the debtor asks the bank to
  - the bank wishes to propose a genuine alternative arrangement to benefit the debtor, or
  - the debtor does not comply with the terms of the repayment arrangement (15(a)).
- Collection activity relating to a dispute that has been referred to an EDR scheme must be suspended while the scheme considers the dispute (24(c)).

**What did the CCMC do?**

The CCMC sought to assess whether banks' have procedures in place to suspend debt collection activities while a financial difficulty assistance request is being considered.

The CCMC asked banks to provide details of how they suspend debt collection activity on a customer’s account while that customer’s request for financial difficulty assistance is being considered.

**What did the CCMC find?**

**Banks confirmed that they have processes in place to suspend debt collection activity on a customer’s account while that customer’s request for financial difficulty assistance is being considered**

The majority of the banks indicated that they have a process where once the bank is aware of a request for assistance it manually makes a change to its systems. The system then suspends any recovery or collections activities throughout assessment of the request and during the agreed arrangement period, where appropriate.

One bank noted the process is purely manual for small business customers. Some smaller banks described a more manual process but confirmed that collections activities would be suspended in these circumstances.

**Recommendations**

While banks have indicated that processes are in place to suspend debt collection activities when a request for assistance has been received, the CCMC recommends that:

Recommendation	Rationale
<p><b>R13</b> Banks monitor processes for the suspension of debt collection activities when considering applications for financial difficulty assistance to ensure they are adhered to, addressing any deficiencies in practice or staff knowledge.</p>	<p>Processes which require manual input are of higher risk to the outcomes. Effective monitoring will ensure that any omissions will be identified and rectified.</p>



#### **4.6 Do banks effectively monitor that they are training staff on code obligations and meeting their key commitment to act fairly and reasonably towards customers?**

Identifying, self-reporting and remedying activity that is not compliant with the Code is critical for a successful self-regulatory framework. The CCMC expects a positive compliance culture and consistent and effective internal compliance monitoring processes and procedures.

##### **What are the code obligations?**

Under clause 3.2, banks will act fairly and reasonably towards customers in a consistent and ethical manner.

Under clause 28.11, banks will ensure that relevant staff who are responsible for dealing with customers about their financial difficulties are trained in the provisions of the Code and the National Credit Code, including the obligations to act fairly and reasonably and to comply with the law.

##### **What did the CCMC do?**

The CCMC sought to assess whether banks are:

- Complying with their key commitment to act fairly and reasonably towards customers in a consistent and ethical manner in meeting their financial difficulty obligations under clause 28 of the Code.
- Effectively training staff on the obligations within the Code.

To do this the CCMC asked banks:

- What monitoring they undertake to ensure compliance with clause 28 of the Code.
- How they monitor compliance with their key commitment to act fairly and reasonably towards customers in a consistent and ethical manner, when dealing with customers experiencing financial difficulty.
- About the nature and remediation of identified instances of non-compliance with financial difficulty code obligations since they reported to the CCMC through the 2013–14 Annual Compliance Statement program.

##### **What did the CCMC find?**

###### **Banks undertake a range of monitoring activities to ensure compliance with financial difficulty and key commitment obligations under the Code**

Across the industry, banks stated that a range of monitoring activities are conducted including:

- quality reviews of emails
- reviews by managers / business units assurance managers

- divisional compliance department reviews
- internal audits, and
- reviews of complaints data.

These banks use these monitoring activities to assess:

- whether staff are correctly identifying triggers from conversations
- if appropriate assistance is provided
- whether timeframes for responding to customers are being met, and
- overall processes and procedures.

Reports on outcomes of monitoring are provided to senior management / oversight committees.

Generally, central compliance teams, who are likely to have more of an overview of processes and issues, monitor banks' compliance with their key commitment to act fairly and reasonably towards customers.

Several banks stated that customer feedback and complaints (including Net Promoter Scores)<sup>20</sup> are considered when assessing fair and reasonable conduct, along with reviews against banks' own internal principles, values and codes of conduct.

One bank stated when it declines assistance for customers, these cases are all reviewed by senior staff within the financial difficulty department before being finalised.

Where compliance and performance issues are identified, generally feedback and coaching are provided to staff involved, which may include encouraging staff to comply with the fair and reasonable obligations under the Code.

### **Banks have self-identified several instances of non-compliance with the financial difficulty code obligations since the 2013–14 Annual Compliance Statement**

There were 217 breaches of the Code's financial difficulty provisions self-reported to the CCMC in 2014–15 compared to 146 in 2013–14.

The CCMC will report fully on banks compliance with code obligations in its 2014–15 Annual Report. However, banks have reported incidents of non-compliance for part of 2014–15 which include issues around:

- Adhering to the process for referring customers to the financial difficulty team – the process is being reviewed as part of the remediation.
- Responding to requests for financial difficulty assistance within the required timeframes under the National Credit Code (NCC) – staff are undergoing further training.
- Using an appropriate tone with customers – staff are undergoing further training.
- Advising customers of the NCC in accordance with clause 28.7 of the Code.

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<sup>20</sup> Net Promoter Scores measure the loyalty that exists between a company and its consumers.

## Recommendations

The CCMC recommends that:

Recommendation	Rationale
<b>R14</b> Banks continue to monitor compliance with the Code to support the continuing improvement of standards of practice and service when dealing with customers experiencing financial difficulty.	Effective monitoring and feedback will improve overall compliance with the Code.

### 4.7 Are copies of the Code readily available to customers?

#### What are the code obligations?

Under clause 11, banks will:

- display a copy of the Code in a readily visible manner in branches
- make the Code available on request, and
- publish the Code on the bank's website.

#### What did the CCMC do?

The Code is another source of information about an individual's rights to financial difficulty assistance and the processes a bank must follow. As such, the CCMC sought to assess whether banks comply with their code obligations by reviewing banks' websites and visiting a sample of bank branches.

#### What did the CCMC find?

##### Copies of the Code were not readily visible in all bank branches

A copy of the Code was on display in only 31 of the 44 branches the CCMC visited.

For the 13 branches where the Code was not on display:

- staff in eight branches confirmed it could be provided on request
- in two branches there was not an opportunity to ask for a copy,
- in two branches staff could not provide a copy of the Code when requested, and
- in one branch a copy of the 2004 version of the Code was provided.

The CCMC distributed the findings of the branch visits to the banks before 30 June 2015 and asked the banks to consider reporting breaches of clause 11 of the Code in the 2014–15 ACS, where appropriate.

**Copies of the Code are available on all bank websites**

A copy of the Code was available on all 22 websites reviewed as part of the inquiry.

**Recommendations**

The CCMC recommends that banks:

Recommendation	Rationale
<b>R15</b> Review the availability of the Code to ensure that it is accessible in all bank branches.	It is a requirement of the Code that a copy is on display in a branch and is available on request.

**5. FOLLOW UP**

The CCMC will:

- Develop a Guidance Note related to financial difficulty to ensure stakeholders are aware of the CCMC’s likely approach when it considers potential breaches of the ‘financial difficulty’ obligations under clause 28 of the Code. This will include the CCMC’s views on good industry practice, which illustrates how code obligations can be effectively applied in practice and may extend beyond the strict requirements of the Code in some cases.
- Continue to monitor banks’ compliance with the financial difficulty obligations under the Code through its investigations into alleged code breaches and its Annual Compliance Statement program. The CCMC may also consider conducting a follow up inquiry in the future.

## APPENDIX 1: Financial difficulty code obligations

Code obligations within the scope of the inquiry	
28	If <b>you</b> <sup>21</sup> are experiencing financial difficulties with your credit facility
28.1	This clause 28 applies to a credit facility <b>you</b> have with <b>us</b> <sup>22</sup> .
28.2	With <b>your</b> agreement and cooperation, <b>we</b> will try to help <b>you</b> overcome <b>your</b> financial difficulties with any credit facility <b>you</b> have with <b>us</b> . <b>We</b> could, for example, work with <b>you</b> to develop a repayment plan.
28.4	If, in the course of <b>our</b> personal dealings with <b>you</b> , <b>we</b> identify that <b>you</b> may be experiencing difficulties in meeting <b>your</b> repayments under the credit facility, <b>we</b> may decide to contact <b>you</b> and invite <b>you</b> to discuss <b>your</b> situation with <b>us</b> and the options available to assist <b>you</b> in meeting <b>your</b> obligations in these circumstances.
28.5	If, at any time <b>you</b> consider <b>you</b> are, or expect to be, experiencing difficulties in meeting <b>your</b> repayments to <b>us</b> , <b>you</b> should make contact with <b>us</b> as soon as possible to discuss <b>your</b> situation with <b>us</b> and the options available to assist <b>you</b> in meeting <b>your</b> obligations.
28.6	<b>We</b> will respond promptly (for example, within the timeframes prescribed by the <b>National Credit Code</b> , if it applies) to any requests for assistance from <b>you</b> , or <b>your</b> authorised representative, in relation to <b>your</b> financial difficulties with a credit facility <b>you</b> have with <b>us</b> . <b>We</b> will take into account the information available to <b>us</b> , including the information <b>you</b> provide to <b>us</b> , about <b>your</b> financial situation in determining whether or not <b>we</b> are able to provide assistance and the nature and extent of any assistance.
28.10	<b>We</b> will make information about <b>our</b> processes for dealing with customers in financial difficulty with a credit facility available on <b>our</b> website (including relevant contact numbers). <b>We</b> will inform <b>you</b> at <b>your</b> request about how to find this information on <b>our</b> website and <b>we</b> will make this information available in another format if <b>you</b> tell <b>us</b> <b>you</b> do not have access to <b>our</b> website.
28.11	<b>We</b> will take reasonable steps to ensure that relevant staff, who are responsible for dealing with <b>you</b> about <b>your</b> financial difficulties with a credit facility <b>you</b> have with <b>us</b> , are trained in relation to the hardship provisions of this <b>Code</b> and the <b>National Credit Code</b> .

Code obligations outside of the scope of the inquiry	
28.3	<b>We</b> will deal with <b>you</b> or, at <b>your</b> request, with <b>your</b> authorised financial counsellor or representative where <b>you</b> have given <b>us</b> their correct contact details. If <b>our</b> reasonable attempts to contact or otherwise deal with <b>your</b> financial counsellor or other representative are unsuccessful, <b>we</b> will revert to dealing with <b>you</b> .
28.7	If, when <b>you</b> contact <b>us</b> in any of the circumstances described in clauses 28.5 and 28.6 or when <b>you</b> discuss <b>your</b> situation with <b>us</b> as a result of an invitation described in clause 28.4, <b>we</b> think that the hardship provisions of the <b>National Credit Code</b> could apply to <b>your</b> circumstances, <b>we</b> will inform <b>you</b> about them.
28.8	<b>We</b> will inform <b>you</b> in writing of <b>our</b> decision whether or not to provide <b>you</b> with any assistance if <b>you</b> are in financial difficulty with a credit facility <b>you</b> have with <b>us</b> and the reasons for <b>our</b> decision. If <b>we</b> agree to provide <b>you</b> with assistance, <b>we</b> will confirm in writing the main details of the arrangements.
28.9	<b>We</b> will: (a) not require <b>you</b> to apply for early release of <b>your</b> superannuation benefits to repay the whole or any part of <b>your</b> credit facility with <b>us</b> ; and (b) recommend that <b>you</b> seek independent advice on the option of applying for early release of <b>your</b> superannuation benefits, for example, from a financial counsellor or financial adviser. Information on having <b>your</b> superannuation benefits released early is available from the Department of Human Services ( <a href="http://www.humanservices.gov.au">www.humanservices.gov.au</a> ).

<sup>21</sup> Under the Code, **you** and **your** means a person who is an individual or a small business that is a customer of a code subscribing bank.

<sup>22</sup> **We**, **us** and **our** means the code subscribing bank.

## APPENDIX 2: Background information

### Understanding financial difficulty

The Financial Ombudsman Service's and the Australian Bankers' Association's definitions of financial difficulty:

*“Financial difficulty occurs when a consumer is unexpectedly unable to meet their repayment obligations. This can be as a result of a variety of causes including accident, separation, death of a family member, unexpected medical or funeral expense, reduction of work hours, redundancy or a downturn in business.”*

– *The FOS Approach to Financial Difficulty*<sup>23</sup>, Financial Ombudsman Service (FOS) Australia, April 2013

*“Financial hardship”<sup>24</sup> is when a customer is willing and has the intention to pay, but is unable to meet their repayments or existing financial obligations, and with formal hardship assistance, a customer's financial situation can be restored.”*

– Australian Bankers' Association guideline on financial difficulty, March 2015<sup>25</sup>

The financial services sector has generally adopted an approach to financial difficulty which distinguishes between customers that:

- 'CAN' pay at some stage and there is a finite timeframe before a customer's financial position will recover. The types of assistance provided may need to include simpler repayment arrangements and moratoriums.
- 'MAY' be able to pay at some stage and where solutions need to be more flexible and tailored to a customer's individual circumstances.
- 'CAN'T' pay. A person may fall into this group where they have no assets or permanent income. The solutions for this group are likely to be longer-term such as debt waivers and write-offs.

### CCMC monitoring and investigations data

Data collected by the CCMC from its monitoring program and investigations was considered by the CCMC in conjunction with the data collected as part of this inquiry. It indicates that financial difficulty has been one of the top categories of self-reported code breaches over the last four years.

The CCMC also collects data on the number of requests for financial difficulty assistance received and granted by each bank. Chart 3 below illustrates the number of requests for financial difficulty assistance received by banks and the number of requests where assistance was provided to customers from 2011 to 2015.

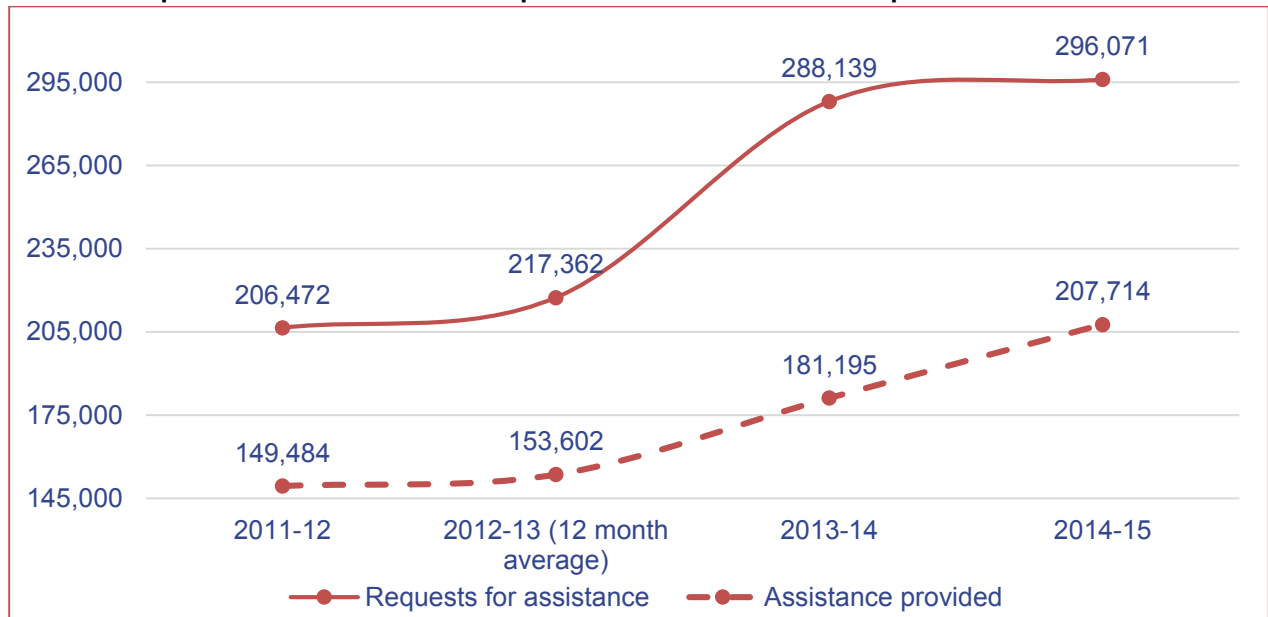
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<sup>23</sup> [www.fos.org.au/resolving-disputes/our-approach/the-fos-approach-to-financial-difficulty/?sstat=224540](http://www.fos.org.au/resolving-disputes/our-approach/the-fos-approach-to-financial-difficulty/?sstat=224540)

<sup>24</sup> Financial hardship and financial difficulty are often interchangeable terms and are both used when discussing these matters.

<sup>25</sup> [http://www.bankers.asn.au/ArticleDocuments/113/Financial\\_Hardship\\_Guidelines\\_March\\_2015\\_Final.pdf.aspx](http://www.bankers.asn.au/ArticleDocuments/113/Financial_Hardship_Guidelines_March_2015_Final.pdf.aspx)

**Chart 3: Requests for assistance and requests where assistance was provided 2011 to 2015**



Further information regarding this data can be found in the CCMC's annual reports<sup>26</sup>.

### External dispute resolution data

Data published in FOS's 2013–14 Annual Review<sup>27</sup> indicates that financial difficulty case numbers remain high.

In 2013–14, 50% of all of the disputes accepted by FOS were related to credit and the most common issue in credit disputes was financial difficulty. Some 3,647 accepted disputes involving banks (including banks that do not subscribe to the Code) were related to financial difficulty. Banks were involved in 70% of consumer credit disputes in 2013–14 and 82% of disputes relating to business finance, where financial difficulty was again the main issue.

The Credit and Investments Ombudsman reported in its 2013–14 Annual Report on Operations<sup>28</sup> that complaints about financial difficulty represented 29% of all complaints handled.

### Other relevant information

In June 2013, the ABA reported that research had identified that only one in four Australians know that banks have programs in place to assist customers experiencing financial difficulty.<sup>29</sup> The ABA provides guidance for consumers experiencing financial difficulties on their *Doing It Tough*<sup>30</sup> website.

<sup>26</sup> See Page 20 of both the CCMC's [2012–13 Annual Report](#) and [2013–14 Annual Report](#).

<sup>27</sup> <http://www.fos.org.au/custom/files/docs/20132014-annual-review.pdf>

<sup>28</sup> [http://www.cosl.com.au/cosl/assets/File/COSL\\_annual-report-on-operations-2014.pdf](http://www.cosl.com.au/cosl/assets/File/COSL_annual-report-on-operations-2014.pdf)

<sup>29</sup> <http://www.bankers.asn.au/Media/ABA-Blog/Blogs/A-helping-hand-with-hardship>

<sup>30</sup> <http://www.doingittough.info/>

## APPENDIX 3: Questionnaire for banks

Banks were asked to respond to the following questions in April 2015:

### Section A: Informing customers about financial difficulty assistance

1. Please provide details of how the bank complies with clause 28.10 of the Code by providing information to individual and small business customers about its process for dealing with customers in financial difficulty with a credit facility.

2. Which of the following channels does the bank use to inform customers that they can contact the bank if they are experiencing financial difficulty (clause 28.5)?

- |                       |                                   |
|-----------------------|-----------------------------------|
| a) branches           | e) telephone                      |
| b) account statements | f) internet and/or mobile banking |
| c) letters            | g) other (please specify)         |
| d) email              |                                   |

3. How does the bank use these channels to inform customers about how they can contact the bank if they are experiencing financial difficulty? Where possible, please provide examples.

### Section B: Identifying customers who may be experiencing financial difficulty

4. What methods (including systems / automatic processes) are used to identify individual and small business customers who may be experiencing financial difficulty (clause 28.4)?

5. How are staff trained to identify triggers from their conversations with customers? Please provide a copy of any relevant staff training materials regarding customers experiencing financial difficulty (clause 28.11).

### Section C: Debt collection activity

6. Please provide details of how the bank suspends debt collection activity on a customer's account while that customer's request for financial difficulty assistance is being considered.

### Section D: Requests for information from a customer

7. Please provide copies of relevant forms or documents used by the bank to request information from an individual or small business customer in support of their application for financial difficulty assistance. Is this process consistent for all customers and/or credit facilities (clause 28.2–28.7)?

8. Is the same type of information requested from every customer?

9. Does the bank follow-up with a customer when information is not provided within required timeframes?



10. Can a customer provide information requested:
- via email
  - online/ through internet banking
  - over the telephone
  - in a branch
  - through any other means (please specify)?

11. When assessing a request for financial difficulty assistance, does the bank consider all of the accounts and financial products that the customer may hold with the bank (clause 28.6)?

### **Section E: Subsequent requests for assistance**

12. Please describe the methods by which the bank identifies whether a customer has had more than one repayment arrangement or has made more than one request for assistance.

13. How many new requests for financial difficulty assistance were received by the bank, between 1 October and 31 December 2014, from customers who had previously been granted assistance? Please note that the data being sought relates to both customers seeking further assistance on one matter and those who had previously been granted assistance in relation to a separate matter.

14. How many of these requests resulted in further assistance being provided?

15. Did the bank require different information from these customers to assess their new situation?

16. What types of assistance did the bank offer their customers making second and subsequent requests for assistance?

17. What process or criteria did the bank use to assess whether these customers required different assistance from that offered to them previously?

18. At what point would the bank determine it can no longer provide assistance?

### **Section F: Monitoring**

19. What monitoring does the bank undertake to ensure compliance with clause 28 of the Code?

20. How does the bank monitor that it has also complied with its key commitment to act fairly and reasonably towards customers in a consistent and ethical manner under clause 3.2 of the Code, when dealing with customers experiencing financial difficulty?

21. Has the bank identified any instances of non-compliance with these obligations since the 2013–14 Annual Compliance Statement return? If so, what was the nature of this non-compliance and how was it remedied?

## APPENDIX 4: Survey of consumer advocates

What is the most common issue you have identified when dealing with banks about financial difficulty matters?

In your experience, is the information requested by banks to support a request for financial difficulty assistance appropriate?

Are there any particular requests for information that customers have difficulty providing?

Have you observed any good industry practice in your dealings with the banks regarding their financial difficulty processes and procedures?

Can you describe an example of financial difficulty assistance offered by a bank to one of your clients who made more than one request for assistance which resulted in a fair, reasonable and appropriate outcome?

Can you describe an example of financial difficulty assistance offered by a bank to one of your clients who made more than one request for assistance which you believed was not fair, reasonable or appropriate?

Did the bank engage differently with that client and if so how?

Are there any further comments you would like to make with regard to this inquiry and/or your overall experiences when dealing with code-subscribing banks about financial difficulty matters?

## APPENDIX 5: Survey of small business representatives

In your opinion, what level of awareness do small business customers have of their right to financial difficulty assistance under the Code of Banking Practice?

What is the most common issue that you or your small business customers have identified when seeking financial difficulty assistance from their bank?

In your experience, is the information requested by banks to support a request for financial difficulty assistance appropriate?

Are there any particular requests for information from banks related to financial difficulty that small business customers have trouble providing?

Have you experienced any positive practices in your dealings with the banks regarding their financial difficulty processes and procedures? If yes, please provide details.

What has been your experience of banks engaging with small business customers who may be making a second or third request for assistance?

Can you describe an example of financial difficulty assistance offered by a bank to a small business customer who was making a second or third request for assistance which resulted in a fair, reasonable and appropriate outcome?

Can you describe an example of financial difficulty assistance offered by a bank to a small business customer who was making a second or third request for assistance which you believed was not fair, reasonable or appropriate?

Did the bank engage differently with those customers and if so how?

## APPENDIX 6: Website reviews and branch visits

Branches:

Is information about financial difficulty assistance provided in the branch?

What information is provided?

Are there any posters displayed in the branch regarding financial difficulty assistance?

Are there any leaflets/ brochures available in the branch regarding financial difficulty assistance?

Do customers need to ask bank staff for assistance to find this information?

Where bank staff were asked for assistance, were they able to provide this information?

What did the branch staff member explain they would do for a customer or what did they explain a customer would need to do?

Is a copy of the Code on display in the branch?

If the Code was not on display, could it be provided on request?

Do customers ask about financial difficulty in the branch often?

Websites:

Can information about financial difficulty assistance be located on the website?

Where on the website is the information located? Is there a dedicated page for financial difficulty information?

Is it accessible directly from the homepage? Is there a button on the homepage –“Are you experiencing financial difficulty?” – in line with the ABA industry guideline?

Is there a site search function? Do basic search terms direct users straight to the relevant information?

What information is provided? In line with the ABA industry guideline:

- Are phone numbers for the bank’s specialised financial hardship team provided?
- Is there information about how to get hardship assistance?
- Is there information about the types of arrangements which may be available?
- What examples of the type of hardship assistance available are there?
- Are there links to relevant information including the *Doing It Tough* website and the Financial Counselling Australia website?
- Is there information about special relief packages offered by the banks, such as emergency support for bank customers and communities following a natural disaster?

Does the information include reference to code obligations? Is a copy of the Code available?

Is there information about financial difficulty assistance available in another format such as in banks’ Terms and Conditions or Financial Services Guide? Are these documents easily accessible?

Is information provided about Internal and External Dispute Resolution processes in the event that financial difficulty assistance is not provided? Is this dispute resolution information easily accessible?

# END OF REPORT



**CODE COMPLIANCE MONITORING COMMITTEE  
(the CCMC)**

**Guidance Note No. 12**

**Classification, Reporting and Remediation of Non-Compliance with the  
Code of Banking Practice**

The CCMC is an independent code compliance monitoring body established under clause 36 of the Code of Banking Practice (the Code).

The CCMC oversees the compliance of subscribing banks with their code obligations by:

- a. monitoring compliance with the Code
- b. investigating code breach allegations, and
- c. monitoring any aspects of the Code that are referred by the Australian Bankers Association (the ABA).

This Guidance Note has three purposes, namely to indicate the CCMC's likely approach to:

- a. the classification, recording and reporting of non-compliance with the Code in the discharge of its functions
- b. its enforcement and sanctions powers and how they apply to different levels of non-compliance, including
- c. the public naming of a code subscriber.

Guidance Notes are subject to change by the CCMC and this document reflects the CCMC's views as at the date of its publication.

It is important to understand that the CCMC considers all matters on the basis of their individual circumstances and this document is not intended to anticipate all possible issues that might come before the CCMC.

Any reference to "bank" in this Guidance Note means a bank which subscribes to the Code. Any reference to the "Code" is a reference to the 2013 version of the Code, unless otherwise stated. Any reference to a "consumer" or "customer" means an individual or small business that is either a customer or potential customer of a bank.

When considering whether a bank has complied with the provisions of the Code, the CCMC will also have regard to the key commitments made by that bank to act fairly, reasonably and ethically in the provision of services to its customers and to comply with all relevant laws.

For more information about the CCMC, please visit its website: [www.ccmc.org.au](http://www.ccmc.org.au).

## Introduction

1. The CCMC's Mandate<sup>1</sup> sets out its powers and functions which are interpreted in conjunction with clause 36 of the Code.
2. One of the CCMC's functions is to monitor the compliance of banks with the Code. This is done using a number of methods, including lodgement of an Annual Compliance Statement (ACS) by banks that reports on their compliance with the Code during the previous 12 months.
3. Independent monitoring by the CCMC is important to ensure that non-compliance with the Code is identified, reported and remedied. Robust compliance monitoring arrangements are essential to maintain public confidence that banks comply with, and are seen to comply with, the Code's obligations.
4. The CCMC is also responsible for the investigation and determination of whether a breach of the Code has occurred.
5. The CCMC must report annually on the outcomes of its activities and functions including the level of compliance with the Code, the underlying cause of non-compliance, any compliance measures implemented by relevant banks and any systemic breaches or other trends.
6. The CCMC has a range of actions for enforcing code obligations. This includes the naming of a bank on the CCMC's website, in its Annual Report, or both, in connection with a breach of the Code where a bank has been guilty of serious or systemic non-compliance.
7. To facilitate the effective, efficient and transparent discharge of all of these functions, this Guidance Note outlines the CCMC's likely approach to the classification, recording and reporting of non-compliance (breaches) with the Code's obligations and the subsequent approach that the CCMC may take to ensure remediation of non-compliant activity or sanction against the relevant bank.

## Classification of code breach activity

8. When undertaking its functions to monitor or investigate compliance with the Code, the CCMC may become aware of breach activity or make a Determination that a bank has not complied with its code obligations.
9. Non-compliance with the Code is classified by the CCMC, as follows:
  - 9.1. a breach (non-compliance with a code obligation)
  - 9.2. a significant breach
  - 9.3. a serious breach, or
  - 9.4. a systemic breach of the Code.
10. Appendix 1 outlines these classifications in more detail and the CCMC's likely approach when enforcing the Code against banks.

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<sup>1</sup> The CCMC's Mandate can be found at <http://www.ccmc.org.au/the-code/>

11. The classifications are not mutually exclusive. Some overlap in classification may occur. For example, a significant breach of the Code may have resulted from systemic non-compliance with code obligations.
12. When making a decision about non-compliance with the Code, the CCMC will consider whether a breach is significant and/or serious or systemic in nature. A significant breach is not necessarily serious or systemic and a systemic breach is not necessarily significant.

## Breaches

13. A breach of the Code is described as a failure to comply with the obligations of the Code in the provision of a banking service.
14. The CCMC expects that banks will undertake any remediation that is appropriate to correct non-compliance.

## Significant breaches

15. When assessing the significance of a code breach, the CCMC will be guided by Australian Securities and Investments Commission (ASIC) “Regulatory Guide 78 – Breach Reporting by AFS Licensees”, the Australian Standard “AS 3806 2006 - Compliance Programs” and Section 912D of the Corporations Act 2001 (Cth).
16. A significant breach of the Code’s obligations therefore will be determined on a case-by-case basis, by reference to matters such as the:
  - 16.1. number of customers affected or likely to be affected
  - 16.2. extent of any customer detriment
  - 16.3. adequacy of arrangements to ensure compliance with the Code
  - 16.4. duration of the breach
  - 16.5. number and duration of similar breaches
  - 16.6. rectification and other costs incurred or to be incurred
  - 16.7. impact of the breach on the bank’s ability to provide services, and
  - 16.8. extent to which the breach indicates the bank’s arrangements for compliance with the Code are inadequate.
17. To assist banks in their code breach assessment processes, some examples of significant breaches that have been reported to the CCMC in the past include:
  - 17.1. incorrect disclosures in a Product Disclosure Statement
  - 17.2. inaccurate advertising of product and interest rate details
  - 17.3. procedures that do not comply with another code, for example Debt Collection or Centrelink Guidelines
  - 17.4. multiple errors affecting a class or classes of customers, for example charging of incorrect interest rates or failure to act on direct debits cancellation instructions
  - 17.5. multiple minor instances of failure to comply with code obligations affecting a class or classes of customers, for example customers in financial difficulties, and
  - 17.6. failure to follow the guarantee provisions resulting in significant customer detriment.
18. When the CCMC becomes aware of, or identifies a significant breach of the Code, it may:

- 18.1. seek further information from the bank about how the issue has or will be remedied to prevent recurrence, and/or
  - 18.2. engage in a monitoring program to ensure that actual or proposed remedial action has been completed.
19. The CCMC will publish details of any significant breaches of the Code in its Annual Report and on its website. These publications will be on a de-identified basis, unless the CCMC has decided to publically name a bank (see paragraphs 57–70).

## Serious breaches

20. A breach of the Code that is classified by the CCMC as non-compliance which is fraudulent, grossly negligent or involves willful breaches of the bank's code obligations will be considered to be serious. It may also include instances where a bank has not taken steps to remedy the conduct or errors that led to the breach, or willfully ignores or fails to act on a CCMC Determination or undertaking<sup>2</sup> related to a previously self-reported significant and/or systemic breach.
21. This description is consistent with the definition of *serious misconduct* used in the Terms of Reference of the Financial Ombudsman Service Australia (FOS).
22. A serious breach of the Code is considered by the CCMC to be the highest threshold of breach and will always be significant in nature.
23. The CCMC may conclude a compliance investigation by Determination. In doing so the CCMC must first issue a Notice of Determination in accordance with Mandate clause 10.3(a)(ii) that includes, if applicable, a brief description of any finding the CCMC intends to make that the bank is responsible for serious or systemic non-compliance with the Code.
24. Where a breach is classified as serious, the CCMC is likely to increase its level of engagement with the bank to understand what occurred and why, and how the bank plans to respond to and rectify the non-compliance.
25. In accordance with clause 36(j) of the Code and clause 11 of the CCMC Mandate, the CCMC may consider the public naming of a bank where the bank has been, amongst other things, guilty of serious or systemic non-compliance.

## Systemic breaches

26. Non-compliance with the Code that has implications beyond the immediate actions and parties affected will be considered to be systemic. This is consistent with the definition of *systemic issue* in the FOS Terms of Reference.
27. Systemic breaches are those which have, or are likely to affect, more than one person. It may also involve a process, policy or technological issue affecting the the bank's operations.
28. The CCMC believes that systemic non-compliance is likely to be a lower threshold than a serious breach of the Code. The same conduct may or may not constitute a significant breach of the Code, using the criteria set out in paragraph 16 above.

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<sup>2</sup> In the absence of a formal definition in the Code or Mandate, the term "undertaking" is given its ordinary meaning by the CCMC and means a formal pledge or promise to do (or not do) something.



29. To determine whether a code breach is systemic, the CCMC may request access from a bank to complaints data, product details and internal processes and procedures documentation.
30. Banks should self-report systemic breaches of the Code to the CCMC. If they do so, they should provide details of what occurred, the impact of the breach including the number of consumers affected and detriment caused and the remedial action that has been, or will be, taken to correct the non-compliance and prevent recurrence.
31. Where the CCMC makes a Determination that a code breach is systemic, in addition to recording a code breach against the bank, the CCMC may request additional information about the remediation program the bank will or has undertaken to correct the non-compliance and prevent recurrence and monitor the completion of that program.
32. The CCMC reports on systemic breaches in its Annual Report. This will be on a de-identified basis, unless the CCMC has decided to publically name a bank (see paragraphs 57–70).
33. The CCMC may initiate an Own Motion Inquiry into the issues associated with a systemic breach across all banks, where it believes there may be a risk of broader industry non-compliance.

## Arrangements for recording and reporting code breaches

34. The CCMC expects banks to:
  - 34.1. have a clear and well understood process for identifying, recording, reporting and rectifying non-compliance with the Code
  - 34.2. ensure that arrangements are in place to prevent a recurrence of breach activity, and
  - 34.3. have appropriately trained personnel within each operational area to identify and report when and where breaches have occurred.
35. Breach incidents may typically arise across all of the bank's operational areas and systems in addition to direct dealings with customers (including branches, collections activities and call centres).
36. When recording breach activity, multiple breaches of the Code may be recorded as follows:
  - 36.1. a single incident that results in breaches of the same type (for example a system error that resulted in breaches of the Code's disclosure provisions and has impacted a number of customers) may be counted as one breach or a significant breach of the relevant Code clause, and
  - 36.2. where more than one of the Code's standards has been breached (for example a customer's bank account details are disclosed to a third party and their complaint about this is not dealt with in accordance with internal dispute resolution time frames) both breaches of the Code should be recorded.
37. In accordance with clause 36(b)(iii) of the Code, once a bank has identified non-compliant conduct with the Code's standards, it should assess whether that breach has resulted in a failure to act fairly and reasonably in a consistent and ethical manner in the

provision of services to its customers (clause 3.2) and/or to comply with all relevant laws relating to banking services (clause 4.1).

## When must code breaches be reported to the CCMC

38. Clause 36(f) of the Code requires each bank to lodge (in a form acceptable to the CCMC) an Annual Compliance Statement (ACS) with the CCMC on its compliance with the Code during the previous reporting year. This Statement forms a key part of the CCMC's program to monitor banks' compliance with the Code.
39. The number of breaches of the Code to be reported should include information from all sources (including the bank, the CCMC, FOS and other forums) and be recorded against the relevant clause of the Code.
40. Banks are required to report significant breaches separately in the ACS.
41. The CCMC accepts that banks have systems and procedures to identify and report significant breaches of their legal obligations. The recording and reporting of significant code breaches to the CCMC therefore may be made according to the criteria the bank already applies to determine breach significance (or similar terminology) for its own reporting, both internally and to other regulators (see paragraphs 15 -19 of this Guidance Note).
42. When completing the significant breach table within the ACS, the following information should be provided:

<b>Incident Details</b>	The version of the Code which applies; clause breached; date detected; product category; channel; customer type; location; role/ position of identifier; nature/characteristics; and manner discovered.
<b>Underlying Causes</b>	Matters involved; system/process issues; and personnel issues.
<b>Breach Magnitude</b>	Systemic significance; number of customers affected (actual/ potential/ direct/ indirect); location of customers affected (actual/ potential/ direct/ indirect); duration/ dates over which breach occurred; payments to customers; other rectification costs incurred; and non-financial impacts.
<b>Remedial action</b>	Actions with dates; preventative/ corrective; short/ long-term; temporary/ permanent; and past/ present/ future.

43. Where a breach of the law has been reported to, or identified by, ASIC or another regulator and the incident has also resulted in a breach of the Code, this breach should be reported to the CCMC when reported or identified or in the Code Breach Summary in the ACS.
44. This is the same for breaches of the Code that are determined by another forum, namely any court, tribunal, arbitrator, mediator, FOS, or statutory ombudsman in any jurisdiction.
45. The CCMC may also invite a bank during a reporting year to acknowledge that a breach of the Code has been found by another forum or regulator and/or indicate to the CCMC whether the breach will be self-reported in the ACS.
46. If a bank self-reports an individual breach outside the ACS program, the CCMC will acknowledge the report and may request further information if needed.

47. In some cases the CCMC may not need to take any further action if the reported breach has been rectified to the CCMC's satisfaction.
48. The CCMC may also contact the bank to discuss improvements made or proposed to code compliance processes and procedures to prevent recurrence, if it is not satisfied that this has occurred.
49. A failure by a bank to report breaches of the Code to the CCMC may of itself, in certain circumstances, be a breach of clause 36(f) of the Code.
50. The CCMC acknowledges that banks may wish to annually self-report unique breaches of clauses 3 and 4 separately to the CCMC, without linking to a corresponding breach of the Code's standards. Provision is made for this type of annual reporting in the ACS.

### **Publication of code breach activity**

51. The effective notification by banks of code related breaches allows the CCMC to report on and make recommendations regarding emerging areas of risk and the continuous improvement of industry standards.
52. The CCMC will also add this data to internal risk models for ongoing monitoring of trends in code compliance.

### **Possible enforcement action**

53. Appendix 1 to this Guidance Note outlines some of the potential actions available to the CCMC in its dealings with the banks to address and resolve non-compliance with the Code.
54. These actions may be broadly categorised as:
  - 54.1. Guidance on good industry practice
  - 54.2. Negotiation and resolution
  - 54.3. Remediation and Corrective actions
  - 54.4. Determination
  - 54.5. Undertakings
  - 54.6. Warnings, and
  - 54.7. Public naming
55. These actions are not mutually exclusive and may be used in combination.
56. The level of engagement a bank can expect from the CCMC and the application of the CCMC's enforcement and sanctions powers once code breach activity has been identified, will be commensurate with the level of non-compliance the CCMC considers the bank has engaged in.

### **Public naming of a bank**

57. The CCMC is accountable to its stakeholder groups for the transparency of its code monitoring and enforcement actions.
58. Transparency, through public disclosure of sanctions imposed in certain circumstances, is considered by the CCMC to be an important factor to ensure that the banks are held, and are seen to be held, accountable for their compliance with code obligations. ASIC

Regulatory Guide 183<sup>3</sup> for example, points out that community confidence in the effectiveness of industry codes is largely reliant on the perception that a code is seen to be enforced against non-compliant subscribers.

59. The most serious sanction that the CCMC may impose is the public naming of a bank.
60. Clause 36(j) of the Code states that the CCMC may name a bank on the CCMC's website, in the next CCMC Annual Report, or both, in connection with a breach of the Code where it can be shown that the bank has:
  - 60.1. been guilty of serious or systemic non-compliance
  - 60.2. ignored the CCMC's request to remedy a breach or failed to do so within a reasonable time
  - 60.3. breached an undertaking given to the CCMC, or
  - 60.4. not taken steps to prevent a breach reoccurring after having been warned that the bank might be named.
61. Clause 11 of the Mandate reiterates that the CCMC may name a bank in accordance with clause 36(j) of the Code.
62. The CCMC recognises that the objective in imposing a public naming sanction can be different in each case. For example, a naming power may be used to reprimand a bank that has failed to comply with a request by the CCMC to correct a breach of the Code and/ or to act as a general deterrent to others to avoid engaging in non-compliant conduct.
63. The CCMC accepts that the publication of a bank's name for non-compliance with code obligations may have significant consequences.
64. In considering whether or not to publically name a bank in a particular matter, the CCMC will balance the public interest in publishing the non-compliant activity against the rights of the bank that is to be the subject of the sanction.
65. The CCMC may also take into account a number of factors when deciding whether to publish or not, including:
  - 65.1. any limitations outlined in the Mandate or the Code
  - 65.2. the need to safeguard confidential or sensitive information, pursuant to clause 14 of the Mandate
  - 65.3. privacy legislation and guidelines
  - 65.4. the need to apply procedural fairness and consider fairness in all the circumstances
  - 65.5. the risk of harm or detriment that may be caused to any of the parties, and
  - 65.6. compliance with any court orders not to disclose information in certain circumstances.
66. In applying these criteria, the CCMC will consider the public naming power in the context of what is reasonable in all of the circumstances of each case, having regard to legal principles relevant to the decision-making process, applicable code provisions and any CCMC guidance as to code requirements.

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<sup>3</sup> Australian Securities and Investments Commission, 2013, *Regulatory Guide 183: Approval of financial services sector codes of conduct*, p. 9

67. If the CCMC forms the view that it should consider imposing a public naming sanction, the CCMC will:
- 67.1. notify the bank and the bank's CEO of the proposal, prior to a final decision being made
  - 67.2. provide a brief description of the finding the CCMC intends to make and the reasons for why it reasonably suspects that the bank is responsible for serious or systemic non-compliance with the Code or any other breach of clause 36(j) of the Code
  - 67.3. advise the bank of the opportunity to be heard on the proposed sanction and make submissions within 28 days of the date of the notice as to why the sanction should not be imposed, and
  - 67.4. include a statement that the proposed sanction will become effective after 28 days from the date of the notice should no submissions be received.
68. At the expiry of the 28 day notice period:
- 68.1. if the bank has not responded, the sanction will be adopted, or
  - 68.2. if the bank has responded, the CCMC will consider the submissions made, prior to making its final decision.
69. The CCMC may also consult with the FOS Chief Ombudsman and Australian Bankers' Association (the ABA), as parties to the Code's governance arrangements, about its proposal to impose a naming sanction against a particular bank prior to publication occurring.
70. Once the CCMC decides that a public naming sanction is to be imposed the CCMC will notify the CEO of the bank of its decision and:
- 70.1. prepare a publication notice which includes:
    - 70.1.1. the name of the bank
    - 70.1.2. the date of the CCMC's decision
    - 70.1.3. the Code obligations that have been breached
    - 70.1.4. the relevant subsection of clause 36(j) to which the CCMC's decision relates, and
    - 70.1.5. a short statement of the CCMC's reasons for the decision
  - 70.2. provide a copy of the notice to the bank and the ABA
  - 70.3. provide a copy of the notice to the FOS Chief Ombudsman, and
  - 70.4. include the notice in the CCMC's next Annual Report and/or on its website.

## CCMC's classifications of non-compliance

A **serious breach** is non-compliance with the Code which is considered to be fraudulent, grossly negligent or wilful. It may also include instances where a bank has not remedied the conduct or errors which led to the breach, or willfully ignores or fails to act on a CCMC Determination or undertaking related to a previously self-reported significant and/or systemic breach.

A serious breach is the highest threshold of breach (and will always be significant).

A **significant breach** is a breach of the Code's obligations that is determined to be significant on a case-by-case basis, by reference to matters such as the:

- number of customers affected or likely to be affected
- extent of any customer detriment
- adequacy of arrangements to ensure compliance with the Code
- duration of the breach
- number and duration of similar breaches
- rectification and other costs incurred or to be undertaken
- impact of the breach on the bank's ability to provide services, and
- extent to which the breach indicates the bank's arrangements for compliance with the Code are inadequate.

Consideration given to ASIC "Regulatory Guide 78 – Breach Reporting by AFS Licensees", the Australian Standard "AS 3806 2006 - Compliance Programs" and Section 912D of the Corporations Act 2001.

Code subscribing banks are required to report significant breaches separately in the Annual Compliance Statement.

The CCMC will give consideration to the criteria above when making a Determination on whether there is a breach of the Code.

A **breach** is a failure to comply with the obligations of the Code in relation to the provision of a banking service.

The CCMC may become aware of breaches or make a Determination that a bank has not complied with the Code, as a result of:

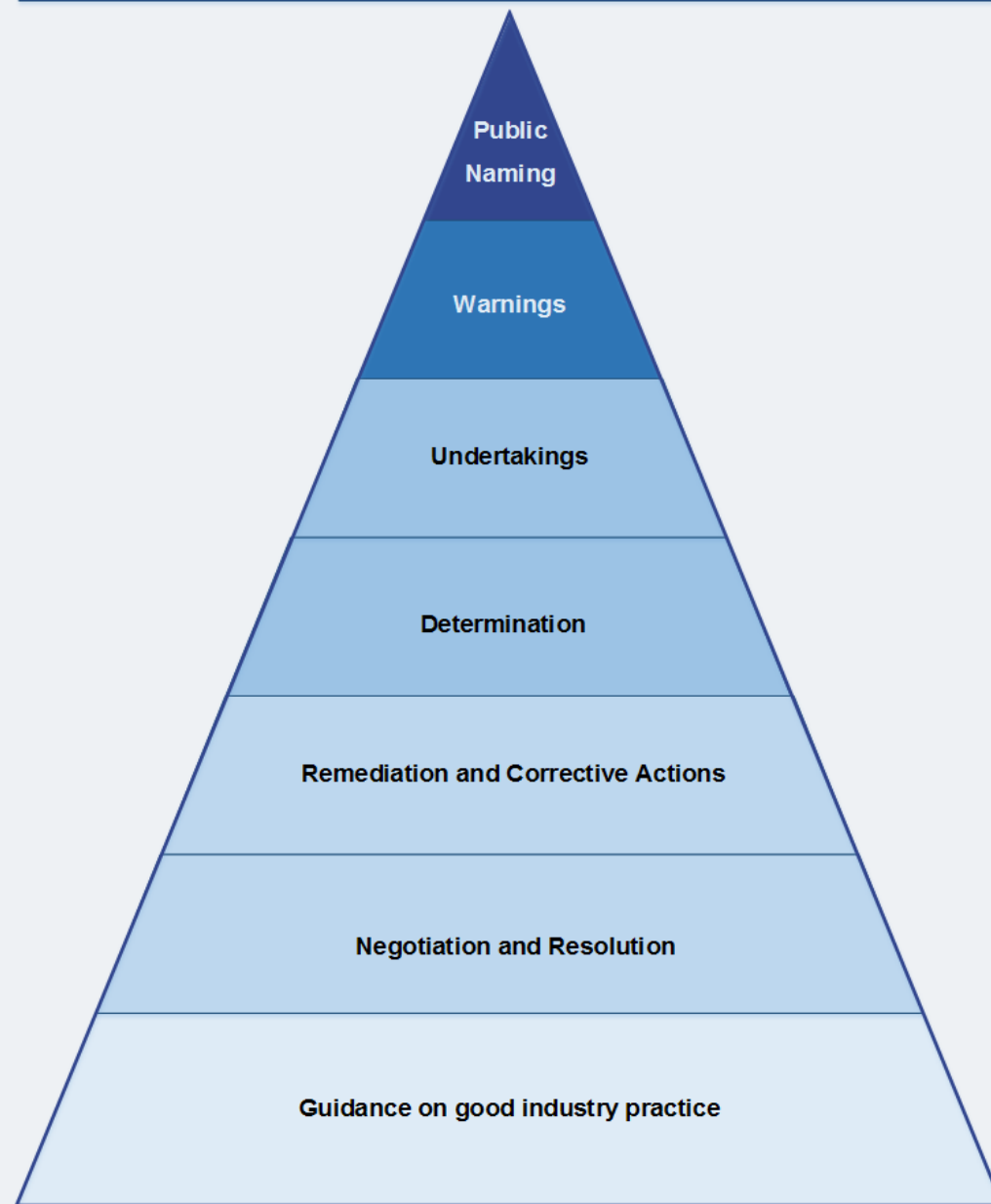
- a bank self reporting breaches in the Annual Compliance Statement
- an investigation into an allegation that a bank has breached the Code
- an investigation into a referral from the Australian Bankers' Association (ABA)
- another forum hearing an allegation and that forum making a determination that a bank has not complied with the Code, or
- through another monitoring process such as an Own Motion Inquiry (which may lead to a CCMC investigation or self-reported non-compliance).

A **systemic breach** is non-compliance that has implications beyond the immediate actions and parties affected by the non-compliance with the Code.

Systemic breaches are those which have or are likely to affect more than one person. It is likely to involve a process, policy or technological issue within the bank's operations.

A systemic breach is likely to be a lower threshold than a serious breach, and may, or may not, be significant.

## CCMC's likely action in enforcing code obligations



## Breakdown of allegations received by the CCMC during 2014-15

Table 1 below details the breakdown by Code obligation of allegations received by the CCMC in 2014–15. Table 2 provides a breakdown of Code breaches identified as a result of CCMC investigations.

**Table 1: Allegations made regarding Code Subscribing banks 2014–15**

Code obligation	Number of allegations
Key commitments (including Fair and Reasonable)	18
Financial difficulty	14
Provision of credit	8
Copies of documents	7
Compliance with laws	5
Changes to terms and conditions	5
Dispute resolution	5
Debt collection	4
Privacy and confidentiality	3
Customers with special needs	1
Guarantees	1
<b>Total</b>	<b>71</b>

**Table 2: Breach finding by Code category 2014–15**

Breach identification	Code Obligation	No. of breaches
Breaches identified by CCMC Determination	Provision of credit	5
Adoption of FOS Determination of a Code breach*	Joint debtors	1
Breaches conceded by banks**	Copies of documents	2
	Compliance with laws	1
	Debt collection	1
	Direct debits	1
	Privacy and confidentiality	1
	Financial difficulty	2
	Fair and reasonable	5
<b>Total</b>		<b>19</b>

\* Under the terms of its Mandate, the CCMC must adopt a finding by the Financial Ombudsman that a bank has breached its Code obligations. One breach of the Code was identified in this manner in 2014-15

\*\* As a result of an investigation, a bank may concede a breach has occurred, without the CCMC making a Determination. In 2014-15, 13 breaches were identified in this manner.