

29 January 2016

Ms Toni Matulick  
Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
SG.64  
Parliament House  
Canberra ACT 2600  
By email: corporations.joint@aph.gov.au

Dear Ms Matulick

## Inquiry into impairment of customer loans - questions on notice

Thank you for your letter dated 1 December 2015.

Please find below the Australian Bankers' Association's (**ABA**) response to the questions provided.

### 1) Are there any restrictions or criteria for issues to be raised with the CCMC?

Together with the Code of Banking Practice, the Code Compliance Monitoring Committee's (**CCMC**) Mandate sets out the terms which govern the functions of the CCMC.

The CCMC has three functions described in clause 36 of the Code. Briefly, those functions are subject to the Code and the Mandate to:

- Investigate and make a determination on any allegation by anyone that a Code subscriber has breached the Code.
- To monitor compliance with the Code including conducting its own motion inquiries into a subscriber's compliance with the Code.
- Monitor any other aspects of the Code which are referred by the ABA to the CCMC.

The complete terms of the Code, together with the CCMC's Mandate, can be viewed on the ABA's website at: <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice/Code-of-Banking-Practice-2013--Online-Version>; and the CCMC's website at: <http://www.ccmc.org.au/cms/wp-content/uploads/2014/09/2013-Code-of-Banking-Practice-and-CCMC-Mandate.pdf>.

In clauses 6.2 and 6.3 of the Mandate there are restrictions on the CCMC's ability to commence an investigation or to continue an investigation into an allegation that a Code subscriber has breached the Code.

Briefly, those restrictions in Clause 6.2 are for the CCMC not to commence such an investigation if:

- The allegation relates to the subscriber's commercial judgment. The CCMC may commence its investigation if the allegation relates to maladministration by the subscriber in arriving at its commercial judgment. "Maladministration" refers to an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the subscriber and the person making the complaint.



- The subject of the allegation is being, will be or has been, heard in another Forum (Forum means a court, tribunal, arbitrator, mediator, independent conciliation body, dispute resolution body, complaint resolution scheme or statutory ombudsman). If that Forum determines a breach of the Code has occurred, the CCMC must adopt that finding. If the Forum declines to determine whether a breach has occurred the CCMC may commence consideration of the allegation. These provisions are intended to help avoid duplication and inconsistent decision making.
- The CCMC considers, in its discretion, there is a more appropriate Forum to deal with the allegation, for example, if the allegation involves a breach of a legislative provision.
- The complaint (allegation) is based on the same events and facts as a previous complaint by the complainant to the CCMC, unless there is new information.
- The events to which the complaint relates occurred:
  - a) Before the subscriber to which the complaint relates became a Code subscriber, or
  - b) In relation to an entity which was not a Code subscriber at the time of the events to which the complaint relates and was subsequently acquired by a Code subscriber.
- The complainant was aware of the events to which the complaint relates, or would have become aware of them if they had used reasonable diligence, more than one year before the complainant first notified the CCMC in writing unless the complainant had lodged within that one year period a dispute with the Financial Ombudsman Service (**FOS**) about those events, and FOS considered there may have been a breach of the Code. It is noted that in the evidence given by the Chair of the CCMC, Mr Doogan, on 16 October 2015, in circumstances where the CCMC had seen all of the material and the facts behind a complaint and were to form a view that any identified issue warranted further investigation and that the bank was being unreasonable in refusing its permission to go beyond the 12-month rule, the CCMC could, under another provision in the Code, initiate an own motion inquiry. Mr Doogan added the inquiry could include an assessment of whether there had, in fact, been a breach of the Code.
- The compliance investigation is an outcome of the CCMC's monitoring process more than one year after the CCMC had reason to suspect that the subscriber may have breached the Code.

In clause 6.3 of the Mandate where the CCMC has commenced an investigation it may decide that it is no longer appropriate to continue the investigation because:

- Of the nature of the allegations made and the significance of the issues raised.
- The time which has elapsed since the alleged event occurred.
- An alternative Forum would be more appropriate, in which case the CCMC should discontinue its investigation.
- The matter is frivolous or vexatious, in which case the CCMC should discontinue the investigation.
- Previous work of the CCMC in monitoring or reviewing practices or procedures of the Code subscriber are relevant to the allegations made.



- 2) The committee has been informed that the Code Compliance Monitoring Committee is only able to determine whether a breach of the code has occurred. If the CCMC has determined that a breach has occurred, what should consumers do next in order to have their matters addressed?

The role of the CCMC is to determine whether a subscriber has breached the Code. The CCMC has no role to determine any redress which should be provided to the complainant.

The relevant provisions of the Code are incorporated by reference as terms and conditions in a customer's banking services contract with the Code subscriber. It follows that a finding by the CCMC of a breach of a provision by a bank of the Code which has become a term of the bank's contract with the customer will amount to a breach of that bank's contract giving rise to possible remedies. Courts have decided that incorporation by reference of relevant provisions of the Code into the bank and customer contract makes those provisions enforceable as a contract.

The Code requires banks to have internal complaints handling processes and to be a member of an ASIC approved external dispute resolution scheme. The borrower may make a complaint to the Code subscriber's internal complaints handling process. If the complainant is not satisfied, the matter could be taken as a dispute to the subscriber's external dispute resolution scheme, for example FOS, or another independent external resolution scheme, to a court or to another tribunal for redress.

If the complainant is a small business, the complainant may consider seeking the assistance of the newly created Small Business and Family Ombudsman (commencing 1 March 2016), where the terms of reference of FOS prevent FOS from dealing with the matter.

- 3) The committee has heard some concerns that the existence of the CCMC and what it can do for consumers is not well known. What actions does the ABA take or plan to take to ensure that consumers are well informed of their rights in relation to the CCMC?

The ABA considers that the existence of the CCMC is well known among financial counselling and consumer advocacy groups, regulators and FOS. The CCMC publishes an Annual Report of its activities. The Annual Report for the period 1 July 2014 – 30 June 2015 was published on 30 November 2015. The Annual Report highlights the work undertaken by the CCMC in monitoring banks' compliance with the Code, investigating allegations of breaches of the Code and developing guidance to assist stakeholders in their understanding of the CCMC's powers and functions.

It also details the work of the CCMC in engaging with its stakeholders.

The Annual Report is published on the CCMC's website and is also provided to a number of interested parties.

The ABA sets out the role of the CCMC on the ABA's website and often refers members of the public who have a concern with their bank to the CCMC and has provided the means by which those people may contact the CCMC.

To ensure that customers of Code subscribers to whom the Code applies are better informed of their rights in relation to the CCMC, the ABA could develop a fact sheet for publication on the ABA's and Code subscribers' websites describing the availability of the CCMC and customers' rights in relation to the CCMC. The fact sheet would be required to have the same prominence on the websites as the ABA's and subscribers' information about the Code and be positioned with that Code information.



4) What dispute resolution arrangements are available to borrowers who do not fit in the jurisdiction on the Financial Ombudsman Service?

A borrower may refer their dispute with their bank to another dispute resolution scheme that is able to deal with the matter or to a court or other tribunal for redress.

As mentioned above, if the complainant is a small business, the complainant may consider seeking the assistance of the newly created Small Business and Family Ombudsman (commencing 1 March 2016).

If the customer is a farm business, there are farm debt mediation arrangements – legislated in Victoria and New South Wales and voluntary schemes in Queensland and the other states, other than Tasmania.

The ABA is seeking the establishment of a nationally consistent legislative scheme for farm debt mediation.

5) In your submission you state on page 1 that 'it is not industry practice for banks to use non-monetary processes or triggers such as loan to value ratios (LVR) to impair customer loans'.

a) Could you explain to the committee how the ABA has formed that view? For example, is it based on reporting by the banks or industry surveys regarding non-monetary triggers?

The view formed on page 1 of the ABA submission is based on more detailed material on pages 5 through 10 of the submission. The ABA sought information from members on the management of customer loans. There were common themes that banks work very hard to ensure the continued financial viability of their clients. Page 5 of the submission illustrates that the proportion of customers with loans which are in difficulty is very low. Page 5 further notes that the overwhelming majority of defaults are a result of monetary breaches of the loan covenants or a combination of both monetary and non-monetary breaches.

Accordingly, the ABA considers it is consistent and appropriate for it to define 'industry practice' by the predominant behaviour.

The statement is a contemporary evaluation in that it refers to current bank practices.

b) Does the ABA know how many non-monetary impairments or defaults occur annually in Australia?

The ABA is not aware of publicly available data on the number of non-monetary defaults in Australia.

c) Has the ABA examined the submissions to this inquiry which claim that they were subject to non-monetary defaults?

The ABA has read or listened to a selection of the submissions and testimonies to this inquiry.

The ABA does not have the opportunity to 'examine' these submissions and testimonies in the manner in which the PJC members can interrogate and evaluate the veracity and completeness of statements which are made.

Further, the ABA is an industry body. It does not manage matters arising between individual member banks and their customers. Therefore, the ABA is not in a position to provide information about those matters to assist this inquiry.

The ABA understands that its members are providing detailed information to assist the inquiry.



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- 6) Could you explain to the committee the different methods that are used to value properties and whether banks give any direction to valuers on which method to use?

This question is beyond the ambit of the ABA.

The ABA understands that member banks are providing responses to the inquiry on their valuation processes.

- 7) Where a bank requires a property to be used as security to be revalued and the borrower is required to pay for the valuation:

- a) Could a copy of the valuation and the banks instructions to the valuer be provided to the borrower?

There is a range of views on the appropriateness of providing valuations to borrowers.

The ABA understands that member banks are providing their responses to the inquiry in relation to this question.

- b) What review processes are available to the borrower if they disagree with the valuation?

The borrower may consider making a complaint to the bank's internal complaints handling arrangements.

The ABA is not aware of the processes available if the customer disagrees with a valuation and wants to raise their concerns directly with the valuer.

This aspect of the question would be better directed to valuers.

- c) In situations where a bank appoints an investigative accountant, what guidelines or rules does ABA have for banks regarding receivers that may subsequently be appointed? For example, to avoid conflicts of interest, are there any requirements that the investigating accountant cannot be appointed as a receiver?

The ABA does not have guidelines or rules for the appointment of receivers in the circumstances described in this question.

Yours sincerely

Steven Münchenberg/  
Chief Executive Officer