



4 October 2010

**By email: [phil.khoury@thenavigator.com.au](mailto:phil.khoury@thenavigator.com.au)**

Phil Khoury  
The Navigator Company  
GPO Box 5225  
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Dear Mr Khoury,

**Code of Banking Practice - McClelland Review Recommendations 9 and 10 - Location of Code of Banking Practice Code Compliance Monitoring Committee ("CCMC") within Financial Ombudsman Service ("FOS") - Issues Paper and Draft Mandate**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment on the above issues paper (**CCMC Issues Paper**).

**About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

**Consumer Action Response**

Consumer Action shares the view of other stakeholders that the CCMC has, in the past, lacked visibility and accessibility for consumers. Combined with apparent problems in ensuring effective information flows between the CCMC and the Financial Ombudsman Service (and historically the Banking and Financial Services Ombudsman) this has undermined the ability of code monitoring to encourage industry compliance. Although this situation has improved somewhat in recent times, (particularly with the integration of the toll free access number with FOS, and the commencement of monitoring inquiries aimed at reviewing compliance with specific clauses of the Code of Banking Practice (**Code**)), Consumer Action remains of the view that the CCMC

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could yet play a much more active role and, as a consequence, encourage greater compliance with the Code.

Consumer Action strongly supports the CCMC strategic directions outlined under point 6 of the CCMC Issues Paper, and agrees that efforts towards achieving the goals outlined therein will undoubtedly serve to boost stakeholder confidence in the efficacy of the CCMC and, by association, the Code itself. We believe that greater 'visibility' of the CCMC, more effective collaboration with FOS, and a genuinely pro-active compliance monitoring approach will be positive steps forward - and will represent a significant improvement on the activities of the CCMC to date.

It is Consumer Action's view that whilst inherently related, there are also fundamental differences (and even potential conflicts) between the roles of dispute resolution and code monitoring. As such it is our view that in the medium term it would be desirable that an independent codes monitoring body evolve that may provide independent code monitoring and compliance services to a range of industry codes.

It is also our view, however, that the timing is not yet right for such a development. In particular there remains a vast diversity of scope and approach under the various codes. It is clear that the needs of the CCMC for an appropriate corporate and governance structure cannot await that development. On that basis, the McClelland Review recommendation that the CCMC should be established as a separate independent unit with FOS, should be given a chance to work.

Consumer Action acknowledges and has some sympathy with the misgivings that responsibility for governance of the CCMC has generated. There is the risk that strategic oversight of the CCMC may distract from FOS' external dispute resolution (**EDR**) focus, and it will require some effort by FOS to develop knowledge of code monitoring.

Despite these obstacles, Consumer Action does believe that there are potentially significant consumer benefits to be gained from greater knowledge sharing between FOS and the CCMC. These are well outlined under point 7 of the CCMC Issues Paper. Consumer Action believes that for the short to medium term, as the CCMC Issues Paper makes clear, the implementation of this arrangement should be treated as a learning process and there is certainly benefit in providing for a thorough evaluation of that implementation, in the medium to longer term.

On the issue of governance and how the CCMC should sit in relation to the FOS structure, Consumer Action does not believe that the FOS Banking Advisory Committee should provide the governance role, as that committee does not itself have a governance role and the members of the committee (with the exception of the Board member who Chairs it) do not owe directors' duties to FOS. That role and duty rests with the FOS Board and its sub-committees. We would argue that it is fundamentally problematic for FOS' own governance structure to attempt to place a governance responsibility on a body that is intended to provide advice to the FOS board.

We suggest there are also serious shortcomings with this proposal from a practical perspective, including:

- There would need to be a complete review of membership of the committee, including the development of new terms of reference, selection criteria for membership and reporting requirements and frameworks to the Board;

- It is not at all clear that the persons who may be suited to playing the necessary governance role for the CCMC would also be suited to providing the practical advice and feedback that is presently sought from the advisory committee (or vice versa).

Consumer Action's preferred model is for governance responsibility for the CCMC to rest with either:

1. a dedicated sub-Committee of the FOS Board; or
2. a dedicated sub-Committee of the FOS Board, comprising 2 members of the FOS Board (one 'industry' and one 'consumer' director) together with the present members of the Code Compliance Monitoring Committee.

In either scenario and recognising the differing functions we suggest that reporting should be direct from the CCMC CEO to the governance body.

Which of these options is preferred obviously determines significantly the role of the present decision making panel. Under Option 1 a separate decision making panel would operate only on recommendations from the CEO and confine its role to breach decision making. As the CCMC points out, this would be consistent with the way EDR operates with panels. Given the historical governance role played by the present Code Compliance Monitoring Committee members, it may also make sense for them to play an advisory role to the governance body, at least for a transition period.

Under option 2, the decision making panel meeting alone would undertake the present decision-making function. Governance matters would be dealt with by the full sub-Committee. This option has the benefit of the potential to preserve the strategic, proactive nature of the CCMC whilst placing it within a clear governance framework.

In either case (and indeed whatever model is ultimately recommended), given the untested nature of the proposals and the concerns regarding the different (though related) nature of compliance monitoring and dispute resolution, we recommend that a review of governance arrangements for the CCMC is conducted within three years of implementation. This could also provide an opportunity to test whether industry code monitoring is sufficiently developed to benefit from the creation of a dedicated, multi-industry code monitoring body.

Ultimately, the governance structure must maximise the ability of the CCMC to undertake effective compliance monitoring with a view to the provision of a higher standard of banking services to consumers.

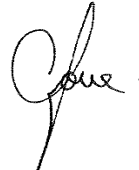
If you have any queries in relation to the above comments, please do not hesitate to contact Zac Gillam or Catriona Lowe on 03 9670 5088 or at [zac@consumeraction.org.au](mailto:zac@consumeraction.org.au).

Yours sincerely

**CONSUMER ACTION LAW CENTRE**

Handwritten signature of Zac Gillam in black ink.

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Senior Policy Officer

Handwritten signature of Catriona Lowe in black ink.

Catriona Lowe  
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