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By email: CCAAC@treasury.gov.au

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Dear CCAAC members

Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to contribute to the Commonwealth Consumer Affairs Advisory Council (**CCAAC**) review of the benchmarks for industry dispute resolution schemes.

In broad terms, Consumer Action strongly supports the benchmarks and notes that they have stood the test of time by providing for strong foundations for many EDR schemes in Australia. Importantly, the benchmarks have contributed to efficient and fair redress for many thousands (if not, millions) of consumers who would not have been able to resolve disputes through courts or tribunals. We do not think that the benchmarks are in need of major overhaul, but believe that they can be improved as outlined in this submission.

Briefly, this submission makes the following comments:

- in regards to the **accessibility** benchmark: considers that accessibility must remain a central consideration, access to schemes must remain free to consumers, informal and easy to navigate. In particular, the benchmarks should not require complaints to be made in writing and should require schemes to promote themselves, particularly through members of the schemes;
- we do not support further measures to discourage legal representation at EDR schemes;
- in regards to the **fairness** benchmark:
    - the scope of the benchmark should be considerably broadened beyond simply making fair decisions to addressing power imbalances between complainants and industry;
    - the fairness benchmark should also be amended to provide more guidance for schemes to require members to produce information relevant to a dispute, and
    - it is important that EDR schemes retain the ability to decide disputes taking into account not only the law but what is fair and reasonable in the circumstances and good industry practice;

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- regarding the **accountability benchmark**, we have recommended the benchmarks give more guidance on:
    - handling systemic issues; and
    - providing reasons for decisions.
- regarding the **efficiency** benchmark, while we welcome requirements for schemes to consider their own performance, they should also look at what is driving demand for the scheme and how demand can be reduced, particularly systemic issues;
- regarding the **effectiveness** benchmark, we have suggested that schemes could monitor effectiveness by following up on a certain number of cases to monitor how effective their involvement was in addressing complaints; and
- we support comments by the Australia and New Zealand Ombudsman Association (**ANZOA**) that it is undesirable to have more than one ombudsman scheme operating in a single industry.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. 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.

Terminology

For convenience, we will refer to Industry-based dispute resolution schemes in this submission as External Dispute Resolution schemes or **EDR.**

Accessibility

Broad remarks

Accessibility must continue to be a central consideration for industry dispute resolution schemes—the rationale for having EDR schemes at all is that costs and formality of courts and even tribunal processes can limit access to justice so alternative options are required.

It is critical that access to EDR schemes continues to be free for consumers, and that processes are relatively informal and easy to navigate. This helps to eliminate power imbalances between businesses and consumers (a point to which we refer in more detail under 'Fairness' below). Moreover, an accessible EDR process enhances the incentives for businesses to have effective internal dispute resolution (**IDR**) processes and so prevent disputes progressing to EDR at all.

Promotion

As the benchmarks note, accessibility also requires schemes to promote their existence and what services they provide. This is particularly important given the proliferation of for profit services (such as 'credit repair' firms) which appear to charge sizeable fees while offering very similar services that EDR schemes provide for free.

As part of the accessibility benchmark, we believe there should be concrete obligations on industry participants to promote EDR schemes. We are aware that some industries include such obligations (for example, default notices issued by credit providers must provide details of EDR schemes; energy or water business in Victoria must include information about the EDR scheme on one bill per annum). Recognising that perhaps the most efficient way to ensure awareness of an EDR scheme is through a relevant industry member when there is a dispute, we think the benchmarks should require EDR schemes to regularly review the way industry members are informing consumers about the schemes.

Escalation from Internal Dispute Resolution

We support the principle that consumers should deal with a trader's IDR mechanisms before escalating a complaint to EDR. However, IDR processes should not operate to prevent access to EDR, for example through requiring multiple 'tiers' of IDR or allowing indefinite IDR processes.

ASIC's *Regulatory Guide 165: Licensing: Internal and external dispute resolution* sets out time limits which apply equally to single tier and multi-tiered IDR systems. Revised benchmarks could adopt this guidance and apply it to other industries.

Making a complaint by telephone or internet

Many, but not all, EDR schemes allow for complaints to be made over the telephone. However, some EDR schemes require complaints to be made in writing. While telephone call centres operate to assist consumers, we are not convinced that those that require extra support to lodge a complaint are identified giving rise to risks that consumers "give up" from making a complaint if they are directed to do so in writing.

In our view, the benchmarks should specifically require EDR schemes to accept complaints through the telephone, and not require complaints to be made in writing. Websites for EDR schemes should also facilitate the making of a complaint from home pages.

Legal representation

We do not support the position of ANZOA that legal representation at EDR schemes should be further discouraged. As a legal service, we regularly represent consumers through EDR processes where the consumer is vulnerable or disadvantaged (and is unable to represent themselves), or to ensure certain legal or systemic issues are ventilated and considered as part of the complaint. EDR schemes need to be viewed as not only providing access to justice, but as part of the consumer protection framework that protects the public interest. Robust exchange of positions and ideas from represented parties can assist an EDR scheme come to a view on particular difficult issues, and may thereby facilitate more efficient outcomes for similar disputes that follow. For similar reasons, consumers should also be able to be represented by financial counsellors.

While Consumer Action also regularly provides assistance to consumers to advocate on their own behalf where they are able to do so, representation by a consumer advocate can ensure consumer stakeholders are able to understand how the schemes operate in practice and to provide feedback for improvement. We also note that industry members commonly benefit from 'in house' legal counsel and also benefit by being repeat players. Given the need for balance,

allowing legal or financial counselling representation for consumers is not only important to promote access, but also to ensure that EDR schemes maintain accountability.

As noted above, we are aware of the problems EDR schemes experience due to some agencies that charge consumers to resolve disputes through EDR. We have also warned consumers about credit repair and similar agencies.[1] We would support further measures to restrict access to EDR schemes for businesses that charge consumers large fees where disputes could be managed without representation, however we do not think that this should be achieved by discouraging free legal representation. We also note that for some high value disputes (for example, investments), consumers may benefit from paid legal or other representatives to represent them through EDR schemes processes.

Independence

It is essential that EDR schemes are seen as independent, particularly because members of EDR schemes are industry participants who pay for the scheme.

While the office of the EDR scheme decision-maker (usually ombudsman) must remain independent and not be answerable or selected by scheme members, another important aspect of independence is an EDR scheme's governing body. We strongly support the existing guidance that the overseeing entity have a balance of consumer and industry stakeholder interests, and the minimum functions of the overseeing entity.

However, we think the benchmarks should be clearer that there should be one overseeing entity or board, rather than allowing schemes to have multiple governance bodies. Our view is that a single, balanced board structure generally results in a fairer, faster and more efficient approach to scheme issues and reforms, for example reviews of scheme jurisdiction or effectiveness.

Fairness

Scope of the benchmark

The stated purpose of the fairness benchmark is 'to ensure that the decisions of the scheme are fair and are seen to be fair.' While this is important, we don't think it goes far enough. Instead the fairness benchmark should seek to promote fairness in all processes of an EDR scheme, not just in decision making. The key plank in this broader view of fairness should be addressing the power imbalance between the parties.

Phil Khoury and Debra Russell's 2011 review of the Credit Ombudsman Service, observed that an EDR scheme should not be narrowly oriented simply towards 'resolving disputes' but should be seen as a part of the broader consumer protection framework.[2] Khoury and Russell went on to argue that, while an EDR scheme must determine disputes neutrally,

> true neutrality in an EDR context is about appropriately 'levelling the playing field' so that consumers are in a position to obtain fair outcomes where they have a dispute with a service provider. It is not advocating for the consumer or for the member, but it is recognising what is required for fairness.[3]

[1] See: http://consumeraction.org.au/think-twice-before-using-a-credit-repair-company/
[2] Phil Khoury and Debra Russell (May 2012), *Independent Review: Credit Ombudsman Service Limited*, The Navigator Company Pty Ltd, p 13.
[3] At page 13.

We strongly support this interpretation of the role of an EDR scheme. As we have said above, EDR is necessary largely because access to other avenues for resolving consumer disputes is limited. Without accessible avenues for consumer dispute resolution, consumer protections under the law are of little value.

On this interpretation, the fairness benchmark needs to be significantly broadened to something closer to Khoury and Russell's explanation above—using processes that allow both parties to obtain fair outcomes. Where a consumer is at a disadvantage because they are less capable of bringing their case than their opponent, this would require schemes to offer assistance or use processes which level the playing field. For example, this may involve:

- providing extra assistance to consumers to identify the relevant issues in their complaint;
- resolving disputes by determination rather than by other options like conciliation where power imbalances have more impact;
- providing education, training and materials for community advocates to help them assist clients to bring cases (FOS does this now).

Requiring members to produce documents

Clauses 3.8 and 3.9 of the benchmarks allow schemes to 'demand' members provide information relevant to a dispute (but cannot compel them to do so). This is reflected in scheme terms of reference.[4]

However, in our experience schemes can be reluctant to enforce requests for documents even after those documents have been requested repeatedly, they are relevant to the case and there is no genuine reason for withholding them. We recommend the benchmarks could provide more guidance to schemes on requiring members to produce documents and options if members refuse. In particular, the benchmarks could state that schemes are entitled to make adverse inferences where a member refuses to provide information or documents after multiple requests and without reasonable explanation.

Considerations of fairness in decision-making

It is important that EDR schemes retain the ability to decide disputes taking into account not only the law but what is fair and reasonable in the circumstances and good industry practice.

Allowing general considerations of fairness encourages good industry practice by scheme members—business models which could be considered legal on a 'black-letter law' analysis may still be challenged successfully at EDR if they produce unfair results. It also levels the playing field when a dispute is at EDR as it reduces the value of technical legal arguments which will be more available to scheme members than consumers.

Accountability

Systemic Issues

EDR schemes are in an excellent position to spot systemic issues as they develop. Reporting systemic issues to members and regulators and providing recommendations for how they can be

[4] For example, see Financial Ombudsman Scheme Terms Of Reference 7.2; Credit Ombudsman Scheme rule 19.1.

resolved should be a key function of EDR schemes, however this is only considered briefly in the benchmarks.

We recommend that the benchmarks be expanded to:

- place more importance on addressing systemic issues;
- require a higher standard of reporting for systemic issues. The accountability benchmark currently requires reporting through the scheme's annual report but nothing further. We consider that best practice would require more frequent public reporting (perhaps quarterly) as well as meetings with members and regulators;
- provide specific good practice guidance for publicly naming members who repeatedly breach the law or engage in poor conduct and do not respond to approaches from the scheme to change practice. This should occur in addition to reporting the same conduct to regulators. The purpose of this guidance is to overcome the reluctance schemes have for naming problem traders.

Providing reasons for decision

It is important that EDR schemes publish reasons for their decisions so that all stakeholders can have some certainty about how the scheme handles particular types of complaint. Clause 4.1 requires that the scheme 'regularly' provides written reports of 'determinations'. This clause should be amended to:

- apply more broadly than 'determinations': complaints to EDR schemes are usually resolved before the determination stage, so there may be recurring themes in disputes handled by the scheme that are not reported;
- provide a more tangible benchmark on how often schemes should report. For example, instead of using the term 'regularly', the benchmarks could require reporting a certain number of times per year (which aligns with current good practice) and that reports should explain the scheme's approach to the most common issues in that period.

Efficiency

All stakeholders want EDR schemes to deal with disputes quickly. However it is equally important that schemes provide just outcomes, not just an ability to close cases quickly. Complex cases in particular will need time to properly consider and resolve. Clause 5.5 of the current benchmarks recognises that a desire for a quick resolution should not be allowed to compromise quality decision making. It is important that the revised benchmarks also make this point.

We approve of the requirements in the current benchmarks (at clauses 5.9-5.13) that require schemes to monitor their own performance. However in our view this should not only be an inward-looking exercise but also an opportunity to look at what is driving demand for the scheme and how demand can be reduced. In particular a pro-active approach to addressing systemic issues may reduce demand and so improve the speed with which schemes resolve disputes without putting pressure on the quality of the scheme's response.

Effectiveness

The effectiveness benchmark contains a number of directions on monitoring effectiveness, though none require the scheme to monitor the satisfaction of applicants with the quality of the service they received.

The benchmark could be improved by requiring schemes to put processes in place to monitor how effective the scheme was in resolving disputes, for example by following up a random sample of complainants each year. The current benchmark requires schemes to submit to an independent review which, among other things, considers scheme member and complainant satisfaction with the scheme. This is welcome, but independent reviews will be several years apart. More frequent contact with complainants will give schemes a more real-time understanding of how well they are dealing with different types of complaint.

Competition

We support the ANZOA position that it is not desirable to have multiple ombudsman schemes operating in the same industry area. We agree with the reasons ANZOA has given for this position in its *Policy Statement on Competition Among Ombudsman Offices*,[5] but in particular we make the point that this kind of 'competition' does not operate in the interest of consumers. Rather than creating incentives for schemes to provide better service for consumers (that is, complainants), EDR schemes will be competing for the business of industry members who will be interested in paying lower fees (which may reduce resources available per complaint received) and more industry-friendly processes.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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[5] See *Competition Among Ombudsman Offices*, September 2011, http://www.anzoa.com.au/ANZOA_Policy-Statement_Competition-among-Ombudsman-offices_Sept2011.pdf