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Mr Colin Neave AM
Chair
Commonwealth Consumers Affairs Advisory Council
C/- Consumer Policy Framework Unit
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Treasury
Langton Crescent
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By email: CCAAC@treasury.gov.au

Dear Colin,

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

The Australian Bankers' Association (ABA) is pleased to have the opportunity to provide feedback on this Issues Paper.

The ABA is the peak national body representing 24 banks that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia. The ABA's membership includes the four major Australian banks, foreign banks that are represented and carry on banking business in Australia as Australian banks and former regional banks that now operate nationally.

A significant number of ABA members are members of the Financial Ombudsman Service (FOS) which is regarded as the peak external dispute resolution scheme handling disputes in relation to the provision of banking and other financial services.

We wish to acknowledge your leadership, foresight, balance and judgment as Banking Ombudsman and later Chief Ombudsman of the FOS and the three EDR schemes' consolidation project which contributed significantly to the success of this project.

In responding to this Issues Paper, we will try to provide some context and hope in what we have to say your Committee will find most of the answers to the specific questions posed in the Issues Paper.

Overall the ABA considers the Benchmarks are satisfactory and do not need changes or modifications.

The ABA believes there are instances where guidance for applying the Benchmarks would be appropriate. The Benchmarks reflect a dual service role for EDR schemes; to serve the consumer and the industry participant which together drives public and industry confidence in the operations of the scheme.

It has been suggested to the Australian Securities and Investments Commission (ASIC) that it might consider including in ASIC's Regulatory Guide 139 a positive responsibility on a scheme to adopt service standards reflective of the scheme's role in providing its dispute resolution services to its members. This

could be developed into a form of service level agreements as the relationship between a scheme such as FOS and its members is contractual. This would reflect the theme of the Benchmarks.

1. The Benchmarks, EDR and regulation

1.1. Regulatory oversight

The Issues Paper acknowledges, at the outset, that the Benchmarks have had successes in guiding effective practices in industry-based EDR schemes. The ABA agrees.

The ABA supports the principle of access to justice for bank customers through the availability of a banking industry-based EDR scheme such as FOS. ABA's members have supported FOS and its predecessor since 1989.

Currently, a significant number of banking disputes handling by FOS fall under a regulatory umbrella where membership of FOS or an alternative ASIC approved EDR scheme is mandatory. All six Benchmarks are taken into account in ASIC's approval decision.

The extent to which government looks to the availability of industry-based EDR schemes as an alternative to judicial processes to resolve customer disputes is substantial. Examples are the requirements for banks as licensees under Ch7 of the Corporations Act 2001 to hold an Australian Financial Services Licence and under the National Consumer Credit Protection Act 1999 to hold an Australian Credit Licence. These licence conditions require the licensee to be a member of an ASIC approved EDR scheme. In addition to approving the EDR scheme, ASIC has responsibility to approve the Terms of Reference (ToR) for the scheme which are required to reflect the Benchmarks.

Membership of ASIC's ePayments Code obliges the subscriber to have similar IDR and EDR arrangements as apply under legislation. The same obligations arise under the ABA's voluntary Code of Banking Practice. Government acknowledges the contribution these two codes make to the broader consumer protection framework in Australia.

The Benchmark of Fairness warrants special mention because it is a key aspect of a scheme's decision-making. Fairness contemplates a consideration of the law, good industry practice, including by reference to codes or practice, and procedural fairness by which decisions are reached which in all the circumstances are fair and consistent.

For banks the Code of Banking Practice and ASIC's ePayments Code inform the Benchmark of Fairness as examples of good industry practice.

The law relating to the banker and customer relationship is based largely on contract and informs the consideration of the law.

A scheme's ToR should reflect fairness in the scheme's proceedings and decision-making.

Over time there have been concerns over the weight given to the three elements of fairness. It would be opportune in the context of this review for the CCAAC to consider how an appropriate balance of the elements might be formed and to provide further guidance after consultation with interested parties and taking their views into account.

As the example of Fairness suggests, of more importance and relevance is to understand how the Benchmarks are applied in practice.

The importance of the Benchmarks is diminished if their application is constrained either by a scheme itself, its ToR or as a result of regulatory oversight.

A recent example of regulatory oversight helps to illustrate a possible problem.

FOS' ToR paragraph 13.1, in part, prohibits a FOS member from continuing with an existing debt recovery proceeding after the debtor has lodged a dispute with FOS. As a result of some significant disadvantages in outcomes, in particular for small businesses, from the application of this ToR it has been necessary for ASIC to review the application of this ToR taking into account the Benchmarks including those of accessibility, effectiveness and fairness. For over a year, having regard to some of the concerns of industry and in some cases of consumers, consultation with ASIC has not yet resulted in publication by ASIC of measures aimed at resolving some of these unfortunate outcomes resulting from the strict application of ToR 13.1. It is understood a decision by ASIC is expected soon.

1.2. Adherence to the Benchmarks

1.2.1 Accountability and Efficiency

The importance of the Benchmarks also can be diminished where their application is constrained by ongoing timing issues for the resolution of disputes lodged with the scheme. This adversely impacts the objects of the Benchmarks of Accountability and Efficiency.

If Benchmarks such as Accountability are to remain relevant then there should be consequences for schemes that are not able to meet critical operational requirements. In the case of FOS, service levels could be agreed with the industries for which FOS provides its services, so that it is clear in terms of Accountability what consequences will flow to each party where agreed service levels are not met. Increasing delays in dispute resolution ultimately impact on the credibility of the dispute resolution scheme, and this is not in the interests of customers, financial services providers or the scheme itself.

The Benchmark for Efficiency could be served if the scheme has mechanisms for prioritising and expediting the review of disputes where the timeframe for dealing with the dispute could have negative financial or legal implications for either party.

1.2.2 Accessibility

It is evident from disputes data provided by schemes that there is widespread knowledge of their availability and role. This is due partly to their promotion by the schemes themselves and through legislation which requires promotion of the availability of these schemes for dissatisfied customers to have their complaints reviewed.

If the Committee is minded to recommend further promotion of the existence of these schemes then the focus should be on the demographically under represented consumers and consumers with special needs. The Accessibility Benchmark itself would not require amendment as its current wording covers these aspects.

Accessibility needs to be balanced with a clear and quick application of the ToR to exclude those disputes which do not fall within the scheme's jurisdiction. This has been a common difficulty with customers frequently lodging new disputes with FOS after a previous dispute has been resolved (or has been closed due to a lack of response from the customer). A recent example concerns the closure of a dispute following a Determination. The scheme member resumed collection activity only to receive advice the following week that a new dispute had been opened from the same customer complaining about the Determination (there is no right of appeal from a determination). The Benchmark of Accessibility would be better served in these cases with a scheme having processes in place to quickly identify and reject a new dispute being lodged under these circumstances.

Other examples where adherence to the Accessibility Benchmark requires the exercise of judgment concern the right of a consumer to appeal a decision that a dispute is outside ToR within 30 days. Increasingly, there have been experiences where large business customers, with several million dollars

of facilities, have been lodging disputes at FOS purely to defer collections activity. Then follows a waiting period while a jurisdictional decision is made. Then the applicant is given 30 days to respond (and additional time in some instances). Then the FOS member is given another opportunity to respond to the applicant's submission and finally the Ombudsman considers all the information to form a view. This can be an extremely time-consuming and frustrating process where disputes are clearly outside the FOS Terms of Reference at inception and the scheme member must wait for the end of this process before appointing a receiver or administrator.

The Accessibility Benchmark is designed to promote customer access to an EDR scheme on an equitable basis.

The ABA is aware of widespread concerns among EDR scheme members, schemes themselves, consumer advocacy groups and regulators about certain fee for service consumer complaint aggregation services, in particular businesses known as credit repair companies. These concerns were highlighted recently in submissions to the Australasian Retail Credit Association (ARCA) in the consultation process for the development of a revised Credit Reporting Code of Conduct for approval by the Privacy Commissioner pursuant to amendments to the Privacy Act.¹

Importantly, this review of the Benchmarks, in particular the Accessibility Benchmark, provides an opportunity for the Committee to recommend that industry-based EDR schemes develop guidelines for the fee based representation of a consumer complainant to be assessed for the suitability of the representative to represent the consumer. The Accessibility Benchmark promotes access for a consumer to a scheme on an equitable basis which should include whether the services provided by the representative to the consumer meet this objective.

The ABA suggests that FOS, and other ombudsman schemes, may wish to develop these guidelines in consultation with each other or in consultation with ASIC.

Finally, Accessibility (and Fairness) should include a requirement for EDR schemes' decisions to be brief, concise, to avoid legalise in favour of simple, plain English written decisions and be consistent.

1.2.3 Effectiveness

Schemes including FOS have an opportunity to play a greater role in advocating for their members' customers and in supporting an increase in financial literacy in Australia through better information sharing and education of customers through the FOS process.

This would promote greater confidence in a scheme by consumers and industry.

For example, providing information that educates complainants on their claim, what is needed to successfully bring a claim, how the scheme will approach the complaint and the range of possible remedies available would help the complainant understand what is achievable and shape their expectations to avoid unrealistic expectations of what the scheme can do.

1.3. Maintenance of the Benchmarks

The trend in government is to increase consumers' access to justice through an industry-based EDR scheme. This will be evident again with the recent amendments to the Privacy Act.

The ABA supports this in principle. But in practice, it is important for government to understand the impacts. As disputes are expected to be handled expediently by all parties, conformity with the Benchmarks means industry must provide additional resourcing and funding for the schemes to avoid a decrease in services to both consumers and industry.

¹ See <http://www.arca.asn.au/docs/category/57/cr-code-submissions-received> Joint Consumer Submission CR Code Submission and Credit Ombudsman Service Ltd CR Code Submission

It is notable that government does not provide any financial support for FOS in providing the alternative route for access to justice.

The CCAAC may consider this could be relevant in its review of the Benchmarks.

2. Consistency in application of the benchmarks

Most industry-based consumer EDR schemes have relief arrangements for consumers experiencing financial hardship but who are unable to reach a resolution with their industry service provider.

FOS and the Credit Ombudsman Service Ltd. stand out as examples of effective access for consumers to financial hardship arrangements in these types of situations.

Many of these consumers will have financial difficulties with a range of service providers including telecommunications companies, essential services providers, such as energy and water providers, and even local government authorities.

To aid consistency in the application of the Benchmarks across the broader range of industry-based EDR schemes it would be helpful for all schemes to be able to assume that the schemes all have adopted a consistent approach to dealing with financial hardship disputes. This knowledge could assist in better overall management of the customer's circumstances.

3. Comparative performance of EDR schemes

The Accountability Benchmark is an important measure and an incentive for an industry based EDR scheme to be productive, transparent and better in its performance.

The current annual reporting of the schemes is an important step in providing transparency. This enables the community, industry and the regulator (if a supervising regulator is involved) to make judgments about the nature and number of disputes received by the scheme and the timeframes for the resolution of disputes.

The ABA wishes to make a suggestion to support the Accountability Benchmark.

Currently there are little, if any, comparisons made across industry-based and funded EDR schemes.

The CCAAC could accept a responsibility to annually report on the comparative performances and productivity of industry-based schemes to support the Accountability Benchmark which could help drive efficiencies and reduce costs to the respective industries.

Suitable metrics would need to be developed to ensure comparisons between schemes are reasonable and realistic including the nature of the industry, the type of simple and complex disputes that a scheme handles, the number of members and disputes, the funding and resourcing of a scheme and key criteria associated with the processing of disputes.

The ABA would welcome the opportunity to participate in developing appropriate metrics for this comparative approach to schemes' performances and service delivery.

4. Concluding comment

ABA members' support for and involvement with FOS has been a long and valued association and a positive service for bank customers and for banks themselves.

The future based on the guidance provided by the Benchmarks should be a beneficial one for customers.

With industry's commitments to support these schemes it is vital that industry retains its sense of "ownership" of the services a scheme provides and for this identification with the scheme to be preserved.

The success of this model arises from the banking and financial services sector's engagement with its market conduct regulator ASIC and the relevant industry-based EDR schemes.

The ABA would be concerned if a body outside the banking industry is given the role of setting industry standards including for the banking and financial services sector's sponsored EDR schemes.

Yours sincerely,

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line that ends in a small flourish.

Ian Gilbert