



**Submission to Commonwealth  
Consumer Affairs Advisory Council**

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

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## About CHOICE

CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers' interests - ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

To find out more about CHOICE's campaign work visit [www.choice.com.au/campaigns](http://www.choice.com.au/campaigns) and [subscribe to CHOICE Campaigns Update](#) at [www.choice.com.au/campaignsupporter](http://www.choice.com.au/campaignsupporter).

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## Executive Summary:

CHOICE believes the External Dispute Resolution (EDR) Benchmarks have proven to be adaptable and durable, and have been adopted by or applied in the policy settings underpinning all significant consumer EDR schemes. As such, they have provided the basis for one of the most important and effective mechanisms of consumer protection by ensuring that consumers not only have rights but receive the benefits of those rights in practice.

CHOICE has been a strong supporter of the Benchmarks since their introduction and their application by policymakers and regulators and industry schemes. We believe that consumer complaints schemes provide an important consumer protection, and implement the fundamental consumer right to redress.

Ultimately, consumers endure the burden both of failed regulation or failure to regulate, either as victims of market failure or increased prices resulting from compliance costs. CHOICE is supportive of as little regulation as possible - but as much as is needed. In this context, EDR plays an important role in keeping regulation to a minimum.

**Recommendation 1:** CHOICE recommends the Benchmarks be retained in their current form, with the addition of a separate benchmark for “Awareness”.

**Recommendation 2:** CHOICE recommends the Benchmarks include a general requirement that schemes operate on a not-for-profit basis.

**Recommendation 3:** CHOICE recommends the Benchmarks give greater prominence to the need for schemes to be well-resourced.

**Recommendation 4:** CHOICE recommends there be no new, specific Benchmarks included that apply to online commerce or online dispute resolution.

## Introduction

1. CHOICE appreciates the opportunity to provide the following comments to the Commonwealth Consumer Affairs Advisory Council (CCAAC) in response to its Issues Paper *Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes (Issues Paper)*.
2. Since they were released in 1997, the benchmarks for external dispute resolution (EDR) schemes (Benchmarks) have provided a sound basis for the development, implementation and review of industry-based customer dispute resolution schemes. CHOICE notes that the Benchmarks preceded similar guidelines that were established in the European Union in 1998<sup>1</sup> and were generally at the forefront of international measures to establish sound principles for extra-judicial redress in consumer transactions.
3. The Benchmarks have proven to be adaptable and durable, and have been adopted or applied by all significant consumer EDR schemes.<sup>2</sup> As such, they have provided the basis for one of the most important and effective mechanisms for consumer protection by ensuring that consumers not only have rights but receive the benefits of those rights in practice.
4. CHOICE has been and continues to be a strong supporter of the Benchmarks since their introduction and their application in industry schemes.
5. This submission responds to the questions raised in the Issues Paper and makes the following additional submissions:
  - In general, the Benchmarks are effective and require little or no amendment.
  - The Benchmarks are capable of being, and should be, applied to new forms of dispute resolution, such as online dispute resolution (ODR).
  - The Benchmarks have been a key factor in supporting the success of EDR in Australia, which has resulted in significant benefits for Australian consumers.
  - Certain of the Benchmarks should be strengthened or be the subject of more detailed guidance.
  - The application and enforcement of the Benchmarks raise more difficult issues that may be the subject of further study by CCAAC. CHOICE sees the three most significant issues as:
    - Ensuring consumer awareness at the point when a dispute arises or when consumers seek advice on resolving disputes;

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<sup>1</sup> See European Commission, Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115 17.04.1998.

<sup>2</sup> See for example ASIC, 2011, *Regulatory Guide 139: Approval and Oversight of external dispute resolution schemes* (ASIC RG 139), at para RG 139.26

- Entrenching the principle that EDR services should be provided at no cost to the consumer; and
  - Ensuring that scheme participants comply with EDR rulings and that a mechanism exists to ensure consumers are not denied redress because of insolvency by a scheme member.
6. CHOICE notes that there are a range of issues relevant to EDR schemes that cannot be addressed by a review of the Benchmarks themselves. Notably, the coverage of separate schemes remains an important challenge and CHOICE agrees with the findings of the Productivity Commission in its Consumer Framework Report that there are still “gaping holes” in the coverage of schemes.<sup>3</sup> Some issues relating to coverage are dealt with below. For example, where coverage limitations on subject matter significantly impede the effectiveness of a scheme to resolve disputes on other issues that are within the scheme’s jurisdiction.
7. CHOICE has consulted with consumer representatives in preparing this submission. In doing so, it is clear that several principles have been fundamental to achieving good consumer outcomes from EDR:
- Access to the schemes is at no cost to consumers and schemes are not-for-profit.
  - Legal representation is not required.
  - Schemes are adequately funded, including that they have access to sufficient fixed funding to ensure staff levels and corporate memory are maintained.
  - Schemes are independent and include consumer representation in oversight mechanisms.
  - Schemes have sufficient powers to deal with systemic issues and to provide industry and consumers with information and statistics on complaints-handling performance in the sector.
8. Although these principles are already reflected in the Benchmarks, CHOICE emphasises that they form the cornerstones of EDR success.

## Background issues

- 2.1 How widely are the Benchmarks used by industry schemes? Are there any examples of how the Benchmarks are used?
- 2.2 To what extent do the Benchmarks act as a useful guide for industry schemes as well as consumers and industries that access such schemes? Are there any ways in which they

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<sup>3</sup> See Productivity Commission, 2008, *Review of Australia’s Consumer Policy Framework* (Inquiry Report No. 45), pp 202-9.

could be improved to more effectively fulfil this role?

- 2.3 Are there any other standards or guidelines that are commonly used by industry schemes to deliver and determine best practice operations? If so, how are they applied in conjunction with or as an alternative to the Benchmarks?
- 2.4 Are the Benchmarks consistent with other standards or guidelines and if not, in what respect are they inconsistent?

9. The Benchmarks are applied almost universally by EDR schemes that have a consumer dispute resolution role. For example, schemes in utilities sectors such as the Energy and Water Ombudsman in both Victoria and New South Wales apply the Benchmarks. The Benchmarks have also formed the basis for policy frameworks underpinning EDR schemes, for example ASIC regulatory guide RG139, which requires schemes in the financial services sector to apply and be periodically reviewed against the Benchmarks.

## The Benchmarks

### accessibility

- 3.1 To what extent do the underlying principles and key practices under the benchmark of Accessibility remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

### Awareness

10. The Accessibility benchmark addresses some of the most fundamental aspects of EDR operation, including awareness, cost, legal representation and assistance for disadvantaged consumers.
11. Although CHOICE generally does not advocate a change to the structure of the Benchmarks, there is a good case that the promotion of awareness of schemes should be covered in a separate Benchmark to Accessibility. "Accessibility" is generally associated with issues of equity in access regardless of technological, linguistic and/or literacy skills, as well as procedural fairness and ensuring that all consumers are treated equitably once a complaint is lodged. As such, the issues involved mostly touch on the scheme's processes and internal operations. The principles and practices that support awareness of a scheme are of a different nature and should be afforded separate treatment in the Benchmarks.
12. It is difficult to generalise about current levels of awareness across the schemes. In many cases, awareness is reassuringly high. In its 2012 National Survey, the Australian Communications Consumers' Action Network found that among consumers who had an unresolved complaint against their service provider, 46% were aware of the existence of

“an Ombudsman” or Telecommunications Industry Ombudsman (TIO).<sup>4</sup> Of those who did not take their complaint to the TIO, only a small proportion (10%) cited a lack of awareness as the reason.<sup>5</sup> However, at the time of the survey, the TIO had received extensive publicity because of widespread mobile network problems on one network.

13. However, some schemes have expressed concern about the level of public awareness. For instance, in the past the Financial Ombudsman Service (FOS) has emphasised the need to build awareness of its operations.<sup>6</sup>
14. Consumer awareness does not only benefit consumers if they have been unable to resolve a dispute with a scheme member. It may provide leverage to achieve a resolution through internal dispute resolution and awareness of the scheme may lead consumers to be better informed about the regulation that applies to their dispute, their rights and the outcomes they can reasonably expect.
15. The “Key Practices” (KPs) included under awareness should also cover making the scheme known to community organisations and counsellors. In industry-specific areas, it might be expected that staff of relevant community bodies will be aware of the existence of schemes in their area but more general consumer advisors and counsellors may need additional information to advise their clients.

### Cost and not-for-profit operation

16. Currently the Benchmarks include KP 1.11 that “customers do not pay any application or other fee or charge before a complaint is dealt with by the scheme, or at any stage in the process”.
17. CHOICE considers this to be a cornerstone of effective EDR both on the grounds of accessibility and fairness. Imposing a cost on consumers to have a complaint resolved would dramatically undermine EDR as a process for redress.
18. Not currently in the Benchmarks is a general requirement that schemes operate on a not-for-profit basis. CHOICE is of the view that this requirement should now be included as a Key Practice under the issue of cost. Although the effect is not immediate, over time, the operation of schemes on a profit basis is likely to contribute to consumer cost by this additional profit being funded either through cost-cutting by the schemes or by the schemes seeking to recover additional fees which are then likely to be passed on to consumers in general.

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<sup>4</sup> See ACCAN, 2012, *National Consumer Perceptions Survey*, pp 66 (available at: <https://accan.org.au/files/ACCAN%20National%20Survey-1.pdf>). See also TIO, 2013, *TIO Talks* no. 1 of 2013, p 1 (available at: [http://www.tio.com.au/\\_\\_data/assets/pdf\\_file/0011/127865/TIO-Talks\\_No1\\_2013\\_FINAL.pdf](http://www.tio.com.au/__data/assets/pdf_file/0011/127865/TIO-Talks_No1_2013_FINAL.pdf))

<sup>5</sup> *Ibid*, p 71.

<sup>6</sup> See FOS, *Business Plan 2010-11*, (“Our surveys of the community and of recent users confirm the critical need is to be clearer about who are members of FOS and what disputes we can consider”).

Available at [http://www.fos.org.au/centric/home\\_page/publications/business\\_plan.jsp](http://www.fos.org.au/centric/home_page/publications/business_plan.jsp)

19. Further, operating schemes on a for-profit basis would create perverse incentives that would encourage schemes to try to avoid more complex disputes, discourage their involvement in resolving systemic issues and reduce their willingness or ability to perform functions such as statistical information gathering, information provision and educative functions. Overall, if a scheme is run as a business, it is inevitable that the scheme will focus on profitable activities and cost minimisation at the expense of its core function of correcting cases of consumer harm. This would result in a gradual lowering of standards across the board, with schemes competing on metrics other than quality of service, focusing instead on cost minimisation to members, in conflict with their objectives and purpose.

## independence

3.2 To what extent do the underlying principles and key practices under the benchmark of Independence remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

20. In CHOICE's view, the Independence Benchmark does not require amendment. We stress the importance of maintaining consumer representation on bodies or boards that are established to oversee and review EDR schemes. This is particularly relevant in the context of EDR schemes that operate as part of an industry self-regulatory mechanism.

21. CHOICE notes that funding is a core element of maintaining real independence. This issue is addressed below under "Effectiveness".

## fairness

3.3 To what extent do the underlying principles and key practices under the benchmark of Fairness remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

## accountability

3.4 To what extent do the underlying principles and key practices under the benchmark of Accountability remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

CHOICE is not aware of any significant problems with regard to the fairness and accountability benchmarks and considers that the key practices established in the Benchmarks are appropriate to stakeholder needs. This submission raises some issues which may be resolved through enhanced reporting requirements. These are discussed in the relevant sections.

## efficiency

3.5 To what extent do the underlying principles and key practices under the benchmark of Efficiency remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

### Timeliness

22. Consumer representatives consulted by CHOICE noted consumers often complain that some EDR schemes are ineffective because of substantial delays in the resolution of complaints.<sup>7</sup> In assessing timeliness, it must be remembered that consumers are required under the Efficiency Benchmark (KP 5.1(a)) to exhaust the scheme member's internal dispute resolution mechanisms before taking the complaint to the scheme. As such, the consumer will most likely already have expended substantial time to have the complaint resolved before they commence an EDR process.
23. Under the Benchmarks, KP 5.5 requires a scheme to have reasonable time limits for each of its processes, without compromising quality decision-making. The Benchmarks also include provisions to track complaints-handling performance.
24. CHOICE acknowledges that there may be tension between a quick resolution of a dispute and requirements for fairness and effectiveness and that in complex cases, disputes may take longer to resolve. However, CHOICE submits that the Benchmarks should be strengthened in regard to timeliness by requiring schemes to establish penalties for failure to comply with deadlines or the making of default determinations where a party fails to respond to scheme requests for information or submissions.

## effectiveness

3.6 To what extent do the underlying principles and key practices under the benchmark of Effectiveness remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

25. CHOICE's experience, which is shared by consumer representatives consulted, is that the effectiveness of some EDR schemes has been compromised in recent times by three factors:
- Ensuring compliance with scheme rules and determinations, including where a member has become insolvent or where redress is otherwise denied;

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<sup>7</sup> See for example ZDNet, 4 Jun 2013, Australian telco ombudsman understaffed for complaints handling, (available at: <http://www.zdnet.com/au/australian-telco-ombudsman-understaffed-for-complaints-handling-7000016312/>).

- Adequate funding of schemes; and
- Timeliness (see discussion above).

## Compliance and fulfilment of determinations

26. Non-compliance with scheme determinations results in obvious consumer detriment in individual cases but is also a serious threat to the legitimacy of the scheme itself and EDR generally. As the ACMA submitted in a recent case on compliance with the TIO scheme,

Abiding by the 'umpire's decision' is self evidently an important part of the TIO Scheme. If members of the TIO Scheme fail to comply with determinations of the TIO the effectiveness of the Scheme is likely to quickly and significantly diminish and thereby potentially have consequences such as the following:

- discouraging Australian small businesses and households who experience difficulties with their telephone and/or internet services from seeking redress;
- reducing public confidence in Australia's telephone and/or internet service industry;
- discouraging the use of telephone and/or internet services;
- increasing the resources required by the TIO and the ACMA to try and ensure compliance with the Telco Act, and
- undermining the objects of the Telco Act.<sup>8</sup>

27. We note that the number of unpaid determinations at FOS has been rapidly rising in the Investments area. For example, FOS research in April 2012 stated that since 1 January 2010, determinations relating to financial services members in liquidation or administration had awarded \$2,668,904.77 of which \$2,426,659.53 remained unpaid.<sup>9</sup> We understand this figure is now substantially higher, and approaching something like 40% of determinations in the Investments, Life Insurance and Superannuation division of FOS going unpaid.

28. Currently the Key Practices under the Effectiveness Benchmark include a requirement for schemes to have "mechanisms to encourage scheme members to abide by the rules of the scheme", which may include contractual obligations or reporting non-compliance in the scheme's annual report.

29. CHOICE submits that addressing deliberate non-compliance with scheme determinations justifies more developed guidelines. Flexibility should be maintained in the Benchmarks and the ultimate decision about what compliance mechanisms to adopt can be left to the scheme. However, a range of options should be included, such as options to tie compliance with the schemes to other regulatory systems. There are already some current examples, such as those schemes where membership of a scheme is often a licence condition, so if expulsion from a scheme is made explicit as a sanction for non-compliance, scheme members will face a stronger incentive to abide by scheme decisions. Similarly, under certain conditions, non-compliance with determinations may constitute misleading or deceptive

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<sup>8</sup> *Australian Communications and Media Authority v Bytecard Pty Ltd* [2013] FCA 38, [57]ff. Foster J. agreed with those submissions.

<sup>9</sup> FOS, *Response to the the Report on Compensation Arrangements for Consumers of Financial Services* by Richard St John April 2012, p. 18

conduct on the part of the scheme member. To enhance enforceability under these laws, scheme members should be required to make a clear public statement that they will comply with scheme determinations.

30. Problems with enforceability also arise where a scheme member is insolvent, no longer trading or otherwise unable to provide redress at the time a determination is made against it. This is not currently addressed in the Benchmarks. The experience of both CHOICE and consumer counsellors is that other compensation mechanisms - notably professional indemnity insurance - often raise more problems than they solve because of the difficulties in pursuing cases against insurers.
31. Here too, flexibility should be allowed in the Benchmarks, so that schemes can address specific issues that arise in their sector. However, the Benchmarks should include an umbrella obligation on schemes to address the problem in their rules. Options should be included to address the issue, such as the establishment of compensation arrangements or a requirement of scheme membership that members hold a security deposit to satisfy claims if they become insolvent.

## Funding

32. The Benchmarks (in Key Practice 2.9) include a requirement that the scheme has “sufficient funding to enable its caseload and other relevant functions necessary to fulfil its terms of reference to be handled in accordance with these benchmarks”.
33. Funding is an issue that clearly extends beyond the Benchmarks themselves but for the sake of establishing confidence in a scheme, it would be helpful for the Benchmarks to require a scheme to address the issue of funding in its constitution or other establishment documents and to have a current business plan that addresses contingencies and alternative sources of funding for the scheme.
34. Transparency and accountability are also important in regard to funding. There is currently no requirement for schemes to report on financial matters in their annual report. Although most schemes do include financial information, this should be addressed in the Benchmarks.

## Modernising the Benchmarks

- 3.7 Could any element of the Benchmarks, including terminology or key practices, be modernised in the light of subsequent developments in ADR processes or technologies?
- 3.8 Do each of the six benchmarks remain appropriate as part of a best practice framework for industry-based dispute resolution services, and are there any additional benchmarks (and associated key practices) that could be included?

35. CHOICE does not consider the emergence and evolution of online dispute resolution mechanisms *per se* creates the need for significant amendment to the Benchmarks. In most respects, the same principles and practices that apply to traditional forms of EDR also apply when processes are online or delivered using other technology. In this sense, the Benchmarks remain appropriate as part of a best practice framework.
36. The main issues raised by online ADR relate to Accessibility, particularly the need to ensure that disadvantaged consumers and those with special needs are not excluded from effective EDR schemes because of technological requirements. Socio-economic status, cultural and linguistic diversity and access to the internet may all affect the ability of individual consumers to achieve a fair outcome.<sup>10</sup>
37. CHOICE considers that the overarching principle that should be applied when considering the availability of ODR is that the consumer must retain the right to choose between an online and a traditional procedure.

## Implementation

- 4.1 Would industry schemes benefit from additional implementation guidance and if so, how?
- 4.2 Are there any elements of the Benchmarks where additional implementation guidance would be particularly beneficial?
- 4.3 Are there any principles or processes that if followed, would improve the quality and usefulness of implementation guidance materials?
- 4.4 Who should be involved in the development of additional implementation guidance?

38. CHOICE has outlined the main areas where it considers further guidance is required in the above submissions.
39. The most significant process issue for guidance is that regulators are involved in ensuring guidance is appropriate to the industry being regulated and that the guidelines are followed by schemes and scheme members. At this time, CHOICE does not advocate for enhanced powers for regulators to issue and enforce guidelines but we note that substantial powers already exist for sectoral regulators to be involved and we support intervention when the legitimacy and effectiveness of schemes or industry codes is undermined by failures to follow guidelines.

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<sup>10</sup> See OECD, 2001, *Building Trust in the Online Environment: Business to Consumer Dispute Resolution, Report of conference*, p 20-2 (available at: <http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=DSTI/ICCP/REG/CP%282001%292>).