

12 June 2013

The Manager
Commonwealth Consumer Affairs Advisory Council Secretariat
Competition and Consumer Policy Division
Treasury
Langton Crescent
Parkes ACT 2600

To the Manager

Subject: Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes (Benchmarks)

Thank you for the opportunity to provide a submission to your review of the Benchmarks. We apologise for the late delivery – this contribution must be fitted in around client’s work. We are also relaxed about whether our notes below are formally ‘accepted’ or not or published – this is not an exercise in promotion from our point of view. Hopefully, they will be of some assistance to the Review.

Background

Cameronralph Navigator is a consultancy that has considerable experience in Industry-based external dispute resolution. Over the past 13 years, we have undertaken fourteen independent reviews of external dispute resolution schemes in Australia, New Zealand and Canada:

- Banking & Financial Services Ombudsman;
- Credit Union Disputes Resolution Centre;
- Insurance Brokers Disputes Limited;
- Credit Ombudsman Service (twice);
- Insurance & Savings Ombudsman (New Zealand) (twice);
- Investments and Life Insurance division of the Financial Ombudsman Service;
- Insurance Ombudsman Service division of the Financial Ombudsman Service;
- Ombudsman for Banking & Investments (Canada) (twice); and
- Public Transport Ombudsman Victoria

All reviews other than the Canadian ones were framed against the Industry Benchmarks.

We have also worked with the Energy and Water Ombudsman New South Wales, the Energy and Water Ombudsman Victoria, the Telecommunications Industry Ombudsman and the Law Institute of Victoria on projects to enhance their effectiveness.

The firm principal, Phil Khoury has spoken at ANZOA and International Network of Financial Ombudsman (INFO) conferences.

Overview

We think that the Benchmarks provide a very useful framework that promotes best practice in external dispute resolution. The six Benchmarks – Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness - are appropriate and well accepted. They are entrenched in legislation (see Corporations Regulation 7.6.02(3) and New Zealand Financial Service Providers (Registration and Dispute Resolution) Act 2008 Section 52(2)) and, in our submission, should be adhered to. For the most part, we are also supportive of the statements of purpose for each Benchmark and think that they are generally well cast.

Reflecting the experience of EDR schemes and their evolution of the last few years, we think that the document could be strengthened in the following ways:

- The life of an EDR scheme is all about striking the right balance and adapting that balance to changing demands. The Preface should include some discussion of the importance of a scheme consciously striving for an appropriate balance – for example the balance between the interests of businesses and the interests of consumers and balance between the pull of the different Benchmarks, for example, efficiency and fairness - see Part A of our submission.
- Some of the statements of principle and the statements of purpose that enlarge upon the Benchmarks should be cast more broadly to reflect the realities that schemes face today – see Parts C to G of our submission.
- We have also identified some gaps in the discussion of Key Practices - see Parts B and D to G of our submission.

A. Preface

Suggest a statement recognising that schemes need to balance the interests of stakeholders and to strike a balance between benchmarks that naturally ‘pull’ in opposing directions – such as Fairness and Efficiency.

B. Accessibility Benchmark

We think that the statements of principle and purpose are appropriate and clear. We have, however, a few suggestions in relation to the Key Practices.

1. It would be worthwhile explicitly acknowledging the importance of a scheme identifying key referral contact points - for example community law centres, financial counselling services or government information services - and promoting awareness of its existence, services and details to those intermediaries. In working with schemes, we have found that

these kinds of promotional efforts are more effective than media promotion, given that schemes inevitably have a restricted budget for promotional activities and consumers typically have no interest in the subject until the time when they have an issue or complaint.

2. Whilst it is appropriate for a scheme to require complainants to try first to resolve their complaint with the scheme member before accessing the scheme, there is evidence that unduly lengthy scheme member internal complaints handling processes can operate as a barrier to accessing the scheme. To address this, we suggest as a new Key Practice that a scheme must either:
 - a. accept a complaint from a complainant who has made reasonable efforts to resolve the complaint with the scheme member; or
 - b. have arrangements with its scheme members whereby the scheme may direct complainants in this situation to a higher authority within the scheme member who is allowed a defined period of time to resolve the complaint.
3. We suggest that paragraph 1.18 – appropriate techniques to settle complaints – better belongs in the Fairness Benchmark (see further comments in paragraph D.x).

C. Independence Benchmark

1. We think that the statement of principle should be broadened along the lines of: The scheme's governance, funding and management arrangements ensure that the scheme can resolve complaints independently from the scheme members and in accordance with these benchmarks.

The funding issue is particularly important as we have seen progressive per complaint funding reductions result in schemes being aggressively criticised for being too slow and inefficient. The resultant pressure to cut backlogs can result in a preparedness to encourage consumers to accept 'low-ball' settlement offers and an unwillingness for the scheme to take matters through to expensive and lengthy determinations.

2. We think that the statement of purpose could be broadened along the lines of: To ensure consumer confidence that scheme members do not have the capacity to influence the scheme's complaints handling.

D. Fairness

We are concerned that this Benchmark is confined to determinations and scheme staff decisions and does not encompass other complaint outcomes. In our experience, it is not unusual for the majority of complaints to a scheme to be resolved without a scheme decision – for example, by conciliation resulting in the complainant settling with the scheme member or by the complainant being advised not to pursue the complaint.

Whilst we are strongly supporting of a scheme employing a range of resolution techniques – including conciliation and encouraging a complainant to withdraw a complaint with dubious merit – a scheme's standing will be irretrievably damaged if these types of outcomes are perceived to be unfair.

We are also concerned that the Fairness Benchmark does not explicitly recognise that a scheme member usually has a knowledge, skill and resourcing advantage over the complainant that can create significant advantage unless the scheme addresses the uneven playing field.

We suggest a range of changes to broaden the concept of scheme fairness to address these issues.

1. We think that the statement of principle should be broadened (and the detail omitted) along the lines of: The scheme's processes and outcomes are fair and seen to be fair.
2. We think that the statement of purpose should be broadened along the lines of: The scheme produces outcomes which are fair and seen to be fair.
3. The section relating to Procedural Fairness should recognise that EDR is not a court of law and that while every reasonable effort should be made to achieve procedural fairness, this must be balanced with the need for quick, informal processes and outcomes,
4. We suggest additional Key Practices:
 - a. The outcomes from the scheme's early resolution processes are fair taking into account the advantages for both parties of a quick resolution.
 - b. The scheme staff provide information and assistance to complainants as required during the complaint resolution process, where the complainant's education, experience or personal circumstances mean that they are in a position of disadvantage relative to the scheme member.

E. Accountability

For some schemes, there are so few matters that proceed to a determination that the publication of determinations is not enough to educate scheme members and consumers about the scheme's approach to commonly occurring complaint scenarios. This can impact scheme fairness: without a sufficient body of scheme published material, the parties find it difficult to make settlement decisions. We suggest a range of changes to address this:

1. We think that the statement of principle should be broadened along the lines of: The scheme demonstrates a high commitment to transparency and publicly accounts for its operations.
2. We suggest that Key Practice 4.1 should be broadened to require publication of the reasons for decision (on an anonymised basis) of all determinations. In addition, it should encompass not just written reports of determinations but also require schemes to publish practice notes or bulletins in relation to commonly occurring complaint scenarios.
3. Key Practice 4.3 should include a provision requiring the scheme to publish an analysis of complaint settlements (through negotiation, conciliation) as well as formal recommendations and decisions.

F. Efficiency

Quality and consistency of process is an area that is not well accommodated by the Benchmarks. When reviewing schemes, we often want to comment on a scheme's procedures manuals, staffing profile, training programs and quality assurance procedures. Not surprisingly, where these are issues in relation to these, we find that the quality of complaints handling reflects the less professional approach. Although there are arguments about whether these are Effectiveness or Efficiency related matters, the Effectiveness Benchmark is cast as an overall, high level benchmark

and so we suggest that the Efficiency Benchmark is broadened to encompass those aspects of internal management.

1. We think that the statement of principle should be broadened along the lines of: The scheme's internal management practices support the quality and efficiency of its complaints handling.
2. We suggest additional Key Practices:
 - a. The scheme provides its complaints handling staff with an appropriate range of tools including procedures manuals and template letters to promote consistency and quality.
 - b. The scheme's recruitment and training programs ensure that its staff have a good knowledge of law, industry practice and consumer issues relevant to the scheme's jurisdiction.
 - c. The scheme's quality assurance and continuous improvement practices support the quality, consistency and efficiency of the scheme's complaints handling.

G. Effectiveness

Although schemes need to be independent of their members, schemes are most effective where they have strong member liaison arrangements that engender understanding of complainant issues and support for the scheme's work. We suggest that this dimension could be included in the Effectiveness Benchmark. This would necessitate a range of changes:

1. The statement of principle could be broadened along the lines of: The scheme's terms of reference and other arrangements enable the scheme to effectively fulfil its mandate.
2. We think that this Benchmark is important to scheme members not just consumers. Accordingly we suggest that the statement of purpose should omit reference to the promotion of customer confidence in the scheme (which could be seen as implying that this Benchmark is for the benefit of customers alone).
3. Paragraph 6.9 should be broadened along the lines of: The scheme has liaison mechanisms that build scheme member understanding of complainant issues and the scheme's processes and consequence mechanisms where scheme members fail to abide by their obligations to the scheme.

We would, of course be happy to provide whatever additional assistance that would be helpful – including discussing our comments or our experience in assessing schemes against the Benchmarks.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Phil Khoury', written in a cursive style.

Phil Khoury
Managing Director