Consumer Credit
Legal Centre NSW

June 2013

Submission in relation to the **Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes: Issues Paper**

by the

Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 18,000 calls for advice or assistance during the 2011/2012 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to comment on the Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes: Issues Paper.

General comments

Dispute Resolution Schemes are a key part of providing consumers access to justice in the event of a dispute. The importance of this should never be underestimated. Court is unaffordable, inaccessible and scary for the vast majority of consumers. Dispute resolution schemes provide a way for consumers to get free access to a resolution for their dispute. The Benchmarks are a way of ensuring the dispute resolution process is fair.

Another key outcome of having external dispute resolution schemes is that there is a clear incentive for industry to continuously improve internal dispute resolution processes. There is no doubt that in some industries dispute resolution has improved quite markedly in the last 10 years. This delivers a tangible benefit for consumers and industry.

CCLC would argue that Australia has the best industry dispute resolution schemes in the world in terms of coverage and commitment to the Benchmarks. This review is timely as it ensures that improvement in this area continues, and that the Benchmarks remain clear, relevant and continue to drive best practice in industry dispute resolution.

The Benchmarks

To the best of our knowledge, the Benchmarks underpin the activities of all EDR schemes in Australia. However, there is wide variation among EDR schemes on how the Benchmarks are interpreted and applied.

The more mature EDR schemes start with the Benchmarks to develop a comprehensive approach to dispute resolution. In financial services, the Benchmarks are complemented by ASIC Regulatory Guide 139 which provides guidance on the interpretation of the Benchmarks.

It is important to recognise that EDR and ADR are functionally different. ADR is a set of possible approaches to resolving disputes as an alternative to Court. Although those approaches can be used in EDR, EDR is ultimately a decision making process which encourages negotiation and conciliation during the course of proceedings. EDR also has a very sophisticated set of guidelines and policies governing the process. It is critical that EDR is recognised as being separate from ADR.

Below we set out our detailed submissions. Our individual recommendations are numerically listed in the Appendix for your convenience.

I) Accessibility

The Benchmark on accessibility remains very relevant. There is no point having EDR that no one knows about and that is difficult to access. CCLC recommends that this Benchmark include further detail and guidance as set out below.

Awareness/Promotion

Some EDR schemes are well promoted while others are poorly promoted. The Benchmark is not specific enough on promotion to ensure that all EDRs meet a minimum standard.

Recommendation 1: The section on awareness and promotion should require that:

1. There is a website for all EDR schemes;
2. EDR schemes must have a media presence; and
3. Information about the EDR scheme is available widely on government information websites.

An ongoing problem with access to EDR is that industry often does not provide details about EDR to its customers. In consumer credit, legislative change was introduced to address this issue by requiring details of EDR in credit guides and default notices. This has assisted consumers enormously in having knowledge of their right to access EDR in the event of a dispute. Industry members are best placed to give their customers information about EDR as they regularly communicate with their customers.

Recommendation 2: CCLC would suggest that industry members of EDR schemes must promote the EDR scheme by:

1. Including details of the EDR scheme on all letters of demand;
2. A brochure on the EDR scheme should be provided to all customers at the beginning of the customer relationship;
3. Any regular statements sent to the consumer must include details about the relevant EDR scheme; and
4. Retaining the existing procedures for notifying customers about EDR in the complaints process.

Access

The requirements to ensure consumers who are disadvantaged and have special needs should set specific minimum standards.

Recommendation 3: The following specific minimum standards are set to further expand on point 1.8:

1. Complaints can be made orally or in writing. A complaint does not have to be reduced to being in writing. Disadvantaged and/or illiterate consumers find it extremely difficult (or impossible) to make a complaint in writing.
2. TTY must be compulsorily available for deaf consumers. Sign language interpreters must be available for in-person conciliation conferences.
3. The EDR scheme must offer language interpreting services for consumers who have poor English skills. Those services must include over the phone interpreters for a significant range of languages. For example, the interpreters should cover the same amount of languages as the Telephone Interpreting Service. If standard letters need to be sent to the consumer the EDR scheme must translate the letter into at least the top 16 languages used in Australia other than English.
4. Provision is made for letters to be read to vision impaired consumers or any consumer who has difficulty reading.

Cost

EDR must be free to consumers. The Benchmarks must continue to make this a key requirement. The only way to facilitate access to EDR in a meaningful way is to make it free.

Staff Assistance

CCLC has had problems over the years with EDR schemes dissuading consumers from lodging a dispute. Staff of EDR schemes have told consumers:

1. The claim is over the jurisdictional limit when in fact it was not – the consumer was simply describing the value of a facility or claim rather than the value of the amount in dispute;

2. The claim is not a type of dispute handled by the EDR scheme when it is in fact one of the types of disputes that are regularly handled by that EDR scheme; and
3. The consumer must speak to a specific department of the industry member, or person performing a particular role before lodging a complaint (when this is not required).

Recommendation 4: The Benchmarks should specifically require EDR schemes to make it clear that a consumer can make a complaint to the EDR during all phone contacts. The website for the EDR should be required to have a clear pathway from the homepage to make a complaint.

Use

A major problem for consumers using EDR is understanding the process. For many consumers complaining to EDR is like lodging a complaint in a black hole. The complaint is sucked in never to return (or at least not return for a very long time).

Recommendation 5: The Benchmarks should require the EDR to:

1. Provide every consumer complainant information on the complaints process (and average times). This process should be depicted as a flow chart for ease of use;
2. Information on what to do if there is a reason why the complaint may be urgent (as they may suffer significant detriment from delay); and
3. Information about getting advice and support through the process. This would mean providing information to all consumers on how to get free advice from an accredited financial counsellor or solicitor.

Non-adversarial approach

1.18 and 1.19 are supported.

Legal Representation

CCLC provides free advice and representation to consumers in EDR on a regular basis. In many cases, the client would have abandoned the EDR process but for the assistance of CCLC. CCLC provides expert advice that a consumer may need in order for him or her to understand:

1. The dispute;
2. The range of remedies that may be available;
3. How to obtain and present appropriate evidence;
4. How to negotiate settlement;
5. The right to go to court after EDR if dissatisfied with the result; and
6. Time limits to go to EDR.

CCLC contends that this advice is vital for the consumer (and the EDR scheme) as it:

1. Clarifies and focusses the dispute;
2. Explains the process;
3. Manages expectations; and
4. Suggests settlements to resolve the dispute.

CCLC also represents consumers in EDR where the matter is complex or the consumer is disadvantaged. CCLC has represented consumers in circumstances where it is arguable that the EDR scheme is not complying with its own rules or has made an incorrect decision that does not comply with the law.

More importantly, as CCLC represents clients, we get a very detailed understanding of each EDR scheme. This enables us to:

1. Give detailed feedback to each EDR scheme and suggest improvements;
2. Compare EDR schemes and make observations which drive continuous improvement across all schemes; and
3. Advise clients accurately about the process.

It also has to be pointed out that the industry member has (often, very easy) access to legal advice and representation. For larger members this expertise may be 'in house'. To deny consumers legal representation often means being presented with complex legal arguments from the industry member that may be difficult for a consumer to understand.

Recommendation 6: In our view, it is essential that consumers have the right to be legally represented by a solicitor during the EDR process. We also contend that (for similar reasons), consumers must have the right to be represented by an accredited free financial counsellor.

CCLC concedes that a right to legal representation creates some challenges for EDR schemes but in our view, these challenges have been well-managed to date.

CCLC is also concerned about paid consumer representatives in EDR. There are a range of services where the consumer pays to be represented in EDR including:

1. Credit repair companies;
2. Part IX debt agreement brokers;
3. Personal budgeting services; and
4. Debt negotiation services.

CCLC objects to these services being able to represent consumers in EDR because:

1. The consumer is often not aware that EDR is free and the paid representation is not required; and
2. The organisation representing the consumer is charging for access to a free service which means they have an incentive to misuse EDR (such as encouraging consumers to pursue complaints which have no merit).

Recommendation 7: Section 1.22 should be amended to state that no party can claim the costs of representation as part of the dispute.

Recommendation 8: CCLC contends that the Benchmarks should set a standard where paid (non-legal and non-financial counselling) representatives are banned. These representatives include, but are not limited to: Credit repair companies; Part IX debt agreement brokers; Personal budgeting services and Debt negotiation services.

II) Independence

A primary consumer concern about EDR is that it is not independent because:

1. It is paid for by industry;
2. EDR (and particularly small EDRs) can have a very close relationship with industry; and
3. The ombudsman in EDR are often from industry.

It is essential that the Benchmarks do whatever possible to ensure that EDR is independent.

CCLC supports the existing requirements under the benchmark. CCLC submits that the following further requirements should be added:

1. The EDR must be not for profit. We support the ANZOA request for this.

2. Two or more EDR schemes in the one industry area should be strongly discouraged. It is desirable for consumers to have one EDR scheme for a particular industry complaint. This assists with promotion and access. Competition between EDR schemes is undesirable because:

    a. It is unclear which scheme to complain to;
    b. A dispute may involve one party in one scheme and another in the other scheme;
    c. Industry members move back and forward causing confusion;
    d. It encourages forum shopping; and
    e. It encourages pricing and deals to attract members.

Recommendation 9: The following further requirements should be added to Benchmark 2:

1. The EDR must be not for profit; and
2. Two or more EDR schemes in one industry area should be strongly discouraged.

III) Fairness

Fairness is a key benchmark for EDR. It is essential that the process and decisions be fair.

Recommendation 10: Benchmark 3 should clarify that the requirement of fairness must apply to all procedures and decision making.

Procedural Fairness

It is a key part of procedural fairness that any decision, preliminary view or assessment is provided to both parties at the same time. At least one EDR scheme provides their preliminary view to the member for comment prior to providing it to the consumer. It is unclear why this is done but it is not procedurally fair.

Recommendation 11: Benchmark 3 should include a requirement that all decisions must be sent to both parties at the same time.

Recommendation 12: Benchmark 3 should include a requirement to support letting the dispute resolution process work. EDR schemes need to have rules that require members to stay further action and negotiate in good faith on the complaint. If a consumer lodges a complaint it would be unfair for the industry member to commence court proceedings or continue court proceedings.

Fairness in decision-making

As noted in the issues paper, the Fairness Benchmark requires schemes to look beyond a strictly legal resolution of a dispute (what would the Court do?) and take into account fairness and good industry practice. This is *critical* in effective dispute resolution as it drives improved industry practice, customer satisfaction and consumer confidence.

As also noted in the discussion paper, ideas about fairness and good industry practice may not be convergent, and this can lead to inconsistency and dissatisfaction, particularly on the part of industry members who are the "frequent flyers" and funders of the schemes. This problem can be effectively addressed by improved transparency around decision-making (see subsequent section in relation to Accountability) and processes to ensure internal consistency.

The Fairness Benchmark remains relevant, and extremely important.

Recommendation 13: EDR schemes should be:

1. Required to demonstrate that they apply fairness and good industry practice in decision-making;
2. Required to have procedures to ensure internal consistency in this application; and
3. Encouraged to publish and otherwise disseminate appropriate information to guide users on how disputes will be handled and particular issues/practices approached (complainants and industry members).

IV) Accountability

Determinations

EDR schemes make very few determinations compared to the amount of disputes lodged. Consequentially there is little guidance from issued determinations on how decisions are made by each EDR scheme.

Recommendation 14: Benchmark 4 must include a requirement that findings, case assessments and similar evidence of decision-making are published on the relevant EDR scheme's website to ensure the parties have some guidance on likely EDR outcomes.

Recommendation 15: The Benchmarks need to specify that a bulletin/circular is published at least quarterly that covers:

1. Updates and news; and
2. The EDR approach to a particular common complaint.

Reporting

Reporting of EDR schemes is critical to determining whether there are systemic problems in the industry. It also identifies industry members who are performing poorly at resolving disputes.

Recommendation 16: The annual report of the EDR scheme should include:

1. Details of numbers and types of complaints against particular industry members; and
2. Identified systemic issues.

Systemic issues are a particularly problematic area for EDR schemes. EDR schemes often keep systemic issues confidential and do not name the issue or the party involved. Even if the EDR scheme has attempted to resolve the systemic issue it is not clear whether this was a fair resolution. There is no transparency or oversight on this process.

Recommendation 17: To ensure better and more transparent handling of systemic issues, the Benchmarks should require:

1. The EDR report quarterly on systemic issues;
2. The EDR create a liaison group of consumers to discuss specific systemic issues on a confidential basis;
3. The regulator be informed; and
4. Provisions to name scheme members where the matter is serious.

V) Efficiency

The current Benchmarks are acceptable.

VI) Effectiveness

Independent Reviews

Independent reviews are a key driver in the continuous improvement of EDR schemes.

Recommendation 18: The Independent reviews of EDR schemes should occur at a minimum of every 5 years after the first review.

Other accountability mechanisms

There are a number of reasons why EDR schemes should employ other mechanisms to continuously measure effectiveness between Reviews:

1. The time between reviews is long;
2. There is a limit to what can be achieved in the context of a Review;
3. As EDR schemes take over Tribunals and small claims jurisdictions as the key forum for the resolution of consumer disputes, there is a greater need for transparency and accountability in relation to the quality and consistency of decision making; and
4. EDR schemes, like any other effective organisation, should aspire to continuous improvement and also have processes in place to ensure that decisions meant to resolve one issue don't create problems in other areas.

Most of the schemes engage in some form of activity to measure user satisfaction. Some are also grappling with the difficult idea of auditing the quality of their decision-making – including the fairness of their processes and the accuracy of their interpretation and application of good industry practice and law. As these processes evolve, it is anticipated that Independent

Reviews will comment on the extent and effectiveness of these processes as an essential element of meeting the Benchmarks. This is entirely appropriate.

It is important that schemes can demonstrate their quality and effectiveness without compromising their ability to provide quick and informal resolutions. EDR schemes should not need to fully duplicate a court or tribunal type system, with complicated procedural rules and appeal mechanisms. Addressing fairness and quality at a systems level can provide improved accountability, without the onerous legal mechanisms employed by the hierarchy of courts.

Recommendation 19: The Benchmarks should require schemes to have systems in place to *regularly* measure:

1. User satisfaction (recognising that not every user will "win");
2. Fairness and efficiency in the dispute resolution process; and
3. Decision making quality.

Where possible such mechanisms should involve feedback from outside the Scheme itself, including complainants, regular representatives of complainants, Members and appropriate experts.

Thank you again for the opportunity to comment on the Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes. If you have any questions or concerns please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216, or on my direct line listed below.

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Appendix

List of CCLC Recommendations

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