Submission

by

the

Credit Ombudsman Service Limited

to

The Review of the Benchmarks for Industry-Based External Dispute Resolution Schemes

1. Introduction

The Credit Ombudsman Service Limited ("COSL") appreciates this opportunity to respond to the Issues Paper produced by the Commonwealth Consumer Affairs Advisory Council entitled "Review of the Benchmarks for Industry-Based External Dispute Resolution Schemes" ("the Issues Paper").

COSL is an industry-based external dispute resolution scheme having been approved by the Australian Securities and Investment Commission ("ASIC") as a scheme which satisfies the external dispute resolution ("EDR") requirements of holders of Australian Credit Licences ("ACL") and Australian Financial Services Licences ("AFSL").[1]

COSL has over 16,500 participating members who operate in a variety of financial service industries. Members include non-bank lenders, mutual banks, credit unions, building societies, finance brokers, financial planners, debt buyers and small amount short term lenders. From 1 July 2013 to date, COSL received over 15,000 inquiries and 3,500 complaints.

We are therefore well placed to contribute to this Review.

2. Overall Support for the Benchmarks

While it is appropriate to review a set of benchmarks first promulgated fifteen years ago in 1997, our position is one of overall support for the existing Benchmarks, their structure and content.

We note that the Benchmarks have been particularly influential in its area of practice. In determining whether to approve and to continue approval of schemes as satisfying the EDR requirements of ACL and AFSL holders, ASIC is required to consider:

(a) accessibility;

(b) independence;

(c) fairness;

(d) accountability;

(e) efficiency;

(f) effectiveness; and

(g) any other matter we consider relevant.[2]

ASIC notes in its Regulatory Guide 139 ("RG 139") that these criteria are based on the principles in the Benchmarks. The entire Benchmarks Document is included as an Appendix to RG139.[3]

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[1] For AFSL holders, this requirement is in sections 912A(2) and 1017G(2) of the *Corporations Act 2001* and for ACL holders, it is in section 47 of the *National Consumer Credit Protection Act 2009*.
[2] See Regs 7.6.02(3) and 7.9.77(3), *Corporations Regulations* and Reg 10(3), *National Credit Regulations*
[3] ASIC RG139.26

COSL has now had two Independent Reviews as required by both the Benchmarks themselves and by RG139. In both of these, the Independent Reviewers relied heavily on the Benchmarks both as statements of principle and for their guidance on "Key Practices."[4] These reviews have been very useful and have assisted COSL and its stakeholders to improve its work as an EDR in the financial services sector.

No taxonomy of criteria and principles for any social phenomenon will be perfect. Indeed, the EDR Benchmarks do have some areas of "overlap" in that some issues are addressed in the context of more than one Principle and some Key Practices could also sit well with more than one Principle. In such matters, it is always preferable to have a small degree of overlap and repetition than for the taxonomical categories to not cover all the relevant issues so that some "fall through the cracks."

With some minor exceptions, to be discussed below, the EDR Benchmarks promulgated by the Department of Industry Science and Tourism in 1997, and now administered by the Commonwealth Consumer Affairs Advisory Council, do not suffer from this problem. They have proven remarkably robust and useful.

To answer specifically Consultation Questions 2.1 – 2.4, the EDR Benchmarks are widely used in the financial services sector, they are a useful basis for assessment, oversight and operation of EDR schemes in the sector. They are mostly consistent with other standards and guides and, indeed, inform most the relevant regulatory instruments and guides for financial services EDR.

3. The Structure of the Benchmark Document

The structure of the Benchmark Document has worked well. Starting with six high concept statements of "Principle" and then explaining these with underlying "Purposes" and then moving down to greater detail in the Key Practices, the document implicitly recognises that there may be more than one way for an EDR scheme to achieve these values. This is a good thing as the diversity of ideas and approaches across and within industry sectors has been, overall, a good thing for EDR.

The relatively generic nature of the Benchmarks should be maintained as the original six benchmark values are still relevant and their general nature allows for development and diversity. Too much detail in any benchmarking document and in its key practices will be too prescriptive.

As discussed above, many of the ways to operationalize the principles underlying the Benchmarks are, for COSL, to be found in ASIC RG 139. This is appropriate. This Review, and this submission, should not call for the sort of detail in the Key Practices in the Benchmarks that really belongs in a more regulatory document like RG 139. That would be a mistake.

4. Accessibility

4.1 Awareness/Promotion

At 1.6, the Key Practices refer to "special needs." This is a little dated implying, as it does, persons with physical or intellectual disabilities. This Key Practice

[4] See for example, *Navigator Independent Review of the Credit Ombudsman's Service Limited* at http://www.cosl.com.au/cosl/assets/File/Independently%20Review%202012%20(The%20Navigator%20Group).pdf

should be expanded to also include other circumstances, disability and disadvantage, such as language and culture for instance:

- providing an interpreter service
- information in different languages
- outreach services to regional and remote communities

The Benchmark should be "technology neutral" and "media neutral", so COSL suggests that specific reference to the internet is not necessary particularly given the preference by some consumer complainants to use traditional means, e.g. post and telephone. The use of the generic term "media" in 1.2 should suffice.

4.2 Cost

By far the most important aspect of the Key Practices underlying this Benchmark is in 1.11: that consumers do not pay any fee or charge for a complaint to be considered or at any other stage in the process. COSL completely supports this requirement.

4.3 Legal Representation

Linking the right to legal representation to whether the other party is so represented is, itself, "legalistic" and "adversarial." The most important question to be asked when considering whether a party to a dispute should be allowed such representation or assistance is not whether another party has it but rather does the consumer complainant need it in order to fairly present their complaint for resolution?

The COSL Rules, for instance, provide at Rule 31 for any party to represented legally, if they wish, though representation in a Conciliation Conference is discretionary. This discretion is almost always exercised for the benefit of the complainant.

As member respondents, particularly in the financial services sector, become more experienced at responding to complaints through EDR schemes, so their need for legal representation is reduced. This exacerbates the inequality of litigious power which faces the consumer complainant. It becomes less relevant, therefore, whether the industry member has legal representation or not.

COSL submits that Clauses 1.20 and 1.21 should be redrawn so as to be more positive about the capacity of consumers to access EDR schemes without the need for lawyers but not restrictive of their right to do so. Some suggested wording follows:

> *1.20 The scheme encourages and facilitates complainant access without the need for legal representation wherever possible.*
>
> *1.21 Complainants have the right to appoint legal representatives and the scheme has the capacity to order that the member, if the complaint is upheld, compensate them, up to a reasonable limit, for the costs of doing so.*

5. Independence

5.1 A key omission from the existing benchmarks is a requirement that any EDR scheme not return a profit to its members. This is essential to ensure the true independence of a scheme and how it operates from its industry members. Of course, all stakeholders, including members and consumers, have an interest in a scheme running economically but this is more appropriately a value embodied in the "Efficiency" Benchmark.

COSL urges that a new "Key Practice" be added to the Independence Benchmark and suggests the following wording to be inserted as a new 2.10 (and the existing 2.10 to become 2.11):

> *2.10 No EDR scheme should be structured or operate so as to return a profit to its members.*

This can be achieved by a variety of structures such as incorporated associations or companies limited by guarantee. COSL is a company limited by guarantee and this is, we suggest, the best structure for an EDR scheme as it can provide for "members" without giving them control over the Board or any right to receive a profit.

5.2 There is no need, in our submission, for the EDR Benchmarks to make any stipulation about competition between schemes in the same or similar sectors.

(a) Firstly, the "not for profit" nature of the existing schemes, supported by an express stipulation to that effect in the Benchmarks, effectively addresses any potential mischiefs that may arise from "competition" between schemes, as the incentive to behave so as to attract members by lowering standards is virtually eliminated.

(b) Secondly, it is arguable whether, when there is more than one scheme servicing the same industry sector, that there is "competition" for EDR services according to the accepted understandings of that term by economists and competition lawyers.

(c) Thirdly, where there is "competition" it is in a "competition of ideas" or a diversity of approaches. This can only be a good thing for improving EDR schemes across all of the dimensions identified by the Benchmarks. It has, in the past, been of particular benefit to consumers in financial services in Australia.

For instance, in the area of hardship variations in consumer credit, under section 66 of the former *Uniform Consumer Credit Code*, a consumer who had borrowed less than a prescribed amount[5] could apply to a credit provider for a variation in their loan repayments based on "hardship", which was defined to include "illness, unemployment or other reasonable cause." If this application was refused, the consumer could apply to a court or tribunal under section 68 to consider the application and possibly impose the variation on the lender. There were limitations on the types of

[5] Regulated by the *Consumer Credit Regulations* at Reg 22A

variations and the relevant courts and tribunals developed case law on when and how such variations would be imposed.[6]

The Banking and Financial Services Ombudsman (which was one of the three large schemes which merged to produce FOS) developed a policy which eschewed jurisdiction for such applications, saying that:

> *There is therefore a compelling argument that, while we can certainly review the process involved in making the decision, the actual decision to agree to or reject a variation is a commercial decision of the credit provider, rather than a breach of a legal duty or obligation. If that is so it is not within our powers to make a decision under s 68 in the terms of that section.*[7]

COSL considered the same issue for its members who were covered by the relevant legislation and reached a different conclusion. In 2007, it produced a Guideline saying that it would consider such applications:

> *Refusal, therefore, of a reasonable application by a consumer debtor under section 66, is not simply an exercise of commercial judgement but a combination of legal and commercial judgement which is expressly subject to statutory review. Refusal gives rise to a dispute or complaint and is, therefore, capable of resolution by COSL if the credit provider is a COSL member.*[8]

Consumers whose credit provider was a COSL member and not a member of the BFSO, had the benefit of independent, free and timely EDR for their consumer credit hardship applications in both form and substance. Those whose credit providers were members of the BFSO could only hope for some review if there was an error in process.[9]

Now, of course, with legislative change since the NCCP Act, consideration of hardship variations is expressly acknowledged by ASIC for EDR schemes for ACL holders.[10]

(d) Of course, without high standards of entry and supervision, referring to values such as those embodied by the EDR Benchmarks, competition may have deleterious effects on the integrity and value of EDR to consumers and industry alike.

The experience in Canada, which does not have mandatory membership of approved EDR schemes as a condition of conducting financial services business, has been of a fragmented landscape of unreliable, inconsistent, partisan, profit-driven and often inaccessible entities claiming to be "ADR"

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[6] E.g. *Jones v ANZ* [2004] NSWCTTT 381 and *Garner v Capital Finance Australia* [2003] VCAT 1171 *Pereria v AGC* [2003] VCAT; *Capital Finance Australia Ltd v Fairservice* [2006] VCAT 624; *Cheer v Citigroup Pty Limited (Commercial)* [2008] NSWCTTT 817; *Permanent Custodians Limited v Carolyn Joy Upston* [2007] NSWSC 223;

[7] BFSO Bulletin 46, June 2005 at *www.bfso.org.au/abioweb/ABIOWebSite.nsf/0/.../Bulletin+46.pdf*

[8] COSL Guideline 2007.

[9] COSL was not the only ASIC approved EDR scheme to take this view, the Financial Co-operatives Dispute Resolution Service Ombudsman, a very small scheme for some credit unions and building societies, also took the same position. The FCDRS scheme has since wound up and its former members are now either in FOS or COSL.

[10] See RG 139.61

for consumer disputes. The experience in the UK was similar, prior to the passage of the *Financial Services Markets Act* (UK) in 2000.[11]

Where there is a high level of regulatory supervision of EDR schemes, such as in the financial services sector in Australia through ASIC and its RG 139, there is little or no opportunity for the potential negative effects of multiple schemes in the same sector, whether they actually "compete" or not, to be realised.

(e) A diversity of approaches to different issues in EDR, all compliant with the Benchmarks, can only produce, overall, better outcomes for all stakeholders.

5.3 While COSL supports the existing Key Practice 2.10 in relation to consultation with stakeholders for any changes to terms of reference, we note that there is no reference in the entire EDR Benchmarks document to the process of originating such terms of reference or establishing a scheme in the first place.

Of course, the Benchmarks themselves are a set of criteria which any new scheme must meet. This is, however, a matter of substance, not process. Key Practice 2.10 addresses the process of changing an existing set of Terms of Reference or Rules, whatever they are named.

COSL suggests that it also refer to the formulation of new rules for a new scheme and that elsewhere in the Benchmarks there be a new section dealing with the process of establishment of a new scheme addressing, perhaps, issues of consultation and consideration of alternatives by stakeholders.

6. Fairness

6.1 The Benchmarks do not provide specific detail as to how determinations are to be made nor should they. This is a fluid concept which, appropriately, may vary from scheme to scheme and even within scheme depending on sectors of the industry and types of transactions.

6.2 The "Fairness" Principle and Purpose are focussed on the "decisions" of a scheme. While the "Key Practices" for "Fairness" do address important issues of procedure, the overall statements in the Principle and Purpose should, we submit, recognise that the majority of disputes/complaints submitted to COSL and to other EDR schemes, are not resolved by decisions. For COSL, the vast majority of disputes are resolved by COSL without the need for a binding determination. In the 2012-2013 financial year to date, less than 1% of complaints went to the determination stage with 76% resolved by facilitated negotiation.

Indeed, EDR schemes "are less concerned with the articulation and determination of legal rights than with the simple resolution of disputes".[12]

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[11] Rhoda James, *Private Ombudsmen and Public Law* (1997); Rhoda James & Phillip Morris, 'The new Financial Ombudsman Service in the United Kingdom: has the second generation got it right?' in Charles Rickett & Thomas Telfer, *International Perspectives on Consumers' Access to Justice* (2003).

[12] P. O'Shea and C. Rickett, In Defence of Consumer Law: The Resolution of Consumer Disputes [2006] 28 Syd L Rev. 139 at 152.

This characterisation has been expressly approved, at least in relation to FICS, the predecessor to FOS for investment complaints, by the Supreme Court of Victoria in *Wealthcare Financial Planning Pty Ltd v FICS.*[13]

It is, in our view, a positive development that most disputes are resolved without the need for a "decision." The Fairness Benchmark will be more relevant to modern EDR practice if it acknowledges this reality and requires fairness in all EDR processes, not just those relating to "decisions."

We suggest, therefore, that the "Fairness" Principle be amended as follows:

> *The scheme resolves disputes in ways which are fair and which are seen to be fair by observing the principles of procedural fairness and by resolving disputes based on the information before it and according to specific criteria.*

And the relevant Purpose:

> *To ensure that the dispute resolutions produced by the scheme are fair and are seen to be fair.*

In addition, a further Key Practice could be added at 3.8 (with the subsequent numbering changed accordingly) as follows:

> *3.8 Procedural fairness must also apply to all dispute resolution outcomes whether they are mediated, negotiated, conciliated or the subject of a decision or determination.*

7. Accountability

As discussed above, non-determinative outcomes represent the vast majority of disputes resolved by EDR schemes and certainly by COSL. COSL already reports extensively on these outcomes in its Annual Reports and Reviews. The EDR Benchmarks should reflect this reality.

We propose, therefore, adding to 4.3(b), the following:

…including those outcomes which do not involve decisions or determinations.

8. Efficiency

Any further detail than that which is already embodied in the existing "Efficiency" Benchmark, is likely to go into inappropriate and overly prescriptive detail as discussed above. COSL supports the existing Benchmark on this point.

9. Effectiveness

Comprehensiveness and enforceability of outcomes are generally dealt with by licensing in the EDR sector and other problems, such as member insolvency preventing consumer redress, are not fit subjects for the EDR Benchmarks.

[13] [2009] VSC 7 at [7]

COSL supports the “Efficiency” Benchmark largely as its stands.