

7 June 2013

CCAAC Secretariat  
c/- The Manager  
Consumer Policy Framework Unit  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [CCAAC@treasury.gov.au](mailto:CCAAC@treasury.gov.au)

Dear Manager

**Review of Benchmarks for Industry-based Customer Dispute  
Resolution Schemes  
Issues Paper released in April 2013**

We refer to the Issues Paper, which requests submissions to the Review. We note that the deadline for submissions has been extended to 7 June 2013.

**Support for Benchmarks and ANZOA's submission**

The Financial Ombudsman Service (FOS) continues to support the Benchmarks and their use in setting standards for external dispute resolution (EDR) schemes. We have contributed to the submission to the Review made by ANZOA (the Australian and New Zealand Ombudsman Association). Four of our Ombudsmen are members of ANZOA. We agree generally with the modifications and improvements that ANZOA suggests.

**Importance of flexibility**

The preface to the Benchmarks explains that the Benchmarks apply flexibly. ANZOA's submission indicated that flexibility is important and we emphasise that the current level of flexibility is needed so that the Benchmarks can continue to apply to all EDR schemes – including large and small schemes.

To explain this point, we refer to the issue of legal representation, which the Benchmarks address in key practices 1.20 to 1.22. Our practices in regard to legal representation are different from key practices 1.20 to 1.22.

As a large scheme, FOS can access internal legal advice to assist in the resolution of disputes, such that the concern about the equality of access to legal representation by the parties is not as significant as it would be for a smaller scheme. While legal representation is discouraged, where the parties choose to be legally represented, they are free to do so. Where the scheme member chooses to be legally represented, in most cases we seek to address any concerns about an imbalance of power by using our internal legal resources, rather than requiring the member to pay for the other party to be legally represented. We are of the view that this is both more efficient and cost effective.

### **Effectiveness of Benchmarks**

Benchmark 6 is designed to ensure that a scheme is effective. It contains the following key practices on compliance:

- 6.9 The scheme has mechanisms to encourage scheme members to abide by the rules of the scheme.
- 6.10 The determinations of the decision-maker are binding on the scheme member if complainants accept the determination.

FOS observes Benchmark 6 generally and follows key practices 6.9 and 6.10 specifically. For example, we have mechanisms to encourage members to abide by our rules including contractual obligations that members enter into when joining the scheme. Nevertheless, compensation awarded in certain determinations issued by FOS and accepted by complainants has not been paid. Some of our members with unpaid determinations against them are insolvent.

Where compensation awarded by an EDR scheme is not paid, the scheme does not provide an effective outcome for complainants. We are concerned that the issue of unpaid determinations could damage the reputation of EDR as an effective redress mechanism.

We provided information about the issue of unpaid determinations in submissions we made to Treasury in May 2011 and July 2012 to the Review of Compensation Arrangements for Consumers of Financial Services conducted by Mr Richard St John. The submissions are available on our website, [www.fos.org.au](http://www.fos.org.au), under "Publications". We can provide updated information if that would be useful for current work.

The Government is leaving open for future consideration the need for a compensation scheme for consumers of financial services, which will take account of any residual under-compensation after improvements in the industry's conduct standards have been implemented. In the meantime, the Government is encouraging professional bodies to themselves consider possible solutions to the issue of under-compensation, such as the



implementation of their own scheme which further protects retail clients in the event of a member's insolvency. We confirm that we remain very willing to work with other organisations to contribute to developing such solutions.

We acknowledge that it may not be possible to address the issue of unpaid determinations through the Benchmarks alone. The effectiveness of EDR and the Benchmarks is affected by factors such as the regulatory and legal framework for financial services and the broad social and community infrastructure that supports EDR arrangements. We believe these broader factors are relevant considerations for the Review.

Through our dispute resolution work, we also see that another very important aspect of this broad social and community infrastructure is the support for consumers of financial services in accessing EDR provided by financial counsellors, community legal centres and other community organisations. This assistance is particularly important for consumers who are vulnerable, disadvantaged or find it difficult to access EDR for a range of reasons.

We suggest that the Review takes into account the importance of continued support for this social and community infrastructure in underpinning the Benchmarks and for access to EDR more generally, particularly by vulnerable and disadvantaged consumers.

#### **Further information or comments**

If we could assist the Review by providing further information or comments, we would be happy to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Tregillis', with a stylized flourish at the end.

**Shane Tregillis**  
**Chief Ombudsman**