FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

24 May 2013

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

Email: CCAAC@treasury.gov.au

Dear Sir / Madam

**Re. Review of the Benchmarks for industry-based Customer Dispute Resolution Schemes**

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to the Commonwealth Consumer Affairs Advisory Council for its review of the dispute resolution benchmarks.

The FPA and its members consider the role of External Dispute Resolution (EDR) as a vital part of the successful operation of the financial services industry in Australia.

The FPA has applied the following principles to inform our response to the CCAAC issues paper. Dispute resolution schemes should encourage:

- clarity and confidence for consumers;
- certainty for dispute resolution schemes and their members;
- efficiency for all parties; and
- fairness and ease of process for all parties

The FPA's submission relates to the application of the Benchmarks to the financial services sector via ASIC's Regulatory Guide RG139 and the Terms of Reference of the Financial Ombudsman Service. Our submission focuses on two matters:

1. Vexatious claims; and
2. Implementation guidance.

## Vexatious claims

The FPA's concerns with the Dispute Resolution Benchmarks resonate from the loop-hole they create which allows vexatious claims to progress through the EDR system with significant impacts on providers, the EDR scheme and other claimants.

Following an initial investigation, some claims are found by the EDR scheme to have no foundation or basis for the complaint and the scheme recommends the complaint does not proceed. However, as

the EDR findings are only binding on the member (under the Effectiveness Benchmark), the complainant can request the complaint proceed to full determination. After progressing through the entire EDR system, the claim is denied as it was again found that there was no basis to the complaint. While there is little impact on the complainant, the impact on the provider and the scheme is significant. This is known as a vexatious claim.

Vexatious claims significantly divert resources away from those consumers with valid EDR claims and in need of assistance. The adverse consequences for the provider can be devastating, particularly for small businesses, and include loss of face, financial costs, time diverted away from servicing clients, and a significant impact on PI insurance premiums even though the claim was successfully defended. (See Attachment A: Vexatious claims examples).

Key practices within the Benchmarks of Accessibility, Fairness, and Effectiveness combine to create an environment which permits claims with no basis to the complaint to proceed through the EDR system at great expense to all stakeholders but with no impact on the complainant:

- Accessibility - EDR schemes provide their services at no cost to the customer.
- Fairness – can demand that scheme members provide information that is relevant to a complaint and encourages but not compel complainants to do so.
- Effectiveness – the determinations are binding on the scheme member.

This creates a moral hazard where one party will have a tendency to take risks because the costs that could result will not be felt by the party taking the risk that is the complainant.

This issue is exacerbated as the key practices in all the Benchmarks do not apply equally to consumers and providers. The FPA argues that this is against the principle of fairness. An effective and efficient complaints-handling process must reflect the needs of both the organisations providing the services and the consumers of those services. However, we also acknowledge and support that EDR mechanisms are intended to provide a useful and cost effective alternative to the courts for consumers in need of assistance.

The issue of vexatious claims could be addressed by improving the Benchmarks and the implementation of the Benchmarks by regulators and ultimately EDR schemes.

The FPA believes that following an initial investigation, claims that are found by the EDR scheme to have no foundation or basis for the complaint and no prospect of success, should not be permitted to continue through the EDR process unless there is a sharing of the costs between the consumer and provider.

This would provide support to EDR schemes in instances where investigations find no basis to a complaint and recommend the claim not continue to full determination. It would present some risk to the complainant if the scheme continues to find no merit for the complaint, and discourage complainants deliberately pushing an invalid claim at significant cost to an innocent party and the scheme. Minimising the risk of vexatious claims will significantly improve the EDR system for those consumers with valid claims so they receive the assistance they need and deserve.

FPA recommendation:

The FPA recommends amending the key practices outlined in the:

- Benchmark for Accessibility to include that industry schemes provide their services at no monetary cost to the customer, unless the complainant insists on an invalid claim progressing through the EDR system
- Benchmark for Effectiveness to include that industry schemes have the appropriate power to reject a claim if initial investigations by the scheme find no valid basis for the complaint.
- Benchmark for Fairness to include that industry schemes can demand that scheme members and complainants provide information that is relevant to a complaint.

## Implementation guidance

The FPA supports the intent and purpose of CCAAC implementation guidance on the Benchmarks; however such guidance is not necessary for the financial services sector. The FPA believes ASIC's regulatory guidance detailed in RG139 fulfils this role for financial services EDR schemes, providers and consumers. Additional guidance which is prescriptive in nature, would serve to duplicate ASIC's role and possibly lead to confusion.

The FPA would welcome the opportunity to discuss this further. If you have any questions, please contact me on 02 9220 4505 or dante.degori@fpa.asn.au.

Yours faithfully

**Dante De Gori**
*General Manager Policy and Conduct*
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) represents more than 10,000 members and affiliates of whom 7,500 are practising financial planners and 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- We banned commissions and conflicted remuneration on investments and superannuation for our members in 2009 – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Professor Dimity Kingsford Smith, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 132,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board
- We are recognised as a professional body by the Tax Practitioners Board

## Attachment A: Vexatious claims examples

Please note the following 'examples' have been written and provided by FPA members.

Example one

I just wanted to reiterate the horrible experience we have had with FOS over the last year. We knew from the start that the claim was not for things that we had done wrong. The client simply lost a relatively small percentage of their portfolio during the GFC. We worked tirelessly to help mitigate these losses and this was very obvious from the start. But as there is nothing to deter a consumer from making an ambit claim, it proceeded through FOS.

The complainant was able to claim that as she had seen an adviser that she did not expect her shares would not fall in value. And, the client only made a relatively small loss anyway, as we helped her sell out of much of her portfolio prior to the GFC. In our initial correspondence to FOS, this was all communicated, but I don't think they actually looked at this closely in the initial stages, as this case really should not have proceeded as far as it did. Our issue is that as advisers, we cannot stop it earlier, other than to agree to settle with the complainant (which we were advised to do). BUT, we knew we had done no wrong and thought it was unethical to make a false settlement. As we didn't agree to settle and as FOS took so long to agree that we had done absolutely nothing wrong, we have ended up with an enormous bill.

FOS were always professional in their dealing and their final judgement is very well written. After a lengthy and time consuming process, the complaint was found in our favour. But we are now up for PI excess of $10k, $11,000 in FOS case fees, plus legal costs. FOS case fees have increased rapidly in recent years and PI insurance does not cover these fees. There was also a ridiculous amount of time wasted that we could have used helping clients. Plus, it was a great stress for us.

Example two

We had a very professional lady at FOS do a conciliation conference with the client. This lady said that she was just a conciliator and could not recommend anything but at that stage she could not see the case going any further as the client admitted that he was a regular share trader etc and therefore she could not really see where we had misled him. But, again, it's up to the client to choose to proceed- which he did. All of which just cost us as the adviser more. The final judgement was very well written by FOS, but it really should have been an obvious outcome from the start, not after so much work by both FOS and us. Even our PI insurers say it's a completely wrong system as the adviser has no say in the process.