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Consumer Safeguards Review
Department of Communications and the Arts
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ANZOA Submission to the Consumer Safeguards Review

The Australian and New Zealand Ombudsman Association (ANZOA) is a professional association and the peak body for Ombudsmen in Australia and New Zealand. ANZOA's membership includes industry-based ombudsmen, parliamentary ombudsmen and other statutory ombudsmen. More information about ANZOA and the foundations and value of the ombudsman model of external dispute resolution can be found at www.anzoa.com.au.

The Australian model of industry-based Ombudsman is now in its 29th year. Its success and longevity are in large part due to the model being firmly and publicly underpinned by the *Benchmarks for Industry-based Customer Dispute Resolution (CDR Benchmarks)*¹. The *CDR Benchmarks* address six fundamental Ombudsman principles — accessibility, independence, fairness, accountability, efficiency and effectiveness. Originally published in 1997, the Benchmarks document was reviewed and republished by the Australian Government in February 2015. ANZOA was pleased to support and contribute to that review.

Industry-based Ombudsman schemes play an important role in providing independent, fair, free and effective external dispute resolution in a number of industry sectors. Indeed, the value of the Ombudsman model in providing a low cost, informal pathway for dispute resolution was recognised by the Productivity Commission in its *Access to Justice Arrangements, Inquiry Report No. 72 (the Access to Justice Report)*². The Productivity Commission went so far as to recommend greater visibility and awareness of Ombudsman services to support access to justice across Australia (Recommendation 9.1).

ANZOA appreciates the opportunity to respond to the issues raised in the *Consumer Safeguards Review Consultation Paper* (the Consultation Paper). Our response to the questions raised about proposals two and three follow.

¹ <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution/>

² Productivity Commission 2014, *Access to Justice Arrangements, Inquiry Report No. 72*, Canberra: <https://www.pc.gov.au/inquiries/completed/access-justice/report>

1. Should the current Telecommunications Industry Ombudsman (TIO) arrangements be transformed to an independent External Dispute Resolution (EDR) body for handling complex complaints?

We note with concern the comment in the Consultation Paper that the “TIO is an industry-owned entity”. The TIO meets the *CDR Benchmark* for independence because it has a Board made up of an Independent Chair and equal numbers of industry and consumer representatives. This is a model that has stood the test of time, and has most recently been used as the model for establishing the Australian Financial Complaints Authority. ANZOA is particularly concerned that this characterisation of the TIO brings into question the independence of all industry-based Ombudsman schemes that comply with the *CDR Benchmarks*.

Industry Ombudsman schemes have been established as an important integrity and consumer protection mechanism for the industries where they exist. Industry Ombudsman schemes are an investment in transparency and accountability. The funding of most industry-based Ombudsman Schemes is based on “user pays” and cost recovery principles. This means that industry participants pay their share of the costs associated with operating the Scheme. It would be erroneous to characterise cost recovery as “ownership” of the Scheme.

The TIO scheme already meets the *CDR Benchmarks* and, like other industry-based Ombudsman schemes, regularly tests this via an independent review, most recently in 2017³. As the TIO already meets the *CDR Benchmarks* to deliver fair, independent and efficient dispute resolution, it is difficult to see the benefits that would accrue to industry and consumer stakeholders by “transforming” it into an EDR body for handling only complex complaints, particularly if that EDR body is not required to meet the *CDR Benchmarks*.

Ombudsman schemes deal with a range of complaints, some “simple” and some complex, but all of genuine concern to the consumer who is unable to resolve their dispute with their provider. We would be concerned if “simple” disputes were defined as disputes that were of low monetary value. In our experience, even low value disputes can raise complex or systemic issues (for example the charging of a \$2 fee that is not in the contract could affect a significant number of customers who have been charged the same fee incorrectly).

Effective IDR, not an alternative structure or model, is proven to ensure complaints are appropriately resolved without requiring Ombudsman intervention. For IDR to be effective, it requires industry participants to be genuinely committed to resolving disputes in a fair and reasonable manner. It also requires industry participants to properly resource their complaint function.

By way of example, the Energy and Water Ombudsman (Victoria) (EWOV) experienced a 40% decrease in cases in 2014-2015, driven in part by “customer service and internal dispute resolution improvements by the companies”⁴. A similar trend was also experienced by the Energy and Water Ombudsman New South (EWON)⁵. There is no evidence that a restructured or transformed EDR process will drive reduction in overall complaint volumes in the absence of appropriate investment in IDR.

It is also important to note that improvements in IDR does not diminish the need for a free, fair and independent dispute resolution entity. In the circumstances of the TIO, the Independent Review of

³ https://www.tio.com.au/_data/assets/pdf_file/0005/253643/2017_0929-TIO-Report-Final.pdf

⁴ [Energy and Water Ombudsman \(Victoria\) Annual Report 2014-15 at p 6](#)

⁵ https://www.ewon.com.au/content/Document/Ewon_AR_2015_WEB.pdf

the TIO emphasised its importance as a key consumer protection mechanism for the benefit of Australian consumers:

The TIO is one of Australia's best known and arguably most influential Ombudsman schemes. Over many years it has built a high level of awareness and credibility and contributed to better consumer outcomes in a critical sector that continues to grow in importance for all Australians⁶.

Irrespective of any foreshadowed improvements in industry IDR and service delivery, the TIO is the entity that satisfies the *CDR Benchmarks* and meets the consumer protection needs for the telecommunications industry.

2. Should the independent EDR body be proactively engaged in driving industry improvements, identifying systemic complaints and analysing root causes or recurring issues?

Ombudsman schemes play an important role in identifying and resolving systemic issues. It is also a requirement under the *CDR Benchmarks*⁷. It is common for an EDR scheme to have systems and processes in place to:

- a) *identify* systemic issues that arise from its consideration of complaints
- b) *refer* these matters to the financial firm for response and action
- c) *report* systemic issues to the relevant regulator⁸.

The systemic issues function plays a significant role, even if a matter is not considered to be systemic, because it can lead to improved industry outcomes. For example, in its 2016-17 Annual Report, the Financial Ombudsman Service noted that 105 referred issues were not systemic, but in many cases a positive outcome was achieved from the referral, including:

- updating product terms and conditions
- additional resourcing and training of claims-handling staff
- improving processes for engaging with external dispute resolution
- revising policies and procedures, as well as additional training, for teams dealing with customers
- better disclosure of how a product operates.⁹

The TIO already has a systemic issues investigation function. We note the Independent Review of the TIO recommended that the function be better resourced. The TIO accepted that recommendation in principle and is working to practically address this.

Ombudsman schemes, including the TIO, also play an important role in sharing their complaint experience to improve industry behaviour and enhance customer outcomes. Methods to do this include:

- publishing regular updates about complaint handling statistics and common issues
- publishing case studies and guidance notes
- engaging with industry and consumer stakeholders to provide insight into the complaints received by Ombudsman and how they ought to be resolved.

In relation to analysing root causes of systemic issues, in our experience the EDR scheme can, in some more straightforward cases, identify the cause and work with industry to remedy this.

⁶ https://www.tio.com.au/_data/assets/pdf_file/0005/253643/2017_0929-TIO-Report-Final.pdf at p 5

⁷ *CDR Benchmarks, Key Practice 6.4 and 6.5*

⁸ See for example Australian Securities and Investments Commission Regulatory Guide 267.67

⁹ [Financial Ombudsman Service Annual Report 2016-17 at p 114](#)

However, to really get to the bottom of the issue often requires a deeper understanding of the industry participant's systems. This is, in our view, beyond the role of an EDR scheme and requires the more comprehensive powers and functions of regulatory bodies.

3. Should the charging structure for complaints lodged with the EDR body be structured to encourage providers to exhaust all practical steps to directly resolve the complaint with the consumer before referring to the EDR body? How can this be achieved?

Effective and well-resourced IDR should be a requirement for all industry participants. In our experience, a charging mechanism that combines a fee based on the number of disputes received and a case based fee that increases as the dispute is progressed through the EDR scheme (i.e. operates on a "user pays" principle), encourages industry participants to adequately resource their IDR and to resolve matters early.

The *CDR Benchmarks* include a requirement that schemes are accessible to consumers. One of the key ways to ensure an Ombudsman scheme is accessible is to make it easy to lodge a complaint. A process where the consumer is required to exhaust all available options with the industry participant (including by getting a complaint reference number) makes it difficult for a consumer. It is the opposite of "making it easy" and could lead to consumers with a valid complaint "giving up" because it is too hard to have a matter reviewed by an independent third party.

ANZOA is particularly concerned that any steps that would limit the accessibility of an EDR scheme may have a disproportionate impact on the most vulnerable members of the community, further undermining both compliance with the *CDR Benchmarks* and the important consumer protection function provided by industry-based Ombudsman schemes.

The *Access to Justice Report* suggested greater visibility and use of Ombudsman services was actually a desirable outcome¹⁰. It recommended that providers be required to inform customers about Ombudsman services at the time of making a complaint (Recommendation 9.1), which would seem contrary to the concept of a customer exhausting all steps prior to being referred to an EDR body.

In our experience, the provider should be given one last chance to resolve the dispute within a specified time, either after referral back by the Ombudsman scheme or through its IDR process. However, the provider having been given that one last chance, the consumer should be able to progress their dispute without further impediments.

4. What process should be followed before a consumer lodges a complaint with the EDR body?

Industry-based Ombudsman schemes generally require a customer to have raised their concerns with their provider before lodging a complaint with the Ombudsman. Research by EWOV in 2015¹¹ suggests that up to 76% of customers provide their companies three or more opportunities to resolve their complaint prior to contacting EWOV, with 62% spending three or more hours trying to resolve their complaints prior to contacting EWOV.

This suggests customers are attempting to work through their provider's IDR procedures and are not prematurely contacting an Ombudsman scheme. However, it is also not reasonable for a customer to spend excessive time working through IDR before contacting an Ombudsman scheme for free, fair and accessible assistance.

¹⁰ *Access to Justice Report* at page 36

¹¹ <https://www.ewov.com.au/publications/can-i-speak-with-a-manager/201503>

Importantly too, most Ombudsman schemes will facilitate a further contact between the customer and a higher level contact at the provider (similar to the TIO's Level 1 complaints). This ensures customers are informed of their rights and responsibilities, provided general information and are able to speak with staff adequately trained and empowered to resolve complaints prior to a detailed investigation. This has proven effective for most Ombudsman schemes, ensuring the right process and resource is directed to the complaints that require more detailed involvement due to the nature or scale of the issue or the parties involved.

5. What process should the EDR body follow in the event it receives a complaint from a consumer where the consumer has not followed the provider's complaint handling procedures?

As a general rule Ombudsman schemes require customers to have given a provider the opportunity to resolve the complaint. However, this doesn't mean that the customer must have followed the provider's complaint handling procedure to the letter — especially if the procedure doesn't meet the *Guidelines for complaints handling in organisations*¹², or otherwise imposes an unreasonable obligation on customers in circumstances of vulnerability or urgency. To do so would undermine the role of Ombudsman schemes as a key consumer protection mechanism.

For example, it is common for Ombudsman schemes to exercise their discretion to bypass certain referral back processes if a customer is exhibiting particular vulnerabilities that would make further efforts to liaise with their provider onerous, increasing the likelihood that the customer will fatigue and fail to pursue their dispute. For example, both EWOV and FOS have clear policies and processes to guide staff about when to exercise this discretion, and their members understand the importance of this discretion for fair and effective dispute resolution.

ANZOA would expect EDR schemes would have the appropriate flexibility to adjust standard process in circumstances where it is required to support fair and reasonable outcomes, even if a customer has not followed the provider's complaint handling procedures.

6. What process should the EDR body follow in the event it receives a complaint from a consumer where the provider has not followed its own complaint handling procedures?

The question raised in the *Consultation Paper* highlights the IDR failings of providers that can significantly increase complaints made to an Ombudsman scheme, with the largest energy and water ombudsman schemes, EWOV and EWON's experience a case in point. Ombudsman schemes are required to be accessible to customers and should not present barriers to access in an effort to overcome (possibly systemic) failings of providers' IDR procedures.

Where a customer has contacted an Ombudsman scheme after attempting to raise a complaint with a provider, without the provider following its own procedures, we would accept this complaint — though we may facilitate a referral back to a specialised complaint handling team if it is fair and reasonable to do so. It is not reasonable or appropriate that customers be denied access to a fundamental consumer protection mechanism of an Ombudsman scheme because of IDR failings of a provider.

¹² [Australian and New Zealand Standard Guidelines for complaint handling in organizations AS/NZS 10002:2014](#)

Data collection, analysis and reporting

The *Consultation Paper* proposes that the Australian Communication and Media Authority (ACMA) become the central repository of all information on industry performance and complaints data. We believe it is appropriate for a regulator to obtain data about complaints directly from industry participants. To the extent that the proposal goes beyond the collection of data about IDR from industry, ANZOA's concerns are summarised below.


The *CDR Benchmarks* require schemes to publish a detailed and informative annual report that contains information about the performance of the office and the nature and types of complaints and their outcomes¹³. Publication of complaint and performance data by Ombudsman schemes provides an important mechanism for industry, media, government and regulatory stakeholders and the community more broadly to better understand the customer experience of the industries that we work in. It also assists key stakeholders to hold Ombudsman schemes to account for their performance. Transparent, public reporting of complaint data is key to an accountable industry, driven to improve its service performance, and also the accountability of the Ombudsman scheme. As such, ANZOA is very concerned that this may render TIO unable to meet the requirements of the *CDR Benchmarks*.

We also make the observation that shifting the obligation on the TIO to report complaint data to ACMA (rather than the TIO publishing its own data) creates the risk of misinterpretation of the TIO's data and, inadvertently, the wrong conclusions to be drawn by ACMA who may not understand the detail of the data. This would undermine the accountability mechanism that sits below the TIO's current obligations to publicly report.

It is also important to note that position the ACMA as the central repository of the TIO's data starts to blur the respective roles of the regulator (as the enforcement agency) and the dispute resolution body (an independent, free and fair entity that supports consumer protection by providing access to justice). This is an important distinction that has been recognised by the principles contained in the *CDR Benchmarks* and reinforced by the relationship between industry-based Ombudsman schemes and regulators in the energy, water and finance industries.

If you would like to discuss the matters raised in this submission with members of the ANZOA Executive, please call me on [REDACTED] or email at [REDACTED]

Yours sincerely



Philip Field
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ANZOA

¹³ Key Practice 4.5