

Fair Go:

Complaint Resolution for Digital Australia



An Occasional Paper
John T. D. Wood
Baljurda Consulting



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**An Occasional Paper prepared for the
Australian Communications Consumer Action Network**

John T.D. Wood

Baljurda Comprehensive Consulting

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ACRONYMS

ADR	Alternate Dispute Resolution
ANZOA	Australia and New Zealand Ombudsman Association
DIST Principles	Benchmarks for Industry-based Customer Dispute Resolution Schemes – see Appendix B
EDR	External Dispute Resolution
FOS	Financial Ombudsman Service
IDR	Internal Dispute Resolution
NBN	National Broadband Network
Telco	Telecommunications
TIO	Telecommunications Industry Ombudsman

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He has reviewed external dispute resolution schemes in the private and government sectors in Australia, New Zealand, the United Kingdom and Asia-Pacific.

1 FOREWORD

This paper is not a review of the Telecommunications Industry Ombudsman (TIO) scheme, nor is it a review of telecommunications regulation in Australia. Rather it is an attempt to revisit the background and development of internal and external complaint handling processes and systems and, in the context of the communications industry, suggest ways in which these processes could be better aligned to current and future consumer needs.

From everything I have seen and heard, the TIO deserves significant acknowledgement for what it has achieved, and for having survived the huge increase of complaints over the 2007-09 period¹.

This paper draws on my twenty-six years of experience working in the ‘complaints industry’ in the public, community, and private sectors, including many reviews of government and industry internal and external complaint handling schemes – in Australia and internationally.

My work has been informed by discussions with a total of 35 people from industry, external dispute resolution (EDR) schemes, consumer and academic perspectives as well as current and former ombudsmen. In total, the interviews stretched over a total of more than 60 hours. For reasons of confidentiality the names of interview participants have been withheld.

This paper has also been informed by an extensive literature review of reports and papers which are listed in the *Bibliography*.

Questions that were discussed in interviews included, but were not limited to the following:

- How can systemic issues best be handled by an industry run EDR, and paid for?
- What should an EDR scheme’s effective public reporting measures/indicators be?
- What is the most appropriate governance structure for an EDR scheme?
- Who should monitor & audit compliance with codes?
- How can complaint pricing be structured to prevent members ‘dumping’ complaints on the EDR scheme, yet not penalise those who resolve the complaint at the first level of the EDR?
- How can member’s internal dispute schemes be monitored?
- From a consumer perspective, should the NBN be considered the same as the airwaves and its use regulated in a similar way?
- Why not have one EDR scheme that deals with all communication complaints – but with dedicated divisions such as for dealing with content?
- Should anyone providing content intended for public consumption or purchase, over the NBN, other cable or satellite systems, or internet, or public airwaves have to be

¹ See Telecommunications Industry Ombudsman (TIO) 2008 Annual Report; See also TIO 2009 Annual Report and TIO *Connect.resolve* 2010

registered/licensed?

- What issues do you believe would apply if there were to be a government operated communications ombudsman scheme, funded by a levy and user charge system?
- How can a statutory scheme best make binding determinations?
- What is the best mechanism for securing providers adherence to IDR and EDR requirements:
 - Including requirements in a code that applies to all service providers?
 - Including them in the rules of the EDR scheme, membership of which is a condition of registration/licensing?
 - Including them in statutory guidelines, adherence to which is a condition of registration/licensing?
- Who should have responsibility for monitoring compliance with these requirements in each case; EDR scheme or Regulator?
- How should industry wide systemic issues be handled – by the EDR scheme or Regulator?

I thank all who assisted for their frank and constructive views. I thank ACCAN for the opportunity to undertake this project.



John T. D. Wood

March 2011

2 EXECUTIVE SUMMARY

The Paper starts from the premise that it is important to reflect on why external complaint handling schemes were established in the first place in Australia, and to understand the essential criteria and principles that should underpin and support any system of complaint handling. Equally, it is crucial to consider the evolution of such schemes and how they may need to operate in the future, in the light of rapidly changing markets for services. Chapter 3 provides a background to dispute resolution, from terminology to a discussion of both external and internal dispute resolution components, as well as standards and systems.

The need for the *connect.resolve* campaign to address rising complaint numbers and customer service issues in the telecommunications sector conducted by the Telecommunications Industry Ombudsman (TIO) in 2009 was itself an indictment of the way in which members had been dealing with customers. It also reflected poorly on the regulatory system for the telecommunications sector. Most of the telecommunications industry has recognised over the past three years that improved customer service is not only necessary from a reputational viewpoint, but also that it is the essential base for customer loyalty and retention. Chapter 4 provides a discussion of the basis of a dispute resolution system in the communications sector in Australia.

In Chapter 5 the Paper identifies a number of broad options for the future of dispute resolution in the communications sector:

1. Leave it as is and do nothing;
2. Upgrade the existing scheme and adopt reforms;
3. Start from scratch with a new scheme;
4. Create a government communications ombudsman scheme;
5. Develop a national services ombudsman scheme.

The paper then addresses aspects of these options. It is proposed that the TIO scheme's underpinning standards should be elevated, at least, to that of the national benchmark Alternate Dispute Resolution (ADR) scheme – the Financial Ombudsman Service. A bonus would be that parity of ADR standards would enable either scheme to handle matters involving complaints relating to combined and evolving services – such as, for example, mobile payments.

Suggestions are made about means for enhancing the Scheme's ability to engage with young people and people with disabilities.

Whilst recognising that good providers want to own the resolution of complaints about them, there is, nevertheless, a real danger of the 'referral treadmill'. Consequently a policy of accepting a complaint where the complainant has tried on two occasions to resolve the

matter with the member is proposed.

To avoid actual or perceived conflicts with the necessary independence of the Ombudsman, the TIO Scheme should adopt a single level governance structure, with consumer and industry members equally represented such as that of the Financial Ombudsman Service.

Problems of a systemic nature are frequently identified in External Dispute Resolution (EDR) schemes, whether relating to an individual member, or industry wide. Given the primary purpose of these schemes is the resolution of individual complaints, the matter of systemic issues and their investigation, and how investigations are funded, are now recognised as being an important component of schemes. However, how industry wide systemic problems should be investigated is still somewhat contentious. The paper proposes some changes both to the Scheme and the regulatory system.

The current situation where there is no licensing or registration requirement for carriage service providers is nonsensical and needs to change to prevent entry of fraudulent operators, or at least to make them more easily traced and identified. It also establishes a mechanism for requiring an acceptance of complaint handling responsibilities by potential providers.

Much needs to be done to improve internal complaint handling processes in the sector, and this area is a key for attention in improving outcomes for consumers. It is proposed that standards developed under Part 6 of the *Telecommunications Act 1997* establish that minimum standards for internal complaint handling provided by members be those of the Australian Standard AS/ISO10002, and that the current and future EDR schemes require adherence to the 'DIST Principles' as amended.

A range of other measures to improve internal complaint handling and compliance are also discussed, and the need for a simpler, more cost effective, and quicker enforcement and penalty system for ACMA needs to be put in place.

The value of a super-complaint process – enabling designated consumer bodies to lodge complaints where they believe there is market failure that is or appears to be significantly harming the interests of consumers is also canvassed.

Due to the social and economic importance of the sector, the Paper suggests that a Government run scheme for communications may need to be considered if the industry and regulators fail to make the necessary improvements for an upgraded scheme.

Finally, the paper considers whether in three years' time, it may be necessary to have a unified national ombudsman scheme covering the major services. Initially an Australian Services Ombudsman (ASOO) would ensure that consumers were directed to the most relevant scheme to handle their complaints, but ultimately it is envisaged that there would be a single organisation managing the scheme.

3 A BACKGROUND TO DISPUTE RESOLUTION

3.1 Terminology

Complaint handling includes both Internal Dispute Resolution (IDR) and External Dispute Resolution (EDR). These terms are used in this Paper simply because they are the ones commonly used. Both terms are, however, limiting. IDR should more accurately refer to internal complaint handling, which does not necessarily involve a dispute between the complainant and the provider. Similarly this paper's view is that EDR schemes should in fact be ombudsman schemes, which have a broader remit than simply the resolution of individual disputes.

The phrases 'industry EDR schemes' or 'industry ombudsman schemes' are also used to distinguish between schemes set up and funded by industry as opposed to those Parliamentary ombudsmen or statutory schemes. Unfortunately it gives the impression that these are schemes FOR industry, rather than for consumers. Perhaps 'independent EDR schemes' would be more accurate.

Over the years the term ombudsman has become synonymous with independence, impartiality and fairness. Because the term has attracted this cachet, it has been increasingly adopted by complaint handling schemes that are not independent or impartial. As a result, the Australasian and Pacific Ombudsmen Conference (APOC) in 1994 - following consideration by parliamentary ombudsman and the then Banking Industry Ombudsman, - adopted criteria for the use of the term 'ombudsman'.² These covered areas such as Independence, Jurisdictional Criteria, Powers, Accountability, and Accessibility. So far, however, unlike the situation in New Zealand, the use of the term has not been given any statutory protection by the Australian Government.

In May 2010, reflecting the growing concern about the misuse of the term, the Australian and New Zealand Ombudsman Association (ANZOA) - a body with members from both industry and parliamentary ombudsmen - called for stronger controls on the use of the term, and issued a policy statement setting out six essential criteria—addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability—which it says the public are entitled to expect of any office described as an Ombudsman.³ A copy of the Criteria is at Appendix A.

There are a number of external dispute resolution schemes that use the term ombudsman, that do not meet one or more of these criteria, for example the Public Health Insurance

² Parliamentary Ombudsmen, *Criteria for the Use of the Term 'Ombudsman'*, adopted by the 14th Australasian & Pacific Ombudsman Conference, New Zealand, October 1994 – hereafter 'APOC Criteria'

³ ANZOA, *Essential criteria for describing a body as an Ombudsman*, at http://www.anzoa.com.au/Use_of_term_Ombudsman.html

'Ombudsman' Scheme or the Fair Work 'Ombudsman' where the Minister can give a direction to the 'ombudsman'. Or university ombudsmen who are regular staff of the university carrying complaint handling duties, but with no real independence

3.2 Background to External Dispute Resolution Schemes

The emergence of industry-based dispute resolution schemes took place in the late 1980s with Britain at the fore, initiating both the Insurance and the Banking Ombudsman schemes. These were a reflection of consumer, government, and (some) industry concern that there was a considerable imbalance in the relative bargaining position of the parties when it came to resolving complaints. Previously, affected consumers had to either take a dispute to court, or rely on a consumer protection or fair trading agency to take up the matter as a breach of relevant laws. The court option was prohibitively expensive, and consumer protection bodies simply did not have the resources to pursue other than a fraction of complaints. Besides, many of the complaints related to service quality and information related complaints that were not covered by any statute. The emphasis, when action was taken was, thus, on prosecution rather than consumer redress and compensation.

Consumer activism and media interest exposed large numbers of unsatisfactory and unacceptable practices in various industries. These ranged from incomprehensible contract terms through to failure to respond to complaints and repair mistakes or, indeed to provide any relevant information to bewildered consumers.

Initially, the focus was on the financial services sector, but the utilities rapidly came in for the same sort of scrutiny. This was accelerated in various countries with the privatisation of previously state owned monopolies. Other sectors that attracted attention and various EDR systems included real estate agents; funeral directors; legal services; public and private health services; etc.

Until recently, with the exception of Scandinavia where there are a range of consumer complaints boards with a general remit and consumer ombudsmen for particular sectors, the development of these forms of EDR schemes has been concentrated in English speaking Commonwealth countries.

In Australia, there has been an evolution of the various schemes with, for example, a number of financial services schemes joining together to form the Financial Ombudsman Service, and with the rationalisation of governance in some schemes.

3.3 External dispute resolution principles

The first external schemes commenced in 1990 - the Australian Banking Industry Ombudsman; 1991 – the Claims Review Panel (general insurance) and the Life Insurance Complaints Service; and 1993 – the Telecommunications Industry Ombudsman. All schemes still left much to be desired, however.

Thus it was that work first commenced on the development of principles that should be the basis against which industry dispute resolution schemes should be measured. They emerged in 1997 as the Benchmarks for Industry-based Customer Dispute Resolution Schemes, and set out a series of recommended principles, purposes and key practices. The principles were:

1. ACCESSIBILITY

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2. INDEPENDENCE

The decision-making process and administration of the scheme are independent from scheme members.

3. FAIRNESS

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4. ACCOUNTABILITY

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5. EFFICIENCY

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6. EFFECTIVENESS

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

These benchmarks are now in wide use in both Australia and New Zealand, and have played a key role in the examination and review of EDR schemes. The ANZOA has recently undertaken a review of the Benchmarks and it is hoped that they will be relaunched by the Federal Government at some future opportunity. A copy with some suggested minor amendments is at Appendix B.

There can be no doubt, then, of the availability of a tried and tested architecture for effective complaint resolution systems that can be applied in the communications sector.

3.4 Common elements of EDR schemes

3.4.1 Governance

The governance of schemes in Australia differ somewhat. There is a two level structure, e.g. – Energy & Water Ombudsman NSW (EWON) and the Telecommunications Industry Ombudsman. The TIO describes its Board's role:

The Board has corporate governance responsibilities including financial management of the scheme and ensuring compliance with the Memorandum and Articles of Association and the Constitution. With the exception of the independent director, who is appointed by the Board itself, directors are appointed by the TIO membership.⁴

and that of its Council:

The Council is comprised of five TIO member representatives and five consumer representatives, with an independent Chairman. While the Ombudsman has responsibility for the day to day operations of the scheme, the Council provides advice to the Ombudsman on policy and procedural matters.⁵

There is also a single level structure, e.g. – Financial Ombudsman Service (FOS), Energy and Water Ombudsman (Victoria) (EWOV), Credit Ombudsman Service Limited (COSL); the FOS describes its Board's role thus:

The Financial Ombudsman Service is governed by an independent board of consumer representatives and financial services industry representatives. The Board also seeks expertise and advice from Specialist Advisory Committees drawn from Financial Ombudsman Service member organisations and consumer organisations. The role of the Board is to monitor the performance of the Financial Ombudsman Service, provide direction to the Ombudsman on policy matters, set the budget and review from time to time, the Terms of Reference including the jurisdictional limits of the Ombudsman. The Board does not get involved in the detail of cases which come before the Ombudsman as that would prejudice the independence of the Ombudsman. The decisions of the Ombudsman are independent of any interference from the Board.⁶

A single board or council governing the scheme is considered preferable to a dual layer, in that it vests all matters of governance of the scheme (apart from those that are the

⁴ TIO, *Structure of the TIO scheme*, TIO Website at: http://www.tio.com.au/about_tio.htm

⁵ TIO op. cit.

⁶ Financial Ombudsman Service, *Our Board*, FOS Website at: http://www.fos.org.au/centric/home_page/about_us/governance/our_board.jsp

responsibility of the ombudsman) squarely in the hands of a body made up of an equal number of industry and consumer representatives with an independent chair.

3.4.2 Independence

In the dual level schemes the ombudsman is appointed by the Board on the recommendation of a joint industry/consumer body, independently chaired. In the single level schemes, the ombudsman is appointed by the independently chaired joint industry/consumer board/council.

The grounds for the termination of the appointment of ombudsmen, is not always specified, and is a matter deserving of some attention. The ANZOA criteria specify that the person appointed as Ombudsman should be ‘... removable only for misconduct or incapacity according to a clearly defined process.’⁷

A critical factor is that the Ombudsman is not subject to direction or influence by others including the governing body of the scheme. Influence, in this context, can include restricting resources, or threatening to do so. This is one of the concerns expressed about a having a dual level governance structure, where only industry is represented on the board having financial control.

3.4.3 Jurisdiction

If schemes are to be effective in delivering the most effective consumer protection, they should have 100% coverage of the industry concerned. Increasingly this is being achieved through making membership of an external dispute resolution scheme a condition for a grant of licence to operate.

For example, underpinning the FOS, is the *Corporations Act 2001*, under which financial services licensees, unlicensed product issuers and unlicensed secondary sellers are required to have a dispute resolution system that consists of:

- internal dispute resolution (IDR) processes that meet standards or requirements made or approved by ASIC; and
- membership of one or more ASIC-approved EDR schemes.⁸

Persons registered to engage in credit activities are also required to be members of an ASIC-approved EDR scheme. Similarly, for the TIO, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* provides⁹ that:

⁷ ANZOA, op. cit.

⁸ s912A(2) and 1017G(2), Corporations Act 2001

⁹ ss 127 and 128, Telecommunications (Consumer Protection and Service Standards) Act 1999

- Certain carriers and carriage service providers must enter into the Telecommunications Industry Ombudsman scheme;
- The membership of the scheme must be open to all carriers and carriage service providers; and
- Carriers and carriage service providers must comply with the scheme.

It is worth noting here, that in the financial services sector, membership is required in **an** Australian Securities & Investments Commission (ASIC) approved EDR scheme, i.e. there can be a competitor to the FOS scheme. This same situation exists in New Zealand and in some industry sectors in the United Kingdom.

By way of contrast, in the telecommunications sector, the EDR scheme **is** the TIO scheme.

There is legitimate concern that a scheme member could become disenchanted with an EDR scheme, leave it and set up an alternative one. This happened in New Zealand, in the energy sector.

Another concern is the idea that competition contributes to a better EDR process. In the UK a not-for-profit company, Ombudsman Services Limited, runs four ombudsman schemes – telecommunications, property, energy, and music copyright. In the real estate field there are competing ombudsman schemes approved by the Office of Fair Trading.

Another company, IDRS Limited (Independent Dispute Resolution Services), a company specialising in alternative dispute resolution, runs a variety of EDR schemes, including for communications (Communications and Internet Services Adjudication Scheme [CISAS]); post (Postal Redress Service [POSTRS]); movers; and funerals.

In New Zealand, Dispute Resolution Services Limited (DRSL) runs the reserve EDR Financial Dispute Resolution Scheme (FDR); the Telecommunication Dispute Resolution (TDR) Scheme; and the external disputes scheme for the Accident Compensation Corporation.

3.4.4 Powers

One of the key aspects of the operation of parliamentary ombudsmen, is that in coming to a conclusion about a complaint, they take into consideration whether the action complained of was reasonable, in all the circumstances. In other words, the action may have been lawful, but otherwise unreasonable.¹⁰ This is a power that should exist in all schemes wishing to be known as ombudsman schemes.

The ANZOA criteria includes this criterion:

¹⁰ See, for example, s.15 *Ombudsman Act 1976* (Cwlth)

The Ombudsman must be able to investigate whether an organization within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.¹¹

3.4.5 Accessibility

The 1994 APOC Criteria for Accessibility included a criterion which stated that '[t]he Ombudsmen should be enabled to ensure the Scheme is made known to potential users.' This is not included in the ANZOA policy, but is a crucial one for these schemes. Early in the life of the then Australian Banking Industry Ombudsman scheme, some of the industry members became concerned at the Ombudsman's diligence in publicising the scheme – and the consequent rise in complaints - and expressed their concern to the Ombudsman. Subsequently banks realised that knowing areas where customers were experiencing difficulties assisted with future planning so that the concerns of their customers were not perpetuated. Additionally a realisation that a proportion of the large amounts expended in advertising was better spent in keeping the customers they had by better catering to their needs occurred. Development of more sophisticated in house complaint resolution processes, which provided better statistics and identification of issues of customer concern, followed.¹²

In 2007, the OECD Council adopted a Recommendation on consumer dispute resolution and redress. This included, *inter alia*, the following requirements for dispute resolution and redress mechanisms:

1. These mechanisms should be designed to be sufficiently accessible and easy to use to enable consumers to elect to conduct the procedure without need for legal representation or assistance as far as possible.
2. Consumers should be provided with clear, comprehensible, and accurate information on the procedure, including the process for initiating a complaint and selecting a dispute resolution mechanism, expected costs and duration of the procedure, possible outcomes, avenues for appeal, and whether the outcome is binding.
3. These mechanisms should be designed so that they can be used by consumers with only minimal additional information or help (e.g. through the use of standard forms to facilitate the submission of necessary documents).
4. The special needs of disadvantaged or vulnerable consumers should be considered so that they, or their representatives, can access these mechanisms.¹³

¹¹ ANZOA, op. cit.

¹² Discussion with former ombudsman, Graham McDonald, August 2010

¹³ OECD, OECD Recommendation on Consumer Dispute Resolution and Redress, OECD, 2007.

The ANZOA policy states, 'A person must be able to approach the Ombudsman's office directly'. However, many consumers report that they did not know of the existence of an EDR scheme, or were not told by their service provider of their right to escalate their complaint to such a scheme.¹⁴

The International Standards Organisation Standard, 'Guidelines for dispute resolution external to organizations', suggests:

Communications can be made by an organization at various times, such as at the point of sale and at the time a complaint is filed with the organization. As a minimum, the organization should communicate at the end of unsuccessful internal complaint handling processes.

These communications are most effective if placed in multiple locations, such as in customer satisfaction codes of conduct, on store displays, websites, complaint forms, sales contracts and documents ending an internal complaint handling process.¹⁵

More specifically the Benchmarks for Industry-based Customer Dispute Resolution Schemes¹⁶ states the Principle that – 'The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers' and sets out the key practices to ensure this:

- 1.1. The scheme seeks to ensure that all customers of the relevant industry are aware of its existence.
- 1.2. The scheme promotes its existence in the media or by other means.
- 1.3. The scheme produces readily available material in simple terms explaining:
 - (a) how to access the scheme;
 - (b) how the scheme works;
 - (c) the major areas with which the scheme deals; and
 - (d) any restrictions on the scheme's powers.

¹⁴ See, for example, TIO, Telecommunications Ombudsman Annual Report 2008, TIO, 2008

¹⁵ International Standards Organization. ISO 10003 - Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations. ISO. Geneva, 2007.

¹⁶ Department of Industry, Science and Tourism. Benchmarks for Industry-based Customer Dispute Resolution Schemes. Canberra, 1997.

1.4. The scheme requires scheme members to inform their customers about the scheme.

1.5. The scheme ensures that information about its existence, procedures and scope is available to customers through scheme members:

- (a) when a scheme member responds to a customer's complaint; and
- (b) when customers are not satisfied in whole or in part with the outcome of the internal complaints mechanism of a scheme member, when the scheme member refuses to deal with a complaint, or when the time period within which the internal complaints mechanism is expected to produce an outcome has expired, whichever first occurs.

1.6. The scheme promotes its existence in such a way as to be sensitive to disadvantaged customers or customers with special needs.

These practices are deserving of being built in as minimum requirements in the rules for EDR schemes.

Finally, in some schemes, the dreaded complaint 'treadmill' has been exacerbated by requiring complainants to continue addressing their complaint to yet another contact in the member organization. A guide published by the Commonwealth Ombudsman in 1997 suggested that there should be a maximum of two tiers of internal complaint handling, before the complainant takes the matter to external review.¹⁷ This approach is also suggested in Standards Australia's handbook¹⁸ accompanying the Australian Standard – 'Guidelines for complaints handling in organizations' (AS/ISO 10002).

The principal underlying this is to ensure that consumers do not drop out because of the process. If a consumer has tried twice with different people in the member company, and still has not succeeded in getting the matter resolved, on approaching the TIO the complaint should automatically be dealt with by the TIO and NOT again referred back to the member.

It is interesting to look at the various complaint levels for different industry EDR schemes. All EDR schemes have established different complaint handling levels that relate to the amount of time that needs to be spent by the scheme in resolving the complaint. There is a fair degree of consistency between the schemes, but perhaps the EWON classifications represent the most direct management of complaint handling processes.

¹⁷ A Good practice guide for effective complaint handling. Commonwealth Ombudsman's office, Canberra, 1997

¹⁸ Standards Australia, *The why and how of complaints handling*, Handbook HB229-2006, Sydney, 2006

3.4.6 Accountability

As part of the process of instilling confidence in an EDR scheme, it is important that the ombudsman is free to publish the names of members involved in disputes where that is relevant, and especially where the member has not met their obligations under the scheme. This was included in the APOC Criteria, but not in the ANZOA criteria.

A further improvement, from an accountability perspective, would be more extensive and consistent performance reporting in some schemes' annual reports. This would enable not only assessment of member's performance, but also the performance of the scheme itself. Agreement between schemes on some standards for public reporting – including of outcomes – would also assist in enabling schemes and the public to analyse comparative performance.

3.5 Is competition relevant to EDR schemes

As implied from the above, both the UK and New Zealand – and, indeed, some Australian legislation - have envisaged that more than one redress scheme might operate in any single sector market. It would appear that the architects of this policy considered that competition would thus lead to greater efficiency in the EDR 'market'.

In its 2008 paper, *lessons from ombudsmania*, the UK National Consumer Council considered this model to be 'conceptually and practically flawed'¹⁹. Referring to the telecommunications sector, it says:

The telecommunications model falls down hardest, because the choice of redress scheme lies with the firm, not the consumer. This creates a perverse incentive for firms to choose the scheme which is cheapest – or which develops a reputation for industry-friendly decisions.

For example, a competing consumer adjudication scheme run by IDRS:

...can offer cheaper membership fees than the ombudsman, partly because it has no enquiry line to signpost consumers to further help if their complaint is out-of-scope – something which consumer organizations would consider a necessary consumer protection measure.²⁰

Other complications arise for consumers in multiple scheme landscapes, where confusion can be generated about to whom they should complain.

Indeed, as will be discussed later, rather than encouraging multiple schemes, the nature of developing markets suggests a different approach altogether.

¹⁹ Brooker, Steve *lessons from ombudsmania*, National Consumer Council, London, 2008

²⁰ Brooker *op. cit.* page 12

3.6 Internal complaint handling

3.6.1 Why an internal complaint handling system?

A internal complaint handling system has a multiplicity of purposes, which can deliver benefits for all the participants. Such a system provides an opportunity for the consumers of an organisation's services to have their voice heard on those occasions when:

- the organisation fails to deliver its services or goods;
- they are delivered in a manner that is unacceptable to the consumer;
- the organisation fails to meet its own standards of service, or those considered generally acceptable for the industry in which the organisation operates;
- the organisation fails to meet an undertaking; or
- the organisation acts in a manner that the consumer considers to be injurious to his or her interests or self.

Secondly, a complaint handling system provides a unique opportunity for an organisation to find out what its consumers think of it, both good and bad, a window into the minds of its consumers and avoids their tarnishing the reputation of an organisation by voicing their complaints in the wider community. An organisation will fail to discover what its public thinks is wrong with it until there is a critical mass that compels attention.

Thirdly, a complaint handling system is an essential ingredient of a client service quality program. Research has shown that effectively handling a complaint will lead to greater levels of loyalty and customer satisfaction than if there had been no problem at all.²¹

Finally, effective complaint handling is a major component of an accountability system. It is a declaration by an organisation that it has sufficient confidence in itself to conduct its business in the public gaze; invite complaints, deal with them properly, and report publicly on the outcomes.

3.6.2 How do consumers expect to be treated?

Discussions with users of a wide variety of internal complaint handling systems have identified key characteristics that are required. In summary, these include:

- the consumer's ability to understand the process of complaint handling;
- that staff are fully aware of the complaint handling procedures;
- that staff understand the issues raised by the consumer;
- that complaints are easy to make;

²¹ TARP. American Express/SOCAP study of complaint handling in Australia. *op.cit.*

- that consumers are respected;
- that procedures are focussed on achieving speedy resolution of complaints wherever possible;
- that initial contact is followed up in a timely manner;
- that progress is reported regularly;
- that communications are easy to understand;
- that reasons for conclusions are explained; and
- that undertakings are implemented.

3.7 Standards

In 1979 the White House Office of Consumer Affairs commissioned a report called the TARP (Technical Assistance Research Programs) study²². The report revealed the following facts about unhappy customers:

- 96% of dissatisfied customers do not complain directly.
- 90% will not return.
- One unhappy customer will tell nine others.
- 13% will tell at least 20 other people.

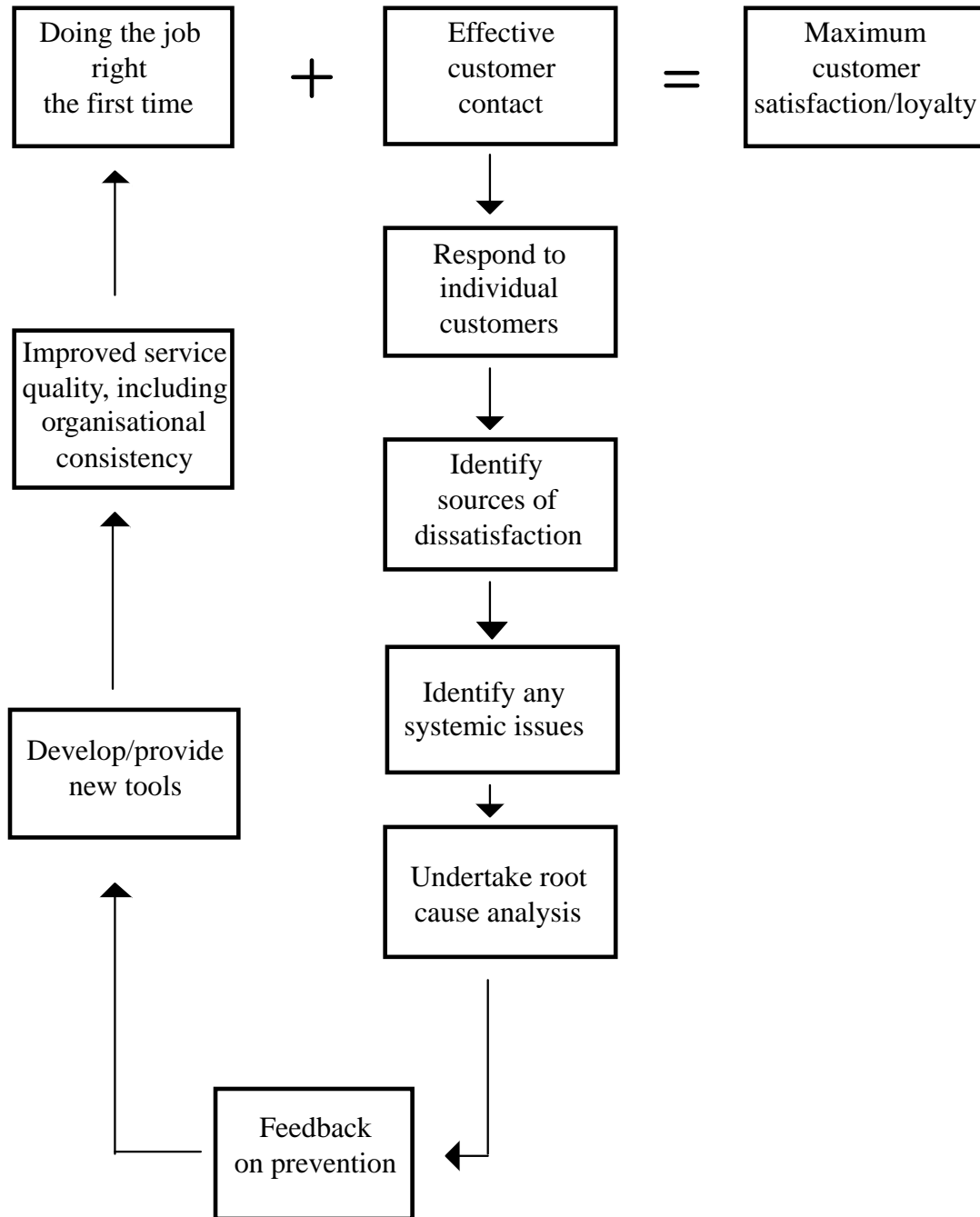
This research was later translated into a formula²³, which has been adapted as follows:

[Caption: A diagram showing a formula for maximising customer satisfaction and loyalty. Maximum customer satisfaction/loyalty is shown to be achieved through a series of linked boxes: effective customer contact + Respond to individual customers + identify sources of dissatisfaction + identify any systematic issues + undertake root cause analysis + feedback prevention + develop/provide new tools + improved service quality including organisational consistency + doing the job right the first time]

²² TARP. *Consumer complaint handling in America: Final report*. White House Office of Consumer Affairs. Washington, DC, 1979

²³ see Adamson, Colin. 'When the skeleton goes on show – Designing and Implementing a Complaints Handling and Logging Procedure as a Tool to Retain Your Customers'. TARP Europe Ltd. London, 1994

Formula for maximising customer satisfaction and loyalty



Customers will reuse your services, and speak well of your services to others

Adapted from original formula by T ARP (USA)

This, rightly, places the onus on the organization to get the job done properly first time around. If not, have a complaints handling system that retrieves the customer quickly and effectively. To assist this, Australia published a pioneering Standard for complaint handling in 1995, AS 4269, the world's first.²⁴ Coming as it did at the same time as a TARP study of complaint handling in Australia, commissioned by the Society of Consumer Affairs Professionals (SOCAP)²⁵, a searchlight was turned onto companies' complaint handling performance.

AS 4269 has subsequently evolved into an international standard adopted in Australia, AS/ISO 10002.²⁶ The guiding principles established by the standard are:

- Visibility
- Accessibility
- Responsiveness
- Objectivity
- Charges
- Confidentiality
- Customer-focused approach
- Accountability, and
- Continual improvement.

It is evident that an EDR schemes' success will depend to a degree on the effectiveness of the internal complaint handling processes established by the scheme's members. It is pointless for an EDR scheme to refer complainants back to members if they have no faith in that member's processes. The EDR scheme should, therefore, have the power to audit members' internal complaint handling schemes.

Because of the considerable variations in quality and thoroughness of internal complaint handling, the rules governing the EDR scheme should establish minimum contemporary standards that members' complaint handling must meet. The requirements of AS/ISO 10002

²⁴ Standards Australia. *Complaints handling. AS 4269-1995*. Standards Australia. Sydney, 1995.

²⁵ TARP. *American Express/SOCAP study of complaint handling in Australia*. Society of Consumer Affairs Professionals. Melbourne, 1995.

²⁶ Standards Australia. *Guidelines for complaints handling in organizations*. Standards Australia. Sydney, 2006.

would provide an appropriate basis for this. For example, in the A.C.T., the Consumer Protection Code under the *Utilities Act 2000*, requires a Utility to:

‘..... provide for the handling of a complaint in accordance with the relevant Australian Standard on complaints handling.’²⁷

²⁷ s.6.1, *Consumer Protection Code, July 2010*. Independent Competition and Regulatory Commission (ACT)

4 THE BASIS FOR AN EDR SCHEME IN THE COMMUNICATIONS SECTOR

4.1 The converging communications world

As noted everywhere in discussions of the communications landscape, the variety of mechanisms, systems and technologies for accessing and delivering content and services to consumers is constantly evolving, so that it is less and less clear who is the provider and who and how they should be regulated. As the Chair of the Australian Communications and Media Authority put it:

‘...there has been a sharp escalation in the complexity of platforms, products, services, options, device interaction and provider arrangements.

This has created business and technical challenges for carriers, and made it significantly less clear what the telecommunications system is and where and how best to regulate it. The inexorable unification of the communications system with enterprise systems and the burgeoning ecosystem of applications in the cloud is erasing traditional notions of the network.

Similarly, the line which once divided content and carriage is also quickly disappearing as telcos and providers increasingly use content as a tool to build loyalty, engagement and margins.’²⁸

In looking at the next five years (from 2009) an ACCAN publication predicted a similar landscape emerging:

‘The clear themes that emerge are that ICTs are becoming more Internet-based, are providing greater mobile functionality, and are developing new types of interactivity between users and content. This is not to say that legacy technologies will not continue to be important parts of consumer experiences, but trends point towards a substitution of fixed lines by mobiles, Internet Protocol (IP)/digital networks, and interactive applications.

The types of access technologies talked about more often than others are fibre to the home (at the centre of the National Broadband Network proposal) and 3G or higher mobile networks. These access technologies provide the capacity over which a wide range of voice (VoIP), video (video calls, streaming media), e-commerce (including mobile commerce and e-wallets, where one can use a mobile device to engage in financial transactions), location based services and other interactive applications can

²⁸ Chapman, Chris ‘Telco Regulation 2.0 – Reconnecting the Customer’, speech to the CommsDay Summit, Sydney 20 April 2010

run. It is also vital to note the switchover of television in Australia from analogue to digital by the end of 2013.

A good example of the convergence of consumer ICTs is mobile phones, which are able to not only make voice and video calls, but can also access the Internet, broadcast television, run applications and capture data.²⁹

So, we have an increasingly extensive market of ideas, services, and content, being delivered through an increasingly opaque system (at least as far as the consumer is concerned), requiring an increasingly responsive redress system for when things go wrong. Again, as the ACMA Chair put it:

'While the dynamic and exciting world of converged media and communications offers great opportunity, its inherently complex, interrelated and global character means we have to ensure the end user of these services and products is not left vulnerable when things do not work the way the marketing brochure suggests.'³⁰

4.2 Mobile money

A further factor of importance is the use of communications technology to open up avenues of finance and credit outside the traditional financial institutions, and especially to those who may be at the lower end of the socio-economic spectrum – the so-called 'underbanked' in the jargon. This is one of the fastest growing areas of growth in financial services in the developing world.^{31,32}

This creates an additional challenge for regulators and consumers, in that those providing mobile money transfer services – often mobile phone carriers – would also need to be members of a financial services EDR scheme and meet the requirements of ASIC.

²⁹ Sengara, Ryan; Humphreys, Sal; Given, Jock; and Milne, Claire Future Consumer, Emerging Consumer Issues in Telecommunications and Convergent Communications and Media, ACCAN, Sydney 2009

³⁰ Chapman op. cit.

³¹ See for example, United States State Department. 'Mobile Payments--A Growing Threat' at <http://www.state.gov/p/inl/rls/nrcrpt/2008/vol2/html/101346.htm>

³² See also, Mas, Ignacio; Radcliffe, Dan. 'Mobile Payments go Viral: M-PESA in Kenya.' Bill & Melinda Gates Foundation's Financial Services for the Poor (FSP) team, March 2010 at <http://go.worldbank.org/NPHXF7AXE0>

4.3 Government

While Australia has lagged behind some countries in the provision of online access to government information and services, there is nevertheless a steady development of such services taking place. Nowhere will access to online services be as important as in government services relating to health, welfare, immigration, and sustainability.

Online engagement goes much further than that however. There is an emerging consensus that citizen participation in the affairs of society – including governance – will increasingly depend on one's access to the communications freeways however they maybe constructed. It is a dangerous assumption that such access can be guaranteed by market only systems – the market-failure approach. As one UK commentator put it:

Regulators or governments that profess to 'know what's best' for citizens are quickly dismissed on principle: at best, they are viewed as paternalistic; at worst, they represent a step on the slippery slope to censorship. But we must be clear about the dangers of the opposite view: that the market simply fails to deliver the level of shared communications and a baseline of equal access, and that the long-term social costs of this may turn out to be enormous.

To summarise: a market-failure approach, particularly one that neglects or underestimates the role of citizen, social and public value, is likely to be indifferent to the key tipping points where digital exclusion begins to seriously undermine citizenship. Even notions of public, social value or externalities do not take an overall view of the level of overlapping inequalities and the extent to which they undermine citizenship *per se*. A notion of rights, and one that sees information citizenship as a relative poverty issue, is the best long-term framework to ensure that communications in the UK perform their integrative, democratic role.³³

The Federal Government has given its imprimatur to accelerating the engagement of government agencies with citizens in responding to the Government 2.0 Taskforce's report. The Taskforce describes the challenge for government:

The use of the internet as a platform for collaboration is already transforming our economy and our lives. Whole industries and sectors are being refashioned by this phenomenon of Web 2.0. Citizens are being empowered to express themselves, organise and collaborate in myriad new ways.

The tools of Web 2.0 include blogs, wikis and social networking platforms. These tools enable communities of interest to develop rapidly to find people with local knowledge or technical expertise to build understanding of issues and solve problems as they emerge. They enable communities to filter the torrent of information on the internet and identify the most useful parts of it. They enable us to find the most

³³ Tambini, Damian. 'What citizens need to know. Digital exclusion, information inequality and rights,' in Richards et al *op. cit.*

useful contributors in any given subject area, be they a world expert or someone possessing important local or ephemeral knowledge.

Web 2.0 also encompasses the way in which the internet has become a platform for the distribution of vast quantities of data and the way in which it has empowered people and organizations to transform data by ‘mashing it up’, combining it with other data so that it can become useful in new ways.

These new tools and the culture of open collaboration which distinguishes the culture of Web 2.0 present important new challenges and possibilities for government. This offers new opportunities to refresh and deepen the enduring principles and values of modern democratic government and improve the quality and responsiveness of government policy making and service delivery.³⁴

This further emphasises the importance for consumers and citizens being able to quickly resolve problems that may emerge in communications service provision.

4.4 Equity

Perhaps, above all else, the developing communications world provides the best chance for a long time to ensure social inclusion for many of those who in the past have been the information poor, or those for whom access to services has been so difficult. Just as new and future technologies provide access to markets and services previously difficult to obtain for those with geographical, physical, cultural, intellectual, or linguistic disadvantage, so should complaint handling and EDR schemes put these consumers at the head of the queue.

As the Chairman of the UK’s Ofcom Advisory Committee on Older and Disabled People summarised the opportunities:

“Now that we are all going to be working for longer, and there is a desire to tackle worklessness and encourage the economically inactive to become economically active once more, technology can help people who are often at the periphery of our society - such as disabled or older people – to play a more active role in the economy and in their local communities. It can also play a role in helping people remain independent, living in their own home, for longer. For younger disabled people it can play a key role in ensuring their lives are as diverse and media rich as their non-disabled peers. Text messaging has revolutionised the lives of young deaf people on the move in the past decade. Next generation broadband has the potential to deliver the same impact in the home.

³⁴ Government 2.0 Taskforce. *Engage: Getting on with Government 2.0 – Report of the Government 2.0 Taskforce*. Australian Government Management Office, 2010, at <http://www.finance.gov.au/publications/gov20taskforcereport/index.html>

Services such as remote health monitoring and consultations, mentoring and befriending schemes, home and community security initiatives, teleworking and life-long learning programmes are just some of the areas in which next generation broadband could deliver wider societal, economic and community benefits to older and disabled people, as well as to society as a whole.”³⁵

4.5 The consumer as beneficiary

The future landscape, then, deserves an improved mechanism for dealing with consumer concerns and complaints. Whatever its final form, it is imperative that it does not contribute to greater consumer confusion.

4.5.1 Rights

Building on a platform of consumer rights is an important starting point when considering an effective redress scheme. Eight consumer rights were developed by Consumers International, and provide the basis for the celebration of World Consumer Rights Day – first observed on 15 March 1983. These rights formed the basis of the United Nations Guidelines for Consumer Protection³⁶, which were adopted by the UN on 9 April 1985. The Rights are:

1. **The right to satisfaction of basic needs** - To have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water and sanitation.
2. **The right to safety** - To be protected against products, production processes and services which are hazardous to health or life.
3. **The right to be informed** - To be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labelling.
4. **The right to choose** - To be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.
5. **The right to be heard** - To have consumer interests represented in the making and execution of government policy, and in the development of products and services.
6. **The right to redress** - To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services.

³⁵ i2 media research limited. *Next Generation Services for Older and Disabled people, final report*. Ofcom Advisory Committee on Older and Disabled People. 13 September 2010.

³⁶ Department of Economic and Social Affairs. *United Nations Guidelines for Consumer Protection (as expanded in 1999)*. United Nations. New York, 2003

7. **The right to consumer education** - To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.
8. **The right to a healthy environment** - To live and work in an environment which is non-threatening to the well-being of present and future generations.

Each of these has relevance in the communications sector.

In 2007, the forerunner of ACCAN, the Consumers Telecommunications Network (CTN), developed a Draft Australian Charter of Communication Rights as follows:

1. **Universal Access to Communications Services** - All people are entitled to a choice of communications services, wherever they live or work in Australia. Communications services include voice, video, text and data, or equivalent depending on the most appropriate technology for a particular user.
2. **Universal Accessibility of Communications Services** - All people are entitled to equal access to communications services regardless of ability. The needs of people with disabilities must be taken into account in the design of all communications services, and must be met with guaranteed and subsidised additional and/or alternative equipment and services if necessary. Services, including equipment, must be interoperable and allow for backwards compatibility wherever possible.
3. **Universal Affordability of Communications Services** - All people are entitled to communications services at reasonable cost, including price controls on basic services, and the availability of tools and mechanisms that allow them to control and limit their expenditure on communications. All communications services must provide a reasonable and accessible financial hardship policy to customers.
4. **Guaranteed Quality of Communications Services** - All people are entitled to services that guarantee a minimum level of performance to ensure reliable communications and, in particular, access to effective emergency services. Furthermore, all communications equipment and services must be safe, and both delivered and repaired in a timely manner.
5. **Consumer Protection** - All people are entitled to mandatory consumer protections of their communications services, including the right to be given the facts needed to make an informed choice, the right to education resources, the right to fair contracts, the right to privacy, and the right to security.
6. **Consumer Representation** - All people are entitled to have their needs represented in the development of communications services and policy in Australia through well-resourced consumer consultation and representative processes.
7. **Right to redress** - All people are entitled to an appropriate form of redress if a breach of their communication rights occurs, including access to an independent

dispute resolution body.

These statements of rights are important expressions of opinion about the bases on which complaint handling systems and dispute resolution schemes should be built.

4.6 Issues

There is widespread agreement in most quarters that the current oversight arrangements for consumer communications are in need of re-design. The need for the **connect.resolve** campaign conducted by the TIO was itself an indictment of the way in which members had been dealing with customers:

Over the past two to three years, more and more of these callers have been telling us about their frustration and concern at being given the run around by their service provider, or about feeling let down because actions promised were not followed through.

The increasing percentage of customer service-related complaints was the catalyst for what became the TIO's **connect.resolve** campaign.³⁷

However, a further six months after the **connect.resolve** campaign the Acting Ombudsman, Simon Cleary, reported that while overall complaint numbers to the TIO had decreased by 7%:

However, customer service and complaint handling issues continued to make up about a third of TIO complaints. While these types of complaints are falling at a similar rate to our overall complaint numbers, we are yet to see a significant reduction in these simple but fundamental issues.³⁸

A summary of the main issues identified in the campaign are at Appendix C.

The response to this poor performance³⁹ included announcements by the Minister and the regulator, ACMA, to strengthen consumer protection measures in the sector. In his CommsDay speech on 20 April 2010, the ACMA Chair, Chris Chapman, said:

³⁷ Telecommunications Industry Ombudsman. *Connect.resolve – A report on complaints to the TIO about Customer Service and Complaint Handling*, for the period 1 January – 30 June 2009. TIO. Melbourne, August 2009.

³⁸ Telecommunications Industry Ombudsman. *Connect.resolve –Complaints to the TIO about Customer Service and Complaint Handling*, Update report for the period 1 July – 31 December 2009. TIO. Melbourne, March 2010.

³⁹ A breakdown of the main issues in complaints identified in the **connect.resolve** update report, are at Appendix C

To do this, the ACMA will be undertaking a formal inquiry into the industry's practices in dealing with the problems of its customers. The inquiry, which is consistent with the ACMA's evidence-informed approach, will also identify what should be the key elements of good customer relationship management and attempt to plot the pressure points in the interaction between customers and providers. In particular, I want the inquiry to shine a strong light on complaints handling and the unresponsiveness of the industry to its customers.

We want to establish, as a reference point, an analytic framework and metrics so that this vexed issue of responsiveness and complaint management can be settled for a foreseeable future.

This framework will be a reference point which community safeguards in future code development can be linked to and measured against.

The inquiry will also consider how the current regulations can be used more effectively to address industry practices in dealing with its customers.

The inquiry may determine whether, from the ACMA's perspective, more direct regulation of complaint handling is necessary and the form that any such regulation should take, for example, through the establishment of standards. We will be actively seeking engagement with all stakeholders using the wide range of communications channels available to us.⁴⁰

Non-performance on fundamental issues such as 'failing to act on a customer request' or 'the provision of incorrect or inadequate advice' by companies is bad enough. But when the main complaints about the member's own complaint handling process are a 'failure to act on its undertakings' or 'failure to advise of outcomes', we know that there is something badly awry.

In the course of undertaking this project, the following issues have also been raised:

- The roles of the regulator versus that of EDR scheme;
- The need for EDR schemes to be underpinned by acknowledgement of imbalances in bargaining power;
- Systemic issues – capacity for dealing with, charging for, reporting;
- Price transparency in services;
- The current restricted role of ACMA – sectoral;
- Perceived unresponsiveness of telco industry to consumers;
- Unwillingness of dissatisfied telco complainants to take their complaint to the TIO;

⁴⁰ Chapman. *Op. cit.*

- The need for standards for complaint handling;
- Incorporating standards into an EDR schemes requirements for approval;
- Unitary governance in EDR schemes;
- Preventing an EDR scheme becoming a surrogate IDR scheme;
- The EDR scheme's role in education and awareness for both consumers and industry;
- Bill shock (unexpected very high bills) and credit management practices;
- Inappropriate credit default listings
- What role is there for 'super complaints';
- Implications of the convergence of industries & equipment;
- Longer service delivery chains – who bears the responsibility for solutions;
- Greater diversity of service providers;
- Accountability of international apps providers;
- More complexity & multitude of drivers;
- Is there a test for responsiveness/accountability for future service providers?
- What are the claimed benefits/disadvantages for control of EDR by industry;
- Arming consumers for interaction with services;
- Monetary limits for an EDR scheme;
- Appropriate funding models for EDR;
- Jurisdictional & cross-jurisdictional issues;
- Timeliness of complaint resolution;
- Accessibility of schemes & reaching disadvantaged consumers;
- Monitoring of code compliance;
- Privacy;
- Exposure of provider performance;
- Understanding the importance of convenience to consumers;
- Complainant drop-out after complaining to EDR scheme

These are all matters that require address in designing a future scheme and the regulatory environment within which it will operate.

4.7 Governance of the Current EDR Scheme

There have been obvious benefits of the dual level scheme in place at the TIO (As described earlier in this Chapter) in that it removes the corporate governance, OH&S, and funding responsibilities from Council members, allowing them to focus on policy matters.

However, under the current arrangements, the TIO Board – with no consumer representative – also effectively (on recommendation only from the Council):

- appoints the Ombudsman and Deputy Ombudsman;
- appoints the independent Chair of the TIO Council; and
- approves changes to the TIO's jurisdiction.

Concerns about the continuation of the current dual structure in place at the TIO are well expressed by two former Ombudsmen and acting Ombudsman, John Pinnock, Deirdre O'Donnell, and Simon Cleary. In a submission to ACMA's Reconnecting the Customer Inquiry, they said:

- The current dual governance model of the TIO has, however, inherent structural elements which undermine -or might be perceived to undermine -the TIO's independence. These include that:
 - of the current combined total of 20 Members of Board and Council, only 5 are consumers (the remainder being the independent Chair of Council, an independent Director of the Board, a former industry executive on the Board, and industry representatives of Board and Council);
 - the Board has significant powers in relation to key appointments that risk, if not exercised with all due care and diligence, being perceived as being exercised in favour of the interests of industry members. These include the power to:
 - appoint, reappoint or not reappoint the Chair of Council;
 - appoint the Ombudsman and Deputy Ombudsman;
 - determine a Council Election and Appointment Policy to provide for the process by which consumer representatives of Council are nominated and appointed.
- the Board may reject or delay Council's recommendations as to changes to the TIO's jurisdiction.

Further, where a telecommunications company has representatives on both the Board and Council, and appoints more junior staff to the Council and more senior staff to the Board,

there is a risk, or perceived risk, to structural decision-making that Council's Constitutional responsibilities are compromised by industry representatives "second guessing" the wishes of their more senior counterparts on the Board.

5 A FUTURE SCHEME FOR DIGITAL AUSTRALIA

5.1 Future Options

There are a number of options for the future of dispute resolution in the communications sector:

1. Leave it as is and do nothing;
2. Upgrade the existing scheme and adopt reforms;
3. Start from scratch with a new scheme;
4. Create a government telecommunications ombudsman scheme;
5. Develop a national services ombudsman scheme.

It is clear that the communications and telecommunications market is rapidly developing into something that would be unrecognisable to any of us ten years ago. In particular, the means for delivering services and utilities will be vastly different in future. Any large company with networking and large scale billing capacity may well deliver anything from financial services through energy to telecommunications, video or audio on demand, and so on. After all, this is envisaged as what the NBN will be all about.

As the Productivity Commission intimated in its *Review of Australia's Consumer Policy Framework* in 2008, changes in markets and consumer needs will require periodic review of the nature and structure of ADR services.⁴¹

This paper suggests that leaving current arrangements as is and doing nothing will not be in the best interests of consumers. This Chapter addresses then aspects of the remaining options, making recommendations and suggestions about ways in which the current TIO Scheme can be upgraded and evolved to meet future needs and deliver effective outcomes for consumers.

5.2 Underpinning of the TIO Scheme

As a major step towards this process, it is obvious that the TIO scheme's underpinning standards should be elevated, at least, to that of the national benchmark ADR scheme – the Financial Ombudsman Service. A bonus would be that parity of ADR standards would

⁴¹ Productivity Commission. *Review of Australia's Consumer Policy Framework – Final Report*. Productivity Commission. Canberra, 2008.

enable either scheme to handle matters involving complaints relating to combined services – such as, for example, mobile payments.

The following further remarks are listed under the relevant DIST Benchmark Principles headings (the Principles are found in Appendix B).

5.2.1 Accessibility

Information for consumers

Currently the requirements of the Communications Alliance's Telecommunications Consumer Protections (TCP) Code are very weak with regard to providing information to consumers about how to complain – internally or to the TIO.⁴²

It has to be said that this seems to be reflected on some company websites (as of November 2010):

- For Telstra the hierarchy is: www.telstra.com.au > about Telstra > Customer Service Commitments > How to Make a Complaint or Compliment;
- For Optus: www.optus.com.au > Contact Us > Complaints & Compliments;
- For Vodafone: www.vodafone.com.au > Help and Support > How to contact us > Complaint Handling Policy;
- For iiNet: www.iinet.net.au > Support > Customer service > Complaints escalation process

This was commented on in the 2006 review of the TIO Scheme, and it is **recommended** that the requirements of the amended DIST Principles be adopted in the proposed statutory guidelines.

Complaint handling for people with disabilities

As mentioned previously, communications technology provides a great chance to advance social equity, and especially for those with a physical or intellectual disability.⁴³ It is **recommended** that the TIO Scheme implement strategies to provide the necessary technology and support for such complainants – including the establishment of a dedicated unit, and that it keeps up to date with technology that enhances the ability of those with an impairment to have their complaints dealt with expeditiously.

⁴² In relation to the TIO, for example, see s.9.4 of C628-2007 Telecommunications Consumer Protections (TCP) Code

⁴³ See for example: Slater, Jim; Lindstrom, Jan-Ingvar; and Astbrink, Gunela. *Broadband Solutions for Consumers with Disabilities*. ACCAN. Ultimo, 2010.

Young people

Unfortunately, little research has been published on the ways in which young people deal with problem resolution in the consumer products and services field. However, some recent work I have undertaken with this demographic (16 to 25 years old)⁴⁴ revealed the following:

- they will return to the place of purchase and try and get an outcome;
- they will try and find a solution from friends;
- they will try and find a solution on the internet, particularly via social media;
- they may approach an NGO such as a financial counselling service;
- they are unlikely to ring or write or email the company concerned if the problem isn't sorted at the place of purchase;
- they are unlikely to go to an EDR scheme; and
- they will tell everyone they know about the 'bad deal' they got.

This would seem to indicate that it would be worthwhile for the TIO to develop a presence in social media in addition to its awareness campaigns targeted at young people.

Complaint referrals

As previously mentioned, the complaint 'referral treadmill' is a constant source of frustration for those trying to have their problems addressed. Some members suggest that a complainant may go through four levels of complaint handling within the organisation. Whilst wishing to 'own' the resolution of the complaint is a very worthy objective, this is stretching the patience of any complainant too far.

At Level 1 the TIO refers the initial complaint back to the provider giving '...both parties another chance at informal resolution.' However, It is possible that the complainant may, already, have tried on a number of occasions to resolve the complaint with the provider. In such circumstances it is **recommended** that the Scheme adopt a policy of generally accepting a complaint without automatic referral where the complainant has tried on two occasions to resolve the matter with the member. Currently it appears from the TIO's published policies this circumstance is not specifically covered but MAY be included in the section 'Exceptions to Standard Escalations' where 4.1 'Direct Classification at Level 2' provides, *inter alia*, that:

The TIO Officer may classify a Complaint directly at Level 2 at first contact if he or she considers that:

⁴⁴ Baljurda Comprehensive Consulting, unpublished research on consumer behaviour of young people in the A.C.T., March. 2010.

- the consumer has made several attempts to resolve the matter with the Member

The point here is to make this escalation automatic – not an exception.

5.2.2 Independence

Governance

While a number of industry EDR schemes commenced with a dual level governance structure – that is a Board made up of industry members only who controlled the company and finances – these have mostly evolved into single level schemes. The great advantage of the latter is that industry dominance is diluted and both consumer and industry members - with an independent Chair – are united as ‘owners’ of the scheme.

It is now clearly time for the TIO Scheme to evolve, and it is recommended that the Scheme adopt a single level governance structure.

The function of the newly constituted Board would be similar to that of the Financial Ombudsman Service, described previously, or the Energy and Water Ombudsman (Victoria) (EWOV) that states its Board’s role thus:

The EWOV Limited Board has four industry directors — two electricity, one gas and one water — elected by scheme participants; four consumer directors nominated by the Essential Services Commission and then approved by the Board and an independent Chairperson.

The Board is responsible for the business affairs and property of the company — including corporate governance, the setting of budgets, risk management, strategic planning and ensuring the Ombudsman's independence. The equal representation of industry and consumers engenders a sense of commitment and ownership of results.

The roles of the Board and the Ombudsman are complementary, with the Ombudsman attending Board meetings.⁴⁵

In relation to the new Board’s Independent Chair and Directors, it would be appropriate to consider the mechanism for selection and appointment adopted by the FOS and set out in its Constitution:

Independent Chair

4.6 The Directors must appoint a person to be a Director and independent Chair.

4.7 Prior to the Chair’s appointment, the Directors must:

(a) consult relevant industry and consumer bodies about the appointment; and

⁴⁵ Energy and Water Ombudsman (Victoria). ‘Corporate Governance’, at: <http://www.ewov.com.au/AboutEWOV/Corporategovernance.aspx>

(b) use their best endeavours to ensure that no person is appointed as the Chair who has a material interest which might conflict with their duties as independent Chair.

Industry Directors

4.8 An Industry Director must be a person with experience in and knowledge of one or more sectors of the Industry.

4.9 Prior to appointing an Industry Director, the Directors must consult with, and have due regard to the views of, such individuals and organizations (including key industry organizations) as the Directors consider appropriate in order to give proper consideration to the person's expertise in and knowledge of one or more sectors of the Industry, independence, capacity and willingness to consult with the Industry.

Consumers' Directors

4.10 A Consumers' Director must be a person who has an interest in, and is knowledgeable about, consumers' interests relevant to the Scheme.

4.11 Prior to appointing a Consumers' Director, the Directors must consult with, and have due regard to the views of, such individuals and organizations (including key consumer and community organizations) as the Directors consider appropriate in order to give proper consideration to the person's expertise in consumer affairs, independence, capacity and willingness to consult with consumer organizations, and knowledge of issues pertaining to the financial services industry.⁴⁶

In relation to the appointment of the Chair, it would also be appropriate to require consultation with the Minister responsible for the *Telecommunications Act 1997*, and the Federal Government Minister responsible for Consumer Affairs.

Consideration will need to be given to appointing some Directors with the necessary corporate governance skills, and a range of technical knowledge and background. However, appropriate skills can also be drawn on through a system of advisory committees, and through consideration of, say, two additional independent Directors.

5.2.3 Accountability

Determinations

The DIST Principles require the publication of determinations made under the scheme. Whilst it appears that some of the case studies published in the TIO Annual Report cover cases in which determinations have been made, this is not entirely clear, and it is **recommended** that this is made clear.

⁴⁶ Financial Ombudsman Service. 'Constitution of the Financial Ombudsman Service Limited' 7 December 2009, at: http://www.fos.org.au/centric/home_page/about_us/constitution.jsp

Transparency

The detail of arrangements that the TIO scheme enters into with regulators or other bodies in relation to complaint handling or code breaches can materially affect public confidence in the scheme, and it is **recommended** that they be published.

5.2.4 Efficiency

Systemic issues and practices

Problems of a systemic nature are frequently identified in EDR schemes, whether relating to an individual member, or industry wide. Given the primary purpose of these schemes is the resolution of individual complaints, the issue of systemic issues and their investigation and how investigations are funded were problematic in the early years of many schemes.

They are now recognised as being an important component of schemes, although how industry wide systemic problems should be investigated is still somewhat contentious.

The facts are, of course, that systemic problems - whether in one company, or industry wide - affect multiple individuals, and are therefore deserving of early attention. This is in the interests of consumers, scheme members and the industry in general.

The best strategy, probably, is to adopt a tiered approach to systemic matters – that are often practices adopted by a company or industry. This would mean the TIO attempting to remedy the matter with an individual member, or identifying an industry wide practice and, having signalled it to the industry, referring it to the regulator. It is not appropriate for the EDR scheme to have overall responsibility for industry wide practices; otherwise a potential conflict is built into the relationship between the TIO and the industry that can affect the co-operative culture that is critical to success for consumers. These processes are reflected in the Scheme's procedural documentation.

Under Clause 5A.5 of the TIO Constitution:

Where a resolution is not agreed or a member fails to implement a resolution agreed under subclause 4(d), the TIO may refer the matter to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or such other statutory authority or industry body as the TIO considers appropriate. Where the TIO refers a matter under this sub-clause the TIO must notify the member.

To ensure that the regulators have an informed view of the market, it is recommended that all systemic problems be referred to the relevant regulator, not just those where the member has failed to implement a resolution.

This would then be similar to the arrangements pertaining in the FOS scheme.

Currently, the TIO can only commence a systemic issues process as a result of a complaint. This bars other sources of information such as media reports, references from consumer agencies, etc. It is recommended that the TIO should be given an 'own-motion' power to

investigate systemic issues. It is further recommended that the TIO Constitution address the issue of industry wide systemic matters.

5.2.5 Effectiveness

Basis of membership

There appears to be an attitude that requiring all carriage service providers to join the TIO scheme is sufficient to ensure adequate EDR scheme coverage. This continues to leave it to the TIO to discover who the carriage service providers are. The regulator will continue to have no idea unless informed by the TIO.

This appears nonsensical, and potentially dangerous for consumers in the future, when, for example, questionable payment services start being offered by carriage service providers. Will it be left to ASIC, as the financial services regulator, to track these players down? Already, fraudulent operators have caused damage to consumers, and the TIO has had to track them down. A more intelligent approach would appear to be to license carriage service providers, or at a very minimum to require registration.

With the roll-out of the NBN a new environment is established for telecommunications provision, and an ideal opportunity is created to establish a licensing regime for carriers and carriage service providers, and it is **recommended** that this be implemented. For example any wholesale or retail service provider would be required to be registered/licensed. It is further **suggested** that the licensing fee be kept to a minimum.

Monetary limits

For up to 15 years the upper monetary limits for scheme coverage of a complaint were not increased. It is sensible to ensure a regular review of monetary limits and it is **recommended** that the limit be automatically adjusted every three years based on Average Weekly Ordinary Time Earnings (AWOTE) (this is considered by many to be a more accurate reflection of prices than the Consumer Price Index [CPI])⁴⁷.

Standards

It should always be borne in mind that EDR schemes only need to exist because organizations' internal complaint handling has failed. The schemes should, therefore, not only seek to resolve those complaints, but also provide advice and assistance to member organizations to prevent complaints having to be escalated to an outside body.

It is **recommended** that the minimum standards for internal complaint handling provided by members of the scheme be those of AS/ISO 10002 as may be amended from time to time, and that these be specified in a standard made under Part 6 of the *Telecommunications Act*

⁴⁷ The [AWOTE](#) is an [Australian Bureau of Statistics](#) measure of earnings by Australians from ordinary time work each week. It is reported quarterly by the ABS.

1997. ASIC's Regulatory Guide 165 provides a very useful reference point for the development of such a standard.⁴⁸

Similarly, it is **recommended** that the TIO scheme, and any future EDR scheme, should comply with a new standard made under Part 6, which requires adherence to the principles set out in what is known as the 'DIST Principles', as amended. Again an ASIC regulatory guide – 139 – provides a valuable starting point for the development of such a standard.⁴⁹

It is also crucial that notification of outcomes of complaints to both members' internal complaint handling systems and to the TIO, are in writing or other suitable form for the complainant. It is also **recommended** that the scheme undertake a program of monitoring members' compliance with their undertakings from time to time.

It is suggested that the TIO should have the resources to enable it to assist members enhance their internal complaint handling processes where necessary. Where the TIO becomes aware of deficiencies in a member's internal complaint handling processes, it should bring the matter to the attention of the regulator. It should also be the responsibility of ACMA to monitor members' compliance with the standards and to undertake compliance audits from time to time.

5.2.6 Regulation

The need for an improved regulatory regime to complement the TIO Scheme has been a constant refrain from those with whom I spoke. It is not the role of this paper to review that regime. No doubt ACMA's 'Reconnecting the Customer' inquiry, and submissions to it, will address many issues.

There are, however, a number of recommendations that directly relate to the need to improve various aspects of regulation. These especially relate to statutory guidelines, the need for a licensing system, and improved monitoring and compliance.

It needs to be remembered that the Australian Competition and Consumer Commission (ACCC) also plays an important part in regulating the telecommunications sector. In some views, it has achieved more in the past for consumer protection than the ACMA and its predecessors.

In this regard, it needs to be borne in mind that the enforcement regime for which ACMA has responsibility is pretty cumbersome, especially when considering that it must take matters to the Federal Court, and the monetary amounts that may be involved can be quite small. It is **recommended** that a simpler, more cost effective, and quicker enforcement and penalty system needs to be put in place, and where relevant breaches can be taken to the Federal Magistrates Court for determination.

⁴⁸ Australian Securities & Investments Commission. *Regulatory Guide 165 – Licensing: Internal and external dispute resolution schemes*. ASIC. Sydney, July 2010.

⁴⁹ Australian Securities & Investments Commission. *Regulatory Guide 139 - Approval and oversight of external dispute resolution schemes*. ASIC. Sydney, July 2010.

In addition it is **recommended** that ACMA be given the legislative power to enter into enforceable undertakings⁵⁰ with non-compliant providers.

Super-complaints

The issue of whether Australia should have legislation enabling designated consumer bodies to make ‘super-complaints’ to a regulator has been discussed from time to time.

Section 11 of the UK *Enterprise Act 2002* enables consumer bodies designated by the Secretary of State to submit ‘super-complaints’ to the Office of Fair Trading (OFT) (or other sectoral regulator such as the communications regulator Ofcom) where they consider that there is any market feature, or combination of features, such as the structure of a market or the conduct of those operating within it, that is or appears to be significantly harming the interests of consumers. Only seven consumer bodies have been designated.

As the UK Department for Business Innovation & Skills describes it:

The super-complaints process has been set up with the aim of strengthening the voice of consumers, as they are unlikely to have access individually to the kind of information necessary to judge whether markets are failing for them. Consumer groups can access individuals’ complaints to form a judgment on whether there is a problem and then take the necessary action.⁵¹

The OFT, or other regulator, must respond with reasons to the super-complaint within 90 days.

As part of its Review of Australia’s Consumer Policy Framework, the Productivity Commission considered the desirability of such a system for Australia. It concluded:

In sum, given the existence of a myriad of alternative mechanisms for empowering consumers and identifying systemic consumer problems, the benefits of a super-complaints mechanism are probably insufficient to outweigh its likely downsides. It is notable too that the New Zealand Ministry of Consumer Affairs (2006) has recently rejected the mechanism for that country.⁵²

Set against this view is the comment of a senior official of the OFT, who wished to be anonymous:

⁵⁰ An ‘enforceable undertaking’ is an undertaking given to a regulator that is enforceable in a court. They are generally accepted by as an alternative to civil or administrative action where there has been a contravention of the relevant legislation.

⁵¹ Department for Business Innovation & Skills. ‘Super-complaints.’ At: <http://www.bis.gov.uk/policies/consumer-issues/enforcement-of-consumer-law/super-complaints>

⁵² Productivity Commission. *Review of Australia’s Consumer Policy Framework – Inquiry Report Vol 2*. Productivity Commission. Canberra, No. 45, 30 April 2008.

I think the best argument in favour of super-complaints is that in at least a couple of markets they have put the OFT in a position of having to do something about long-standing issues which we had previously not addressed despite known public concerns, because we had decided they were 'too difficult' or there were no solutions to the perceived problems. In both these cases, taken together with the Competition Commission's powers to impose remedies following a market investigation, measures have been identified which should improve the working of the market for consumers.

Factually, it could be said that with first class identification, reporting, and investigation of systemic matters across industry sectors, the need for a super-complaint system would not exist. In my view, that is not the case in Australia, and it is **recommended** that a body such as the Ministerial Council on Consumer Affairs undertake a consultative review of the value of a super-complaints system.

(It is interesting to note that notwithstanding the lack of such a system in Australia, ACCAN, the Australian Financial Counselling and Credit Reform Association [AFCCRA], and the Australian Council of Social Service [ACOSS] lodged a 'super-complaint' about the cost of a Free Call - Accessing 1800 and 13/1300 services from mobile phones - with ACMA in September 2010.)

5.3 Government Ombudsman Scheme for Communications

All sectors agree that it is best to have an EDR scheme that is 'owned' by industry because it encourages ownership of the processes and outcome by the individual members, and by the industry as a whole. I believe that it is reasonable to allow, say, three years to get this industry EDR scheme right. This paper suggests that communications are so important socially and economically, that if that is not achieved, the Australian Government should consider legislating for a statutorily based scheme.

5.4 An Australian Services Ombudsman Organisation (ASOO)

One of the most interesting aspects of the interviews conducted for the paper was widespread interest in Australia eventually needing what might be called an Australian Services Ombudsman Organisation (ASOO).

It is evident to many in all sectors that the nature and structure of the market for services in Australia is going to change significantly. As previously indicated, the continued development of communication technologies together with sophisticated networking and billing systems will allow a wide variety of services to be offered by companies who previously have not been in that industry retail market, making traditional industry sector boundaries no longer so visible. Under current EDR arrangements, a single bundled bill in this new world would provide consumers with a considerable challenge about knowing who to turn to in the event of difficulty in resolving the problem with the biller.

An ASOO would bring together all the existing national schemes, together with the energy ombudsman schemes under a national portal. Initially the system would ensure that consumers were directed to the most relevant scheme to handle their complaints, but ultimately it is envisaged that there would be a single industry funded organisation managing the scheme.

Such a scheme would have electronic lodgement and transmission of complaints, so that multiple issues across industries could be quickly transferred and returned to the case management desk.

Clearly there is a huge amount of detail that needs to be considered in the development of such a scheme, but it is suggested that preliminary discussion between the schemes might commence in order for it to become a reality in three years.

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Appendix A: Essential criteria for describing a body as an Ombudsman

Policy statement endorsed in February 2010 by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)

The institution of Ombudsman has proven itself adaptable to a variety of roles and settings.

In Australia and New Zealand today, there are several types of Ombudsman offices:

- Parliamentary Ombudsmen who take complaints from citizens and constituents about government agencies
- Other Statutory Ombudsmen/Commissioners who investigate complaints about particular agencies or professional services—such as health
- Industry-based Ombudsmen who take complaints from customers of companies providing particular services—such as telecommunications, banking, insurance, investments, energy, water and public transport.

The development and popularity of the Ombudsman institution has come about for one reason—the office is renowned for independent, accessible and impartial review and investigation. In increasing numbers, the public turns to Ombudsman offices for assistance and support.

It is important, therefore, that members of the public are not confused about what to expect when they approach an Ombudsman's office—public trust must not be undermined.

Many of those who approach an Ombudsman feel vulnerable, wish to do so in confidence or make serious allegations or whistleblower complaints.

Public respect for the independence, integrity and impartiality of Ombudsman offices is at risk if bodies that do not conform to the accepted model are inappropriately described as an Ombudsman office.

It is a contradiction in terms, for example, to describe a body as an 'internal ombudsman' or to apply the description to a body that is subject to the direction of a government minister or industry body.

The Australian and New Zealand Ombudsman Association (ANZOA) is concerned to ensure appropriate use of the term Ombudsman. Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

ANZOA is the peak body for Ombudsmen in Australia and New Zealand

Independence

- The office of Ombudsman must be established—either by legislation or as an incorporated or accredited body—so that it is independent of the organizations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term—removable only for misconduct or incapacity according to a clearly defined process.
- The Ombudsman must not be subject to direction.
- The Ombudsman must be able to select his or her own staff.
- The Ombudsman must not be—or be able to be perceived as—an advocate for a special interest group, agency or company.
- The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman's office must operate on a not-for-profit basis.

Jurisdiction

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organizations falling within the Ombudsman's jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.

Powers

- The Ombudsman must be able to investigate whether an organization within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.
- In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.
- There must be an obligation on organizations within the Ombudsman's jurisdiction to respond to an Ombudsman question or request.
- The Ombudsman must have power to obtain information or to inspect the records of an organization relevant to a complaint.
- The Ombudsman must have the discretion to choose the procedure for dealing with

a complaint, including use of conciliation and other dispute resolution processes.

Accessibility

- A person must be able to approach the Ombudsman's office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman's investigation of a complaint.
- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.

Procedural fairness

The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:

- The complainant, the organization complained about and any person directly adversely affected by an Ombudsman's decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice.
- The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organization which is the subject of the complaint.

Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
- The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.

Appendix B: Amended Industry Dispute Resolution Principles

[Note: Additions to the 1997 version are in italics, and deletions are struck-through.]

1. ACCESSIBILITY

Principle

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

Purpose

To promote customer access to the scheme on an equitable basis.

Key Practices

Awareness/Promotion

1.1. The scheme¹ seeks to ensure that all customers of the relevant industry are aware of its existence.

1.2. The scheme promotes its existence in the media or by other means.

1.3. The scheme produces readily available material in simple terms explaining:

- a. how to access the scheme;
- b. how the scheme works;
- c. the major areas with which the scheme deals; and
- d. any restrictions on the scheme's powers.

1.4. The scheme requires scheme members² to inform their customers³ about the scheme⁴, *including by providing information at the point of service, on websites, on bills, and in contracts.*

1.5. The scheme ensures that information about its existence, procedures and scope is available to customers through scheme members:

- a. when a scheme member responds to a customer's complaint; and
- b. when customers are not satisfied in whole or in part with the outcome of the internal complaints mechanism of a scheme member, when the scheme member refuses to deal with a complaint, or when the time period within which the internal complaints mechanism⁵ is expected to produce an outcome has expired, whichever first occurs.

1.6. The scheme promotes its existence in such a way as to be sensitive to disadvantaged

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customers or customers with special needs.

Access

1.7. The scheme seeks to ensure nation-wide access to it by customers.⁶

1.8. The scheme provides appropriate facilities and assistance for disadvantaged complainants or those with special needs.

1.9. Complainants can make initial contact with the scheme orally or in writing ~~but the complaint must ultimately be reduced to writing.~~⁷

1.10. The terms of reference of the scheme are expressed clearly.

Cost

1.11. Customers do not pay any application or other fee or charge before a complaint is dealt with by the scheme, or at any stage in the process.

Staff Assistance

1.12. The scheme's staff have the ability to handle customer complaints and are provided with adequate training in complaints handling.

1.13. The scheme's staff explain to complainants in simple terms:

- a. how the scheme works;
- b. the major areas it deals with;
- c. any restrictions on its powers; and
- d. the timelines applicable to each of the processes in the scheme.

1.14. The scheme's staff assist complainants to subsequently reduce a complaint to writing, where complainants need assistance to do so.

Use

1.15. The scheme's processes are simple for complainants to understand and easy to use.

1.16. The scheme provides for a complainant's case to be presented orally or in writing at the determination stage, at the discretion of the decision-maker.

1.17. The scheme provides for complainants to be supported by another person at any stage in the scheme's processes.

Non-adversarial Approach

1.18. The scheme uses appropriate techniques including conciliation, mediation and negotiation in attempting to settle complaints.⁸

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1.19. The scheme provides for informal proceedings which discourage a legalistic, adversarial approach at all stages in the scheme's processes.

Legal Representation

1.20. The scheme discourages the use of legal representatives before the decision-maker⁹ except in special circumstances.

1.21. The scheme provides the opportunity for both parties to be legally represented where one party is so allowed.

1.22. The scheme provides for the scheme member to pay the legal costs of complainants where the scheme member is the first party to request to be legally represented and the decision-maker agrees to that request.

Footnotes

¹ The 'scheme' refers to a dispute resolution scheme run by an industry to resolve complaints by customers about businesses within that industry. The type of scheme which is set up will differ according to the size and nature of the relevant industry.

² 'Scheme members' refers to those businesses which participate in a customer dispute resolution scheme.

³ The term 'customer' is used to refer to consumers who purchase goods or services from scheme members.

⁴ This key practice relates to general promotion of the existence of the scheme by scheme members. The circumstances in which individual customers are required to be informed about the scheme is dealt with in key practice 1.5.

⁵ An 'internal complaints mechanism' refers to the system set up within a business to handle complaints by its customers.

⁶ Maximising access to the scheme could include measures such as providing toll free telephone access for consumers/complainants.

⁷ In most cases the staff of a scheme will help a complainant reduce a complaint to writing where the complainant requires assistance to do so.

⁸ While the focus of the scheme is mainly on alternative dispute resolution, it also has the function of arbitrating disputes which cannot be resolved by alternative means. The alternative dispute resolution techniques listed here are used before arbitration is considered. Initially, customers are encouraged to discuss their complaint with the scheme member and use any internal complaints mechanism that is available. Schemes are then encouraged to attempt to settle complaints before they get to the decision-maker. The scheme does not have to use all of the listed alternative dispute resolution techniques nor in this particular order, but the ones cited in this key practice are recognised techniques.

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⁹ The 'decision-maker' refers to the individual, panel of individuals or other entity which is responsible for the final determination of complaints under a scheme.

2. INDEPENDENCE

Principle

THE DECISION-MAKING PROCESS AND ADMINISTRATION OF THE SCHEME ARE INDEPENDENT FROM SCHEME MEMBERS.

Purpose

To ensure that the processes and decisions of the scheme are objective and unbiased and are seen to be objective and unbiased.

Key Practices

Scheme object

2.0. The object of the scheme should be a public purpose and operate on a not-for-profit basis

The Decision-maker

2.1. The scheme has a decision-maker who is responsible for the determination of complaints.

2.2. The decision-maker is appointed to the scheme for a fixed term.

2.3. The decision-maker is not selected directly by scheme members, and is not answerable to scheme members for determinations.¹⁰

2.4. The decision-maker has no relationship with the scheme members that fund or administer the scheme which would give rise to a perceived or actual conflict of interest.

2.4A. The decision-maker is not subject to direction by the overseeing entity.

Staff

2.5. The scheme's staff are not selected directly by scheme members, and are not answerable to scheme members for the operation of the scheme.

Overseeing Entity

2.6. There is a separate entity set up formally to oversee the independence of the scheme's operation.¹¹ The entity has a balance of consumer, industry and, where relevant, other key stakeholder interests.

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2.7. Representatives of consumer interests on the overseeing entity¹² are:

- a. capable of reflecting the viewpoints and concerns of consumers; and
- b. persons in whom consumers and consumer organizations have confidence.

2.8. As a minimum the functions of the overseeing entity comprise:

- a. appointing or dismissing the decision-maker;
- b. recommending or approving the scheme's budget;
- c. receiving complaints about the operation of the scheme;¹³
- d. recommending and being consulted about any changes to the scheme's terms of reference;
- e. receiving regular reports about the operation of the scheme; and
- f. receiving information about, and taking appropriate action in relation to, systemic industry problems referred to it by the scheme.

Funding

2.9. The scheme has sufficient funding to enable its caseload and other relevant functions necessary to fulfill its terms of reference to be handled in accordance with these benchmarks.

Terms of Reference

2.10. Changes to the terms of reference are made in consultation with relevant stakeholders, including scheme members, industry and consumer organizations and government.

Footnotes

¹⁰ Where the decision-maker consists, for example, of a panel of individuals, only the chair, or the individual who controls the decision-making process, is required to be independent of industry or consumer interests and be appointed by the entity which oversees the independence of a scheme's operation. Where the decision-maker consists of more than one individual, the chair ensures the independence of the decision-making. This allows for the relevant industry to be represented on the decision-making entity, as long as a balance between consumers and industry is maintained.

¹¹ An example of an entity which formally oversees the independence of a scheme could be a council or other body usually consisting of an independent chair, consumer member or members, industry member or members and, where relevant, other stakeholder members or members. Smaller industry sectors or those with few complaints may not have the ability or need to devote large resources to setting up such an entity. Other types of overseeing entities are not precluded as long as they allow for the relevant independence or a balance

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of competing interests.

¹² Suitable consumer representatives can be ascertained by a number of methods, including the relevant consumer organization providing a nominee, advertising for representatives, or the relevant consumer affairs agency or Minister responsible for consumer affairs nominating a representative. Suitable industry and other stakeholder representatives can be sought from the relevant industry association or stakeholder respectively.

¹³ The receipt of complaints about the scheme's operation (by the entity which oversees the independence of a scheme's operation) does not extend to receiving appeals against the determinations of the decision-maker.

3. FAIRNESS

Principle

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

Purpose

To ensure that the decisions *and procedures* of the scheme are fair and are seen to be fair.

Key Practices

Determinations

3.1. The decision-maker bases determinations¹⁴ on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law, *and all the circumstances of the case*.

Procedural Fairness

3.2. The scheme's staff advise complainants of their right to access the legal system or other redress mechanisms at any stage if they are dissatisfied with any of the scheme's decisions or with the decision-maker's determination.

3.3. Both parties can put their case to the decision-maker.

3.4. Both parties are told the arguments, and sufficient information to know the case, of the other party.

3.5. Both parties have the opportunity to rebut the arguments of, and information provided by, the other party.

3.6. Both parties are told of the reasons for any determination.

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3.7. Complainants are advised of the reasons why a complaint is outside jurisdiction or is otherwise excluded.

Provision of Information to the Decision-Maker

3.8. The decision-maker encourages but cannot compel complainants to provide information relevant to a complaint.

3.9. The decision-maker can demand that scheme members provide all information which, in the decision-maker's view, is relevant to a complaint, unless that information identifies a third party to whom a duty of confidentiality or privacy is owed¹⁵, or unless it contains information which the scheme member is prohibited by law from disclosing.

Confidentiality

3.10. Where a scheme member provides information which identifies a third party, the information may be provided to the other party with deletions, where appropriate, at the discretion of the decision-maker.

3.11. The scheme ensures that information provided to it for the purposes of resolving complaints is kept confidential, unless disclosure is required by law or for any other purpose specified in these benchmarks.

~~3.12. Parties to a complaint agree not to disclose information gained during the course of any mediation, conciliation or negotiation to any third party, unless required by law to disclose such information.~~

Footnotes

¹⁴ The term 'determinations' is used to refer to the final decision made by the decision-maker when determining a complaint. The term 'decisions' is used to refer to the decisions made by the scheme's staff.

¹⁵ Where a duty of confidentiality or privacy is owed to a third party in relation to information sought by the decision-maker, the scheme members can seek the permission of the third party to release that information to the decision-maker in full or with deletions as appropriate.

4. ACCOUNTABILITY

Principle

THE SCHEME PUBLICLY ACCOUNTS FOR ITS OPERATIONS BY PUBLISHING ITS DETERMINATIONS AND INFORMATION ABOUT COMPLAINTS AND HIGHLIGHTING ANY SYSTEMIC INDUSTRY PROBLEMS¹⁶.

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Purpose

To ensure public confidence in the scheme and allow assessment and improvement of its performance and that of scheme members.

Key Practices

Determinations

4.1. The scheme regularly provides written reports of determinations¹⁷ to scheme members, the public, and any interested bodies for the purposes of:

- a. educating scheme members and consumers; and
- b. demonstrating consistency and fairness in decision-making.

4.2. Written reports of determinations do not name the parties involved.

Transparency

4.2A. The scheme publishes any internal guidelines or procedures relating to the way in which complaints are dealt with.

Reporting

4.3. The scheme publishes a detailed and informative annual report containing specific statistical and other data about the performance of the scheme, including:

- a. information about how the scheme works;
- b. the number and types of complaints it receives and their outcome;
- c. the time taken to resolve complaints;
- d. any systemic problems arising from complaints;
- e. examples of representative case studies;
- f. information about how the scheme ensures equitable access;
- g. a list of scheme members supporting the scheme, together with any changes to the list during the year;
- h. ~~where the scheme's terms of reference permit~~, the names of those scheme members which do not meet their obligations as members of the scheme;¹⁸
- i. information about new developments or key areas in which policy or education initiatives are required; and
- j. information about complaints as they concern each of the scheme's members.

[Note: Additions to the 1997 version are in italics, and deletions are struck-through.]

4.4. The annual report is distributed to relevant stakeholders and otherwise made available upon request.

Footnotes

¹⁶ Systematic industry problems can refer to issues or trends arising either out of many complaints about one scheme member or out of many complaints (which are essentially similar) about more than one scheme member.

¹⁷ Written reports of determinations can consist of a concise summary of a decision-maker's determination and reasons for so determining. They do not necessarily need to include all the evidence, arguments and reasoning of each complaint. It is not envisaged that written reports would be provided of all determinations made by the decision-maker. The determinations which are reported should be left to the decision-maker's discretion. It is not envisaged that written reports would necessarily be provided of other decisions (apart from determinations) made by the scheme.

¹⁸ ~~The scheme should state in its terms of reference whether it will disclose the names of schemes members which do not meet their obligations under the scheme.~~ Examples of where a scheme member does not meet its obligations under the scheme will include where it does not provide information as and when requested, or where it does not comply with a determination made under the scheme.

5. EFFICIENCY

Principle

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

Purpose

To give customers and scheme members confidence in the scheme and to ensure the scheme provides value for its funding.

Key Practices

Appropriate Process or Forum

5.1. The scheme deals only with complaints which are within its terms of reference and have not been dealt with, or are not being dealt with, by another dispute resolution forum¹⁹ and:

- a. which have been considered, and not resolved to the customer's satisfaction, by a scheme member's internal complaints resolution mechanism; or
- b. where a scheme member has refused, or failed within a reasonable time, to deal with

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a complaint under its internal complaints resolution mechanism.

5.2. The scheme has mechanisms and procedures for referring relevant complaints to other, more appropriate, fora.

5.3. The scheme has mechanisms and procedures for referring systemic industry problems, that become apparent from complaints, to relevant scheme members, *and has the power to investigate systemic issues where necessary.*

5.4. The scheme excludes vexatious and frivolous complaints, at the discretion of the decision-maker.

Tracking of Complaints

5.5. The scheme has reasonable time limits set for each of its processes which facilitate speedy resolution without compromising quality decision-making.

5.6. The scheme has mechanisms to ensure that the time limits are complied with as far as possible.

5.7. The scheme has a system for tracking the progress of complaints.

5.8. The scheme's staff keep the parties informed about the progress of their complaint.

Monitoring

5.9. The scheme sets objective targets against which it can assess its performance.

5.10. The scheme keeps systematic records of all complaints and enquiries, their progress and their outcome.

5.11. The scheme conducts regular reviews of its performance.

5.12. The scheme's staff seek periodic feedback from the parties about the parties' perceptions of the performance of the scheme.

5.13. The scheme reports regularly to the overseeing entity on the results of its monitoring and review.

Footnote

¹⁹ Complaints which have been made to one scheme but are found to be more appropriately dealt with by another scheme can be dealt with by the latter scheme. It is where a complaint has been substantially considered by one scheme that a complainant is discouraged from forum-shopping.

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6. EFFECTIVENESS

Principle

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Purpose

To promote customer confidence in the scheme and ensure that the scheme fulfils its role.

Key Practices

Coverage

6.1. The scope of the scheme and the powers of the decision-maker are clear.

6.2. The scope of the scheme (including the decision-maker's powers) is sufficient to deal with:

- a. the vast majority of customer complaints in the relevant industry and the whole of each such complaint; and
- b. customer complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of customer transactions in the relevant industry.²⁰

6.3. The decision-maker has the power to make monetary awards of sufficient size and other awards (but not punitive damages) as appropriate.

Systemic Problems

6.4. The scheme has mechanisms for referring systemic industry problems to the overseeing entity (where referral to the scheme member or members under key practice 5.3 does not result in the systemic problem being adequately addressed) for appropriate action.

Professionalism

6.4. The scheme should have properly trained staff, who are adequately supported with necessary resources and continuing development, to enable them to carry out their work in a professional manner.

Scheme Performance

6.5. The scheme has procedures in place for:

- a. receiving complaints about the scheme; and
- b. referring complaints about the scheme to the overseeing entity for appropriate action.

[Note: Additions to the 1997 version are in italics, and deletions are struck-through.]

6.6. The scheme responds to any recommendations of the overseeing entity in a timely and appropriate manner.

Internal Complaints Mechanisms

6.7. The scheme requires scheme members to set up internal complaints mechanisms.²¹

6.8. The scheme has the capacity to advise scheme members about their internal complaints mechanisms.

Compliance

6.9. The scheme has mechanisms to encourage scheme members to abide by the rules of the scheme.²²

6.10. The determinations of the decision-maker are binding on the scheme member if complainants accept the determination.

Independent Review

6.11. The operation of the scheme is reviewed within three years of its establishment, and regularly thereafter, by an independent party commissioned by the overseeing entity.

6.12. The review, undertaken in consultation with relevant stakeholders, includes:

- a. the scheme's progress towards meeting these benchmarks;
- b. whether the scope of the scheme is appropriate;
- c. scheme member and complainant satisfaction with the scheme;
- d. assessing whether the dispute resolution processes used by the scheme are just and reasonable;
- e. the degree of equitable access to the scheme; and
- f. the effectiveness of the terms of reference.

6.13. The results of the review are made available to relevant stakeholders.

Footnotes

²⁰ Because the loss arising from the determination of a complaint may vary according to the industry concerned, the benchmarks do not specify a monetary limit above which complaints are excluded from the scheme.

²¹ The Standards Australia Standard on Complaints Handling ~~AS 4269-1995~~ AS ISO 10002 can assist scheme members to set up appropriate internal complaints mechanisms.

²² Mechanisms for encouraging scheme members to abide by the rules of the scheme could include contractual obligations which a scheme member enters into when joining the scheme or naming in annual reports or otherwise those scheme members which do not abide by the rules of the scheme.

Appendix C: Main issues identified in TIO's connect.resolve campaign

The following are the major subjects of complaints by company identified in the *connect.resolve* campaign. The full lists are in 'Connect.resolve –Complaints to the TIO about Customer Service and Complaint Handling, Update report for the period 1 July – 31 December 2009'.

AAPT:

- Failure to act on customer request
- Incorrect or inadequate advice
- Complaints about complaint handling - Failure to act on its undertakings and failure to escalate and failure to advise outcomes

DODO:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling - Failure to act on its undertakings and failure to advise of outcomes

GOTALK:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling - Failure to act on its undertakings

HUTCHISON 3G:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling - Failure to act on its undertakings and failure to advise of outcomes

OPTUS:

- Incorrect or inadequate advice
- Failure to act on customer request

- Complaints about complaint handling - Failure to act on its undertakings and failure to advise of outcomes

PRIMUS:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling – Failure to escalate a complaint and to action an undertaking

SOUL:

- Incorrect or inadequate advice
- Failure to act on customer request
- Lengthy wait times on call queue
- Complaints about complaint handling – Failure to act on its undertakings and to escalate a complaint and failure to advise of outcomes and failure to acknowledge written complaint

TELSTRA:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling - Failure to act on its undertakings and failure to advise of outcomes

VIRGIN MOBILE:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling - Failure to act on its undertakings and failure to advise of outcomes

VODAFONE:

- Incorrect or inadequate advice
- Failure to act on customer request
- Complaints about complaint handling - Failure to act on its undertakings and failure to advise of outcomes