Simon Cohen
ANZOA Chair
Telecommunications Industry Ombudsman
18(d) | info@anzoa.com.au

Ombudsmen: the leaders in independent resolution, redress and prevention of disputes

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Corporate Law
Labour and Commercial Environment Group
Ministry of Business, Innovation and Employment
Wellington

By email: faareview@mbie.govt.nz

Issues Paper – Review of the *Financial Advisers Act 2008* and the *Financial Service Providers (Registration and Dispute Resolution) Act 2008*

The Australian and New Zealand Ombudsman Association (ANZOA) appreciates the opportunity to provide a submission to the Ministry of Business, Innovation and Employment (MBIE)'s *Issues Paper: Review of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008*.

ANZOA is a professional association and the peak body for Ombudsmen in Australia and New Zealand. ANZOA's membership includes Industry-based Ombudsmen, Parliamentary Ombudsmen and other statutory Ombudsmen.

Our submission addresses aspects of question 80 of the *Issues Paper* around the effects on effective dispute resolution of 'competition' between dispute resolution schemes.

ANZOA's concerns about the emergence of 'competition' among schemes (Ombudsman schemes and others) are longstanding and led to the development and publication of an ANZOA policy statement on this issue in September 2011. That policy statement, *Competition among Ombudsman offices,* is attached and is publicly available on the ANZOA website: www.anzoa.com.au under Publications. We have drawn on it to provide this submission.

Competition runs counter to the *Benchmarks for Industry-based Customer Dispute Resolution*

ANZOA considers that 'competition' among dispute resolution schemes runs counter to the *Benchmarks for Industry-based Customer Dispute Resolution* (independence, accessibility, fairness, efficiency, effectiveness and accountability), which provide standards for industry-based dispute resolution in Australia and New Zealand.

'Competition' among schemes is inefficient and undesirable, on a range of policy levels:

- 'Competition' is not in the interests of consumers or their advocates, as it may not be clear where to take complaints or which scheme is the most appropriate to deal with particular issues.

- 'Competition' is likely to add unnecessary and inefficient costs to dispute resolution schemes, e.g. inefficient duplication of infrastructure/resources/services/information systems, mechanisms to

establish a ‘common door’ approach, and the need to provide information to consumers about different schemes.

- 'Competition' may lead to manipulation of dispute resolution schemes, differing standards, and inconsistencies in decision making which could be adverse for consumers and industry participants.

- Poor performing industry participants may choose to join an alternative scheme that they believe is not as rigorous in its approach to complaints.

- A scheme may focus more on industry participants, rather than on complainants or consumers, in order to keep or grow its membership.

- Where schemes are subject to regulatory approval and/or other regulatory mechanisms, regulators may need to set up separate reporting and communication systems for different schemes, potentially about the same issues.

- The value of a dispute resolution scheme as a source of information and analysis to contribute to the ongoing improvement of an industry or service area will be diluted, to the detriment of consumers, industry participants and the wider community.

ANZOA’s views about 'competition' between schemes were included in its May 2013 public submission to the review of the *Benchmarks for Industry-based Customer Dispute Resolution* by the Commonwealth Consumer Affairs Advisory Council. An extract from ANZOA's submission is attached and the full submission is available on our website: www.anzoa.com.au, under Publications.

Achieving competition benefits through other mechanisms

At paragraph 280 of the Issues Paper, the Ministry for Business, Innovation and Employment canvasses a number of potential benefits from 'competition' among schemes. ANZOA’s view is that other more appropriate mechanisms can be utilised to provide a proxy for the benefits that might otherwise be derived from 'competition'. These mechanisms include appropriate governance arrangements, independent reviews, public reporting, effective self-regulatory and/or regulatory mechanisms, benchmarking, formal or informal peer reviews, and scrutiny through avenues such as ANZOA. These mechanisms do not compromise the other benchmarks relevant to the provision of external dispute resolution schemes.

ANZOA is not alone in expressing concerns about 'competition' among schemes

In a 2012 paper commissioned for the World Bank, *Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman*, [at page 39] David Thomas (Financial Ombudsman Service, United Kingdom) and Francis Frizon (French Insurance Mediator), two senior Ombudsmen highly-regarded world-wide as experts in their field observed:

> *‘’A few countries have the unusual idea of ‘competitive’ ombudsmen, where – subject to specified minimum standards – the financial industry is able to choose between two or more competing financial ombudsmen. Such a choice presents severe risks to independence and impartiality – because financial businesses may favour the ombudsman they consider likely to give businesses the best deal … it creates one-sided competition – because, unlike the financial businesses, the consumers are not given any choice of ombudsman …’’*

A 2008 UK National Consumer Council paper, *Lessons from Ombudsmania*, canvassed the views of consumer representatives, senior Ombudsmen, Tribunal Councils, and the British & Irish Ombudsman Association (among others), on a number of Ombudsman-related issues. *Lesson 3: Competition for whom?* assessed the approach that allows more than one redress scheme to operate in any single market as follows [at page 12]:

> *''... We consider this model to be conceptually and practically flawed … [it] 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 making industry-friendly decisions … ''*

In the 2010 Independent Review of the UK Energy Ombudsman, commissioned by the regulator OFGEM, the consultants Sohn Associates [at page 22] concluded:

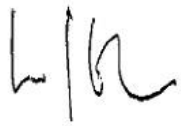
> *''… It is our view that a single, well regulated redress scheme for the sector is, on balance, better for consumers and members, than competition between various service-providers within the same sector …''*

These views are consistent with the position of ANZOA that there should be only one external dispute resolution scheme for any industry or service area.

Further information

I would be pleased to discuss ANZOA's policy position on 'competition' between dispute resolution schemes, and may be contacted on 18(d) or by email at info@anzoa.com.au.

Yours sincerely



Simon Cohen
ANZOA Chair

Attachments

Registered Association Number A0044196B

ANZOA POLICY STATEMENT – SEPTEMBER 2011

Competition among Ombudsman offices

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

Members of ANZOA, both parliamentary and industry Ombudsman/Commissioner offices, operate according to the principles of independence, accessibility, fairness, efficiency, effectiveness and accountability.

ANZOA considers that 'competition' among Ombudsman offices runs counter to these principles, particularly the key principle of independence, for the reasons set out below. ANZOA's position is that there should be only one external dispute resolution (EDR) Ombudsman's office for any industry or service area.

Competition in Ombudsman offices is most likely to impact on industry Ombudsmen, and is considered inefficient and undesirable on a range of policy levels:

- It is not in the interests of consumers/citizens or their advocates, as it may not be clear where to take complaints or which is the most appropriate service to deal with particular issues.
- It is likely to add unnecessary and inefficient costs to Ombudsman services, e.g. inefficient duplication of infrastructure/resources/services/information systems, mechanisms to establish a 'common door' approach, and the need to provide information to consumers about different offices.
- It may lead to manipulation of dispute resolution services, differing standards, and inconsistencies in decision making which could be adverse for consumers and participating organisations.
- Poor performing organisations may choose to join an alternative office that they believe is not as rigorous in its approach to complaints.
- An office may focus more on participating organisations rather than on complainants or consumers in order to keep or grow its membership.
- Where offices are subject to regulatory approval and/or other regulatory mechanisms, regulators may need to set up separate reporting and communication systems for different offices, potentially about the same issues.
- The value of the Ombudsman's office as a source of information and analysis to contribute to the ongoing improvement of an industry or service area will be diluted, to the detriment of consumers, service providers and the wider community.

ANZOA believes that while it is inappropriate to apply concepts of market forces and competition to what are effectively 'natural monopolies', other appropriate mechanisms can be utilised to provide a proxy for the benefits that can otherwise be derived from competing services. These mechanisms include appropriate governance arrangements, independent reviews, public reporting, effective self-regulatory and/or regulatory mechanisms, benchmarking, formal or informal peer reviews, and scrutiny through avenues such as ANZOA.

There may be overlaps between some Ombudsman offices, but this is different from competition between offices. An overlap is usually dealt with by way of a Memorandum of Understanding between the offices, or other transparent arrangements.

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

More at www.anzoa.com.au

Extract from ANZOA's submission of May 2013 to the Commonwealth Consumer Affairs Advisory Council's *Review of the Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (the Benchmarks) (full submission at www.anzoa.com.au under Publications)

Modernising the Benchmarks

3.7 Could any element of the Benchmarks, including terminology or key practices, be modernised in the light of subsequent developments in ADR processes or technologies?

3.8 Do each of the six Benchmarks remain appropriate as part of a best practice framework for industry-based dispute resolution services, and are there any additional Benchmarks (and associated key practices) that could be included?

For overall modernisation and improvement, ANZOA suggests the following …

… Respond to the negative impacts of 'competition' among EDR offices:

ANZOA members recognise the value of competition for consumers in the provision of services. Indeed, in most of the industries in which ANZOA's members operate, there are markets for services that provide demonstrable cost, service and choice benefits for consumers. However, any possible benefit of competition in providing EDR services is outweighed by potential substantial detriment—to consumers, service providers and the community more broadly. ANZOA's considered view, after substantial consultation amongst ANZOA members, is that 'competition' in EDR is inconsistent with the spirit of the Benchmarks, and undermines principles of independence and effectiveness at the heart of the Benchmarks. Reasons for this include:

- It is not in the interests of consumers/citizens or their advocates, as it may not be clear where to take complaints or which is the most appropriate service to deal with particular issues.
- It is likely to add unnecessary and inefficient costs to Ombudsman services, e.g. inefficient duplication of infrastructure/resources/services/information systems, mechanisms to establish a 'common door' approach, and the need to provide information to consumers about different offices.
- It may lead to manipulation of dispute resolution services, differing standards, and inconsistencies in decision making which could be adverse for consumers and participating organisations.
- Poor performing organisations may choose to join an alternative EDR office that they believe is not as rigorous in its approach to complaints.
- 'Competition' among EDR offices may encourage forum shopping by participating organisations, over which their customers (and consumers generally) have no control and no opportunity for any input.
- An EDR office may focus more on participating organisations rather than on complainants or consumers in order to keep or grow its membership.
- Where EDR offices are subject to regulatory approval and/or other regulatory mechanisms, regulators may need to set up separate reporting and communication systems for different offices, potentially about the same issues.
- The value of the Ombudsman's office as a source of information and analysis to contribute to the ongoing improvement of an industry or service area will be diluted, to the detriment of consumers, service providers and the wider community.

For these reasons, ANZOA's stated public position is that there should be one external dispute resolution office only for any industry or service area. Other appropriate mechanisms can be used to provide a proxy for the benefits that can otherwise be derived from competing services. These mechanisms include appropriate governance arrangements, independent reviews and public reporting, matters that the *Benchmarks Document* already provides for.