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21 May 2014

Access to Justice Arrangements
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PRODUCTIVITY COMMISSION'S INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS DRAFT REPORT – APRIL 2014

The Australian and New Zealand Ombudsman Association (ANZOA) is a professional association and the peak body for Ombudsmen in Australia and New Zealand.

ANZOA's membership includes Industry-based Ombudsmen, Parliamentary Ombudsmen and other statutory Ombudsmen.

We welcome the opportunity to supplement [ANZOA's first submission](#) to the Productivity Commission's *Inquiry into Access to Justice Arrangements* with this response to the Draft Report published by the Commission on 8 April 2014.

Our comments relate mainly to Chapter 9 (Ombudsmen and other complaint mechanisms), but we also comment on some aspects of Chapter 5 (Understanding and navigating the system) and Chapter 24 (Data and evaluation).

ANZOA would be very pleased to provide clarification of any of the above information, or additional information to assist further with the Productivity Commission's Inquiry.

Please feel free to contact me directly on (02) 8218 5204 or through the ANZOA Secretariat at info@anzoa.com.au.

Yours sincerely

Clare Petre
Chair
Australian and New Zealand Ombudsman Association



**Submission by the
Australian and New Zealand Ombudsman Association
(ANZOA) (May 2014)**

**Productivity Commission's *Inquiry into Access to Justice
Arrangements – Draft Report* (April 2014)**

Introduction

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

We welcome the opportunity to supplement [ANZOA's first submission¹](#) to the Productivity Commission's *Inquiry into Access to Justice Arrangements* with this response to the Draft Report published by the Commission on 8 April 2014.

Our comments relate mainly to Chapter 9 (Ombudsmen and other complaint mechanisms), but we also comment on some aspects of Chapter 5 (Understanding and navigating the system) and Chapter 24 (Data and evaluation).

We preface our comments with the following overall observations:

- ANZOA supports the findings in the Commission's Draft Report about the opportunity for greater access to informal dispute resolution mechanisms, such as Ombudsman offices, to address a significant proportion of consumer issues, described in the Draft Report as 'unmet legal needs'.
- ANZOA agrees that evidence demonstrates Ombudsman offices are effective in promoting access to justice and generally perform well on measures of timeliness, service costs and complainant satisfaction.
- ANZOA acknowledges the opportunities identified by the Commission to raise the profile of Ombudsmen and improve information collection about the work of Ombudsman offices.

¹ ANZOA's first submission is number 133 at <http://www.pc.gov.au/projects/inquiry/access-justice/submissions>

Chapter 9: Ombudsmen and other complaint mechanisms

Information request 9.1

Given the difficulty in estimating the individual costs of the various functions of some ombudsmen and complaints mechanisms, the Commission seeks feedback on whether the estimates it has derived can be further refined. The Commission also seeks feedback on the costs of ombudsmen undertaking systemic reviews.

ANZOA's response

The range of systemic issues work undertaken by Ombudsman offices

Parliamentary and Industry-based Ombudsmen undertake significant work in addressing the patterns, trends and systemic issues that underlie and arise from complaints. They work closely with regulators and other stakeholders to reduce citizen/consumer detriment and the complaints that arise from such detriment.

This contribution to access to justice encompasses a wide range of activities aimed at resolving existing complaints and preventing future complaints.

These activities are, in some respects, unique in the justice sector. The learnings from a single complaint, or a series of complaints, inform improvements for the broader community. Focus is given to important matters affecting the vulnerable, or those citizens/consumers who have also been treated improperly but have not made a complaint. In this way, information held and obtained by Ombudsmen is put to further good use in the public interest.

To inform ANZOA's response to the Commission's Information request 9.1, we have analysed the systemic issues work undertaken by 10 offices of ANZOA members (four Parliamentary offices and six Industry-based Ombudsman offices). We note, however, that the information about systemic issues work has not been as amenable to quantitative analysis as was the general complaints handling information which we documented in ANZOA's first submission.

Based on the information provided by the 10 Ombudsman offices, we present below five broad categories, which demonstrate the versatility and flexibility of approaches taken by these offices to identify, deal with and resolve systemic issues.

Complaint-driven systemic issues investigations

Systemic issues investigations (including, as appropriate, processes of audit and review) are usually triggered when a complaint about a particular issue has the potential to affect a wider group of citizens/consumers.

Complaint-driven systemic issues investigations are conducted by Ombudsmen to:

- resolve a class of complaints that has arisen
- improve a policy, process or procedure that has caused or exacerbated these complaints, and
- ensure steps are in place to prevent the recurrence of similar complaints.

Systemic issues investigations are an important Ombudsman function — prompting changes to agency/provider policies, processes and/or procedures and having a multiplier effect across a wide range of consumers/citizens, not just those who brought their complaint to the Ombudsman's office.

Systemic issues investigations also reduce the potential for future complaints about the same issue — which in turn helps to reduce the cost of access to justice and free up dispute resolution capacity and resources for addressing other issues.

Systemic issues investigations usually involve a period of monitoring by the Ombudsman's office, after recommendations have been made, to assess whether the recommendations have been implemented and whether the implementation is effective.

The number of systemic issues investigations undertaken each year by Industry-based and Parliamentary Ombudsmen depends very much on the remit of the individual Ombudsman office and the environment in which it operates. The number of systemic issues investigations conducted annually by the Parliamentary and Industry-based Ombudsmen whose information we analysed ranged from 10 to over 50. In addition, some Ombudsmen monitor and informally resolve hundreds of less complex potential systemic issues each year.

Some examples of Ombudsman complaint-driven systemic issues investigations are outlined in Table 1 below.

Table 1: Examples of complaint-driven systemic issues investigations undertaken by Ombudsman offices	
Systemic investigation	Outcomes achieved
Complaint handling practices of local councils	Changes to internal culture; improved policies and procedures for complaint handling; improved responsiveness to complaints; and improved practices to monitor complaint outcomes
Incorrect charging of ticketing system	Reimbursement of charges to consumers with proof of overcharging; changes to provider systems to prevent future overcharging
Incorrect timeframes in disconnection notices	Payments made to affected energy customers for 'wrongful disconnection'; changes to retailers' disconnection notices
Poor procurement and contract management practices	Improvements to procurement and complaint management practices; greater accountability of agencies; recommended removal of officers who misused their positions
Transfer of services due to misleading sales practices	Reversal of transferred services (e.g. in telecommunications, energy); referral of provider to regulator, with regulator imposing fines on the provider
Unnecessary barriers for consumers in financial difficulty	Improvement to provider policies and procedures for dealing with consumers in financial difficulty

Own motion investigations

Parliamentary Ombudsmen and some Industry-based Ombudsmen are empowered to conduct own motion investigations. An own motion investigation is initiated in response to an Ombudsman's own observations, or from information the Ombudsman receives, and does not need to be triggered by a complaint. It may look into a specific event or issue, or more broadly into policies, processes or procedures that could give rise to issues.

Because own motion investigations are most often conducted by Parliamentary Ombudsmen, the stakeholders concerned are usually government agencies. And, while a complaint-driven systemic issues investigation is intended to bring about a practical outcome — a reduction in complaints — an own motion investigation is conducted to promote improvements to public administration and practices. In most instances, own motion investigations involve issues of significant public interest and often concern vulnerable groups in the community.

A Parliamentary Ombudsman conducts an average of three to eight major own motion investigations each year. The Ombudsman usually continues to monitor the outcomes of these investigations, to assess if the recommendations have been implemented and are effective.

Some examples of own motion investigations undertaken by Ombudsman offices are included in Table 2 below.

Table 2: Examples of own motion investigations undertaken by Ombudsman offices	
Own motion investigation	Outcomes achieved
Deaths and self-harm incidents in detention facilities	Eight of the nine recommendations accepted by the agency, with improvements in data collection, information delivery and engagement with detainees and prioritisation of processing of asylum claims
Inadequate secure welfare services for children	All eight recommendations accepted by the agency, with improvements to the safety of children in secure welfare, improved administration, conditions and record keeping for secure welfare
Ways to reduce or prevent sleep related infant deaths	All recommendations accepted by the agency, with changes to practices and promotional advice to parents about safe sleeping practices for infants
Excessive restraints of prisoners in hospitals	Recommendations accepted by the agency, with improvements to standard operating procedures, record-keeping and compliance with legislative requirements
Guarantees to secure credit facilities	Recommendations to improve the disclosure of general warnings (particularly to more vulnerable consumers) about the risks and responsibilities of becoming guarantors

Public interest reports

The complaints data held by Industry-based and Parliamentary Ombudsmen is a rich source of information, as is the analysis they undertake about complaint trends. Ombudsmen commonly publish quarterly and annual reports about complaint issues and trends.

This information provides valuable insights for regulators, government and the community into particular issues of concern. It also enables agencies and providers to take measures to address potentially systemic issues or to prevent future occurrences.

Parliamentary and Industry-based Ombudsmen may also issue special interest public reports to highlight particular issues of concern or emerging issues of public interest.

Ombudsman public interest reports promote the delivery of fair and effective services to citizens/consumers.

The information in Ombudsman public interest reports helps regulators, government and other stakeholders to make informed, effective and timely decisions.

Some examples of public interest reports issues by Ombudsman offices are included in Table 3 on page 8.

Table 3: Examples of public interest reports issued by Ombudsman offices

Public interest reports	Outcomes achieved/sought
Accessibility issues experienced by public transport users	Development of an agreed definition of accessibility for public transport; standardised and industry-wide training on customer service to address accessibility requirements; industry minimum standards for direct assistance; ongoing auditing program to monitor compliance with standards
Quarterly/yearly reports on complaint trends and emerging issues	Publically available information about complaint issues and emerging trends, enabling regulators and other stakeholders to take timely action as appropriate
Consumer resilience when dealing with providers	Introduction of regulatory measures for improved customer service and complaint handling practices; increased industry emphasis on good customer service; reduced numbers of complaints about these issues
Failure of essential service retailer	Identifying early warning signs of retailer in trouble; improved processes for managing complaints about the failed retailer, including those arising years after the failure; and lessons learnt
Conflict of interest in the public sector	Placing this issue in the public domain, leading to amendments to legislation and greater awareness across agencies
Preventing or reducing suicide by young people	Research and analysis of risk factors associated with suicide of young people; and identifying ways in which relevant agencies can reduce incidence of suicide by young people

Submissions

The knowledge that Parliamentary and Industry-based Ombudsmen have about the sectors within which they work is detailed, in-depth and practical. This makes Ombudsman offices a valuable (and often unique) source of information about complaint trends, specific issues that are giving rise to complaints, and the potential impact of proposed regulatory changes within those sectors.

Parliamentary and Industry-based Ombudsmen commonly provide evidence-based, practical and persuasive information to the consultation processes of regulators, policy makers, industry bodies, community groups and other organisations. They also contribute to broader debate around issues of public interest.

In particular, an Ombudsman can provide valuable input to ensure that complaint-minimisation strategies are built into the regulatory framework for the sector in which the Ombudsman's office works, which in turn helps reduce future complaints and strengthen dispute resolution arrangements.

The number of formal submissions made annually by the Parliamentary and Industry-based Ombudsmen whose information we analysed ranged from 8 to 25. These submissions are usually publicly available and easily accessible by relevant stakeholders. Submissions are a key contribution of Ombudsman offices towards addressing potential systemic issues within their respective remits.

Examples of formal submissions made by Ombudsman offices in recent years are included in Table 4 on page 9.

Table 4: Examples of formal submissions made by Ombudsman offices

Submissions	Key recommendations
Privacy amendments and draft Credit Reporting Code	Recommendations on potential gaps in regulatory arrangements; safeguards for consumers in financial hardship; and improvements to clarity of language and accessibility of the draft Code
Inquiry into social inclusion of consumers with a disability	Recognition that lack of access to current and future transport services and infrastructure results in social exclusion; and the need for increased awareness of issues faced by these consumers
Reporting of crimes by citizens with a disability	Recognition that people with severe disabilities may face significant barriers to report mistreatment or crimes against them, with a need to involve carers and other welfare staff in reporting such incidents
Inquiry into public interest disclosure legislation	Supporting the existing integrity framework and conferral of protections on persons who make public interest disclosures and recognition that responsibility should be placed on the agency involved to proactively manage the issue of concern
Inquiry into financial services	Recommendations on ensuring financial service providers put the interests of their customers at the forefront at all stages of their business, to encourage trust and confidence in the financial system

Outreach and stakeholder engagement

Parliamentary and Industry-based Ombudsmen work closely with their stakeholders on a day-to-day basis to help them improve their processes, practices and handling of complaints. The outreach and stakeholder engagement programs of Ombudsman offices are targeted at:

- increasing community and agency/provider awareness about Ombudsman services
- providing training for agencies, providers and community organisations on the role of the Ombudsman, regulatory and code obligations and on best practice complaint handling
- creating opportunities for discussions with agencies/providers and community representatives on complaint trends, potential systemic issues, complaint handling practices and processes, and suggestions for improvement.

Outreach and engagement activities often result in positive changes to agency/provider policies, practices and procedures, increased awareness of their obligations and increased responsiveness to resolving complaints. These activities also improve the capacity of agencies/providers to recognise and respond to complaints proactively, which in turn reduces the demand for dispute resolution services and helps prevent further complaints.

Examples of Ombudsman office outreach and engagement activities are included in Table 5 below.

Table 5: Examples of Ombudsman office outreach and engagement activities

Regular information sharing sessions or meetings with stakeholder staff, on the role of the Ombudsman and feedback from complaints about the experience of consumers with government agencies and industry
Development of position statements or specialist guidance documents on particular types of common complaints and how the Ombudsman expects the parties to respond and resolve these complaints
Online training modules on a range of topics, including systemic management processes and best practice complaint handling that can be undertaken by agency/provider staff at their own pace
Regular publications, such as newsletters or reports, to provide feedback on complaint trends, common complaint issues, practical advice and guidance on resolving these complaints
Community outreach activities, particularly targeting intermediaries and 'gatekeepers', to create awareness about the role of the Ombudsman, how to facilitate complaint resolutions and appropriate referral advice

Estimated costs of dealing with systemic issues

The broad range of activities that Parliamentary and Industry-based Ombudsmen undertake to respond to and resolve current and potential systemic issues, makes it difficult to quantify the costs involved.

Most Ombudsman offices have dedicated staff who work on discrete systemic issues investigations and own motion investigations. Most Ombudsman offices have also developed flexible ways in which to undertake systemic issues work — for example public interest reports, submissions and stakeholder engagement activities as detailed above.

From our analysis of feedback from nine Ombudsman offices on the estimated costs of their systemic issues work, we note that these costs can range significantly — depending on the powers and remit of the Ombudsman, the industry sector and/or regulatory framework within which the Ombudsman operates, and the volume of complaints the Ombudsman deals with.

Table 6 below sets out the different ranges of estimated costs and proportion of staff involved in the systemic issues work undertaken by those nine offices in 2012-13.

Table 6: Estimated effort of dealing with systemic issues in 2012-13		
	Lower range	Upper range
Average cost of systemic issues work for each Ombudsman office per year (estimate)	\$50,000 to \$250,000	\$700,000 to \$1 million
Average cost of systemic issues work as a proportion of total organisational costs per year (estimate)	1% to 5%	10% to 15%
Average number of staff involved in systemic issues work (full time equivalent) as a proportion of total organisational staff (estimate)	0.5% to 3%	5% to 8%

Draft Recommendation 9.1

Governments and industry should raise the profile of ombudsman services in Australia.

This should include:

- *more prominent publishing of which ombudsmen are available and what matters they deal*
- *the requirement on service providers to inform consumers about avenues for dispute resolution*
- *information being made available to providers of referral and legal assistance services.*

ANZOA's response

Raising the profile of Ombudsman offices

ANZOA agrees that building public awareness of Ombudsmen and the free, accessible and timely resolution of disputes which Ombudsman offices offer is very important. We also agree that there is a role for governments and industry to play in raising the Ombudsman profile.

We believe it is particularly important when it comes to vulnerable groups, including Indigenous communities, refugee and emerging communities, low income households, culturally and linguistically diverse communities, rural and remote communities, aged and disability groups. Reaching vulnerable consumers is an outreach priority for each of the offices of ANZOA's

Ombudsman members, and ANZOA supports this by actively encouraging Ombudsman office staff to work together on information campaigns² to build community awareness.

We note the Draft Report's assessment that 'consumer' issues are the largest percentage of the 'Composition of legal problems faced by Australians'.³ Many of these consumer issues — including telecommunications, banking and finance, energy and water — are already appropriately dealt with by an Ombudsman.

Distinguishing the Ombudsman model

However, it will be crucial to any implementation of draft recommendation 9.1 that Ombudsman offices are differentiated from other complaint handling and dispute resolution mechanisms. ANZOA supports consumers having access to a range of dispute resolution mechanisms as appropriate to the citizen/consumer context.

Ombudsman is a particular model of alternative dispute resolution and one that has proven itself adaptable to a variety of roles and settings. With a history going back over 200 years, the Ombudsman model is well known for independent and impartial review and investigation.

Figure 1 in the Commission's Draft Report provides an overview of 'The three major dispute resolution mechanisms' and incorrectly lists 73 bodies as 'Ombudsmen'.⁴ Table D.2 correctly describes the agencies included in that list of 73 as 'Ombudsmen and complaints bodies', thus distinguishing Ombudsman offices from other complaints bodies. If the Commission wishes to include all non-Tribunal and Civil Courts agencies in one group, we suggest that Figure 1 be amended (see page 10).

In addition, under 'Number of Institutions/providers', the 73 'Ombudsmen' are grouped as follows — 22 National, 40 State and 11 Industry. This is confusing. Some Ombudsman offices are national, e.g. the Financial Ombudsman Service and the Telecommunications Industry Ombudsman; while others have a State jurisdiction only, e.g. Energy & Water Ombudsman NSW, Energy and Water Ombudsman (Victoria), Energy and Water Ombudsman Queensland and the Public Transport Ombudsman. Confusing also is the reference to 11 Industry agencies, which suggests that this is the total number of industry complaints bodies. Again, we suggest that this be amended in the Final Report. This confusion also extends to the reference in Figure 1 to 'Funding arrangements' where the funding for industry of \$111 million does not include the funding for the Industry-based Ombudsman offices which are national.

We further note that the Ombudsmen column refers to 'National' bodies, while the columns for Tribunals and Civil Courts refer to 'Commonwealth' bodies. We suggest that the same description should be used for all columns and that 'national' is the appropriate term.

² ANZOA's Public Relations and Communications interest group facilitates co-operation among staff from Ombudsman offices on initiatives of this nature. For example, postcards distributed throughout Australia highlighting the right consumers have to complain and how to seek assistance from an Ombudsman office.

³ Draft Report Overview Figure 2, page 6

⁴ Draft Report, Figure 1, page 4

ANZOA suggests that Figure 1 in the Draft Report be amended as follows:

	Ombudsmen and other complaints mechanisms
Number of institutions/ providers	73 Ombudsmen/other complaints mechanisms National: 22 State: 51
Volume of matters	Total 773 000 National: 267 000 State: 506 000
Funding arrangements	National: \$235 million State: \$248 million

Use of the term Ombudsman

In 2010, ANZOA called for stronger controls on use of the term Ombudsman. It supported that call with a policy statement setting out six essential criteria which the public are entitled to expect of any office described as an Ombudsman — independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

ANZOA's view is that a body should not be described as an Ombudsman unless it complies with these six essential criteria. We are very pleased to see that the Commission has included ANZOA's *Essential criteria for describing a body as an Ombudsman* in its Draft Report and we request that the Commission recognise the importance of these essential Ombudsman features by including them in its Final Report.

As ANZOA observed in 2010, where problems arise in an industry or an area of government services, the call for an Ombudsman commonly follows. This in itself is not a problem — indeed it is a testament to the high level of public respect for the independence, integrity and impartiality of Ombudsman offices. ANZOA's concern, then and today, lies with the increasing inappropriate use of the term Ombudsman to describe bodies that do not conform to, or show an understanding of, the accepted Ombudsman model and its 200 year history.

The term Ombudsman is understood by the public as signifying an independent office which primarily has a complaint handling and investigation function. The term does not refer to agencies with regulatory, disciplinary and/prosecutorial functions, or to agencies that provide limited advice or mediation services. An 'ombudsman' office under the direction or control of an industry or a government minister is not independent. An office set up within a company or government agency as an 'internal ombudsman' is not independent. The concept of Ombudsman is being stretched and the confidence of the public in the role and independence of the Ombudsman institution is at risk of being undermined and diminished.

We also draw the Commission's attention to the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*. These *National Benchmarks*, which address accessibility, independence, fairness, accountability, efficiency and effectiveness, are reflected in ANZOA's *Essential criteria for describing a body as an Ombudsman* and also underpin ANZOA's membership criteria. The *National Benchmarks* document is included as Attachment 1 and available on ANZOA's website at <http://www.anzoa.com.au/National-Benchmarks-1997.pdf>.⁵

⁵ The *National Benchmarks* are currently under review by the Commonwealth Consumer Affairs Advisory Council (CCAAC). We expect there will be an enhancement of the existing Benchmarks rather than a fundamental change.

Draft Recommendation 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

ANZOA's response

In responding to this draft recommendation, we are presuming that the Commission is referring to the 73 agencies listed in Table D.2 of the Draft Report. On that basis, we suggest that the draft recommendation is problematic in not differentiating between Ombudsman offices and other complaints mechanisms.

We therefore suggest that Draft Recommendation 9.2 should read:

Where appropriate, governments should rationalise the complaints services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

However, this recommendation does not apply to Industry-based Ombudsmen in any case, because they are not funded by government. As noted by the Commission, Industry-based Ombudsman offices are funded by the industries they oversight. Because these costs are ultimately passed on by the industry providers, Industry-based Ombudsmen strive to be as efficient as possible.

The Commonwealth Ombudsman is funded by the Federal Government, and State and Territory Parliamentary Ombudsmen are funded by their respective governments. These Ombudsman offices are stand-alone services, not duplicated by other complaints mechanisms — although there are some instances where jurisdiction overlaps, as described in the submission from the Victorian Ombudsman. In many cases, they have taken on additional responsibilities, the result being that governments have achieved considerable efficiencies through not having to set up separate complaint mechanisms. For example, the Commonwealth Ombudsman is also the Postal Industry Ombudsman, the Taxation Ombudsman, the Overseas Students Ombudsman, the Immigration Ombudsman, the Defence Force Ombudsman, the Law Enforcement Ombudsman and the ACT Ombudsman.

As listed by the Commission in Table D.2, there are other complaints handling bodies at both national and state levels, many of which are funded by government. ANZOA is not in a position to comment further on this, except to say that where some rationalisation in complaint handling mechanisms is possible and appropriate, this would likely benefit both government and consumers.⁶

⁶ Western Australian Ombudsman, Chris Field, has noted that the integrity framework (which includes the office of the Ombudsman) should be “delivered at least cost, and is prepared, in an ongoing way, to consider whether it can undertake what it does more efficiently, including considering whether the framework can realise economies of scale or scope. It seems to me that one obvious matter that needs to be kept under periodic review is whether the proliferation of multiple niche integrity agencies should be consolidated into overarching integrity bodies”, Field, Chris, *The fourth branch of government: the evolution of integrity agencies and enhanced government accountability*, (2013) 72 AIAL 24.

Draft Recommendation 9.3

In order to promote the effectiveness of government ombudsmen:

- *government agencies should be required to contribute to the cost of complaints lodged against them*
- *ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded*
- *government ombudsmen should be subject to performance benchmarking.*

ANZOA's responses

In order to promote the effectiveness of government ombudsmen:

- *government agencies should be required to contribute to the cost of complaints lodged against them*

ANZOA's initial observation is that whether government agencies should be required to contribute to the cost of complaints would be a matter of policy for relevant governments, rather than for Parliamentary Ombudsmen themselves, although Parliamentary Ombudsmen would need to be part of any review. We also note the range of incentives which currently operate in relation to the resolution and prevention of complaints by government agencies.

On the one hand, if government agencies were to contribute to the cost of complaints lodged against them — reflecting the practice of Industry-based Ombudsmen — there may be greater incentives for them to resolve complaints at the earliest opportunity. On the other hand, a cost-recovery model would impose additional costs (in terms of establishment and administration) on the existing budgetary processes, and those processes would need to continue unless government agencies were to contribute the entire budget of Parliamentary Ombudsmen.

Consideration would also need to be given to whether the funding model would be on a per-complaint basis or an escalated basis, and whether cost-recovery would be limited to major agencies. We note the Commission's assessment in the Draft Report that "it would likely prove cumbersome to impose a fee for every complaint, [and] a fee could be imposed on agencies that attract complaints above a pre-determined threshold" (page 292).

A model for agency contribution may also result in inappropriate fluctuations in income streams from year to year.⁷

In order to promote the effectiveness of government ombudsmen:

- *ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded.*

ANZOA notes the recommendation in the Draft Report that Parliamentary Ombudsmen should report any systemic issues they have identified that lead to unnecessary disputes with government agencies, as well as how those agencies have responded. We are aware that Parliamentary Ombudsmen currently undertake extensive reporting of systemic issues, Ombudsman action in relation to those systemic issues, and government agency responses, in their annual reports to Parliament, in their reports of major own-motion investigations (which may arise from systemic issues identified in complaints) and in a range of other published forms, including on websites and in newsletters.

⁷ "Schemes which rely heavily on a pay per complaint model can have great difficulties in workforce planning as income streams are not predictable" in Tyndall, Peter, *The Ombudsman and the Changing Face of Public Services*, paper presented at the International Ombudsman Institute Wellington Conference, November 2012, page 4, available at (accessed May 2014): http://www.theioi.org/downloads/6urp/Wellington%20Conference_54.%20Working%20Session%20L_Peter%20Tyndall%20Paper.pdf

In order to promote the effectiveness of government ombudsmen:

- *government ombudsmen should be subject to performance benchmarking.*

ANZOA agrees that it is important for Parliamentary Ombudsmen to undertake performance benchmarking. We are aware that Parliamentary Ombudsmen currently have a range of Key Performance Indicator (KPI) requirements which are publically reported. These benchmarks are generally subject to oversight from offices of the Auditor-General and Parliament and can currently be used for performance benchmarking. We suggest that there may be an opportunity to develop further indicators, and further standardisation of relevant indicators, to assist performance benchmarking.

Draft Recommendation 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

ANZOA's response

ANZOA's initial observation is that whether a review of funding for Parliamentary Ombudsmen and other complaints bodies should be conducted will be a matter of policy for relevant governments, rather than for Parliamentary Ombudsmen themselves. However, Parliamentary Ombudsmen would clearly need to be part of any review.

Chapter 5: Understanding and navigating the system

Draft recommendation 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

ANZOA's response

ANZOA supports steps to make justice accessible to all in the community.

For most Ombudsmen, their title suggests their role. For example, Energy and Water Ombudsmen deal with energy and water complaints, and the vast majority of complaints made to those offices around Australia are about energy and water issues within the office's jurisdiction.

That said, referral of out-of-jurisdiction matters is an established part of the role of all Ombudsman offices. Where someone contacts an Ombudsman office and the office cannot assist, the person is provided with detailed contact information for an appropriate dispute resolution service — be that another Ombudsman, Fair Trading or Consumer Affairs, a tribunal or court, or another body. Where the person has rung an Ombudsman's office, in many cases their call is transferred directly to the appropriate agency. The offices of ANZOA members regularly

collaborate on opportunities to provide a more streamlined experience to the public, and considerable potential exists for further collaboration.

Creation of a stand-alone service promoted as a single point of entry will not automatically improve access to justice. On the contrary, it may represent an extra step for an already frustrated citizen/consumer before their complaint can be progressed — increasing the risk of 'run-around' and 'customer fatigue', with the effect that people drop out of the dispute resolution process before their complaint can be addressed.

Noting the emphasis in this recommendation on 'legal assistance and referral', ANZOA observes (from the experience of our members) that many people don't think of their complaint as a 'legal' issue. For example, we doubt that someone complaining about a credit default listing, a high bill, disconnection of energy supply or bank charges would be thinking 'legal'. For this reason, a 'legal assistance and referral' service may not immediately come to consumers' minds as a logical referral point.

ANZOA suggests that, rather than investing in a single entry point and adding another layer to the dispute resolution process, it may be better to invest in promotion of existing dispute resolution services and in resources that the staff of those services can use to refer consumers to other bodies where required. This may be a more economical and more effective way of promoting access to justice.

That is not to say that there are no opportunities to streamline access to existing services. For instance, the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission, which regularly refer complaints to each other, have recently established a shared reception area. Further opportunities are best considered on a jurisdiction-by-jurisdiction basis through consultation between the key agencies concerned.

Chapter 24: Data and Evaluation

Draft Recommendation 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report). To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- *adopting common definitions, measures and collection protocols*
- *linking databases and investing in de-identification of new data sets*
- *developing, where practicable, outcomes based data standards as a better measure of service effectiveness.*

ANZOA's response

ANZOA supports the Commission's intention, reflected in this draft recommendation, to improve the quality of data about access to justice in Australia.

We note the matters outlined in Appendix J, *Building the evidence base*, concerning Ombudsmen, including that data be collected by all Ombudsman offices about:

- types of disputes
- timeliness of services
- cost of services (including segregating complaint handling costs from the costs of other functions).

We suggest that this data set could be expanded to include data about matters such as:

- citizen/consumer satisfaction with services (using a common measurement tool)
- awareness of Ombudsman services.

Information Request 24.1

The Commission seeks feedback on where a data clearinghouse for data on legal services should be located. Such a clearinghouse needs to be able to coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. It should also have some expertise in linking, using and presenting data, especially administrative data. Ideally, the clearinghouse should also have experience in liaising with legal service providers and different levels of government have an understanding of the operation of the civil justice system and understand the principles behind benchmarking.

ANZOA's response

ANZOA recognises the value of aggregated data, but suggests that (at least in the first instance) collection and aggregation of data about different justice sectors is likely to be more accurate and effective if it is carried out by the peak bodies within those sectors. For example, for Ombudsman services it may be more appropriate for ANZOA to work with each Ombudsman office to establish common data sets and collect information — for the dual purposes of benchmarking among Ombudsman offices and as a contribution to a broader justice sector initiative.

This approach is likely to be more effective than creating a substantial new organisation, which would be unlikely to have a nuanced understanding of the services offered in each justice sector or sector relationships well-developed enough to undertake such work effectively.

BENCHMARKS

for

INDUSTRY-BASED

CUSTOMER DISPUTE RESOLUTION SCHEMES

This publication may be freely reproduced provided suitable acknowledgment is made. Copies of this publication may be obtained from the Consumer Affairs Division, Department of Industry, Science and Tourism at the following address.

GPO Box 9839

Canberra City ACT 2601.

Ph: (06) 250 6972

Fax: (06) 273 1992

Email: consumer.affairs@dist.gov.au

Internet: www@dist.gov.au/consumer/fbcahome.html

Minister for Customs and Consumer Affairs

I am pleased to release the Benchmarks for Industry-Based Customer Dispute Resolution Schemes.

One of the issues which I consider a priority as Minister with responsibility for consumer affairs is that of alternative dispute resolution.

It makes good business sense to have a system for dealing with customer complaints. A dissatisfied customer is not a good advertisement for any business. While a company should try to resolve complaints with its customers, there are some situations where this is not possible. Subscribing to a dispute scheme, which can deal with unresolved complaints, is an equally important part of dealing with customer concerns.

Dispute schemes also serve as an alternative to the court system. The Government and the courts have recognised that costs and delays have reduced access to the court system by the average consumer. Where possible the courts are using alternative dispute resolution within the court system itself. There is also a place for alternative dispute resolution outside the court system.

Dispute schemes have therefore fulfilled a need for cost-free, accessible and effective resolution of disputes.

We have been fortunate in Australia that many industries have taken the initiative to develop dispute schemes. There are a variety of schemes which have allowed us to form views as to the advantages of different scheme structures.

The Benchmarks have been developed with the assistance of dispute schemes, consumer groups, government and regulatory authorities. Public consultation has been extensive, with the final Benchmarks reflecting a balance of views from all parties. I would like to thank those people who contributed to these consultations.

The Benchmarks are not mandatory and have drawn on existing dispute schemes to highlight the desirable elements of a good scheme.

Although the Benchmarks are not mandatory, I encourage industries with schemes to play close attention to them and to assess whether their existing or proposed scheme meets each benchmark. I also encourage those industries which are considering introducing dispute schemes to use the benchmarks to guide the creation of a good scheme.

There is scope for present schemes to continue to evolve and to work more closely with each other in meeting customer needs. I am confident the Benchmarks will play their part in informing further discussion and work in these areas.

I wish to express my appreciation for the contribution of the members of the Working Group in preparing the benchmarks. I look forward to the continued development of effective avenues of dispute resolution for consumers.

CHRIS ELLISON
Senator for Western Australia

August 1997

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PREFACE

Since 1990 various dispute resolution schemes have been set up by industry seeking to provide a cost-free, effective and relatively quick means of resolving complaints about the products or services provided by an industry. Customer dispute schemes of this type play a vital role as an alternative to expensive legal action for both consumers and industry.

The emergence of customer dispute schemes is also due in part to the increasing recognition of the value of effective industry self-regulation. Such schemes enable industry to ascertain the problems faced by their customers and take steps to rectify them, negating the need for government intervention.

Good Business Practice

Customer dispute schemes also make good business sense. They result in improved business practices and the creation of better quality goods and services for customers.

In order to encourage and support the development of customer dispute schemes the government has facilitated the development of a set of benchmarks to guide industry in developing and improving such schemes.

The benchmarks have been developed to apply primarily to nationally-based customer dispute schemes set up under the auspices of an industry. Such schemes currently exist in relation to banking, telecommunications and insurance. However, many of the principles that they represent may be capable of applying to State or Territory based industry schemes or non-industry schemes.

Flexibility

The benchmarks are constituted by key practices which it is hoped many schemes will adopt. However, it is recognised that some key practices in the benchmarks may not be applicable to the smaller sectors of industry or those sectors where there are few complaints. Every key practice does not have to be adopted by each industry sector. Industries should consider the applicability of each of the key practices to their sector taking in to account the industry's size, resources and complaint history. However, where possible, the use of these benchmarks by all customer dispute schemes is encouraged.

Some existing schemes hear complaints involving individual consumers while others allow small business to access their scheme. The benchmarks have been drafted primarily with a focus on individual consumers as users of the schemes. However, where the terms of reference of a scheme allow access to it by other entities, the benchmarks are still capable of applying to such schemes.

Most of the customer dispute resolution schemes to date have been set up in the financial services sector or the telecommunications sector. However, there are some sectors, such as the legal profession, which do not traditionally recognise themselves as an industry and which may have customer dispute resolution schemes set up independently of statute. The benchmarks are capable of applying to dispute resolution schemes in these professions as well.

The benchmarks have a three-fold purpose. They are meant to act as a guide to good practice for those industry sectors which intend setting up a scheme to resolve disputes between their industry members and individual consumers of their goods or services. For existing schemes they will provide objective guidance on the practices to aim for in the operation of such schemes. They will also serve as a guide for consumers in giving them some idea of what they should expect from such schemes.

Voluntary Guidelines

The benchmarks do not have the force of law and are intended to be a guide to stakeholders - but adherence to them by the schemes will be a clear demonstration of their commitment to good practice.

The benchmarks have been drafted by a Working Group chaired by the Federal Bureau of Consumer Affairs and including representatives of the current major schemes - the Life Insurance Complaints Service, the Australian Banking Industry Ombudsman, the Telecommunications Industry Ombudsman and the General Insurance Enquiries and Complaints Scheme, as well as representatives of the Consumers' Federation of Australia, the Australian Competition and Consumer Commission, the Business Council of Australia and the Australian Chamber of Commerce and Industry. In drafting the benchmarks, the Working Group undertook extensive consultation with existing schemes and business and consumer groups.

Emphasis on Alternative Dispute Resolution

The schemes set up under these benchmarks will reflect an informal and inquisitorial style of dispute resolution rather than a formal and adversarial style. Thus overly prescriptive practices have been avoided and early resolution of disputes by consensus has been emphasised.

It is expected that in implementing and interpreting these benchmarks, both industry and consumers will not take an overly legalistic approach to them. The benchmarks should be approached in a spirit of seeking resolution by consensus as far as possible at an early stage to reduce costs, increase productivity and build better relationships between the parties. This is the essence of alternative dispute resolution.

Emphasis on Early Resolution at the Company Level

Customer dispute schemes do not obviate the need for each business to have its own mechanisms for dealing with complaints made by its customers. It is desirable to have a complaint resolved as early as possible after it has been made. It is only when resolution is not possible at the company level that the scheme should be utilised.

Further Assistance

For information about existing schemes and how they have incorporated some of the key practices in these benchmarks you can contact the schemes themselves. Contact details are contained in the Directory of Consumer Dispute Resolution Schemes and Complaint Handling Organisations prepared by the Federal Bureau of Consumer Affairs. Copies may be obtained from:

The Director
Consumer Education & Representation Section
Consumer Affairs Division
Department of Industry, Science and Tourism
GPO Box 9839
Canberra City ACT 2601.
Ph: (06) 250 6922
Fax: (06) 273 1992
Email: lgrant.dist.gov.au

If you would like advice on how these benchmarks might apply in other sectors or would like further copies of these benchmarks you can contact:

The Director
Strategic Policy Section
Consumer Affairs Division
Department of Industry, Science and Tourism
GPO Box 9839
Canberra City ACT 2601.
Ph: (06) 250 6972
Fax: (06) 273 1992
Email: pclarke.dist.gov.au

THE BENCHMARKS AND THEIR UNDERLYING PRINCIPLES

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.

BENCHMARK 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 scheme ¹seeks 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 scheme.⁴
- 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 customers or customers with special needs.

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.

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.

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.

Non-adversarial Approach

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

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.

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.

BENCHMARK 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

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.

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

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 member 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 of competing interests.

¹² Suitable consumer representatives can be ascertained by a number of methods, including the relevant consumer organisation 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.

- (a) capable of reflecting the viewpoints and concerns of consumers; and
- (b) persons in whom consumers and consumer organisations 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 fulfil 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 organisations and government.

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.

BENCHMARK 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 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.

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.
- 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

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.

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.

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 member can seek the permission of the third party to release that information to the decision-maker in full or with deletions as appropriate.

BENCHMARK 4 - ACCOUNTABILITY

Principle

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.¹⁶

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 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.

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 and
 - (i) information about new developments or key areas in which policy or education initiatives are required.
- 4.4. The annual report is distributed to relevant stakeholders and otherwise made available upon request.

¹⁶ Systemic 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 of 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 scheme 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.

BENCHMARK 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 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.
- 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.

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.

- 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.

BENCHMARK 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.

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

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.

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.

²¹ The Standards Australia Standard on Complaints Handling AS 4269-1995 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.