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

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Mr Gary Clements
Chair, Consumer Affairs Australia and New Zealand

REVIEW OF AUSTRALIAN CONSUMER LAW (ACL) ISSUES PAPER

Dear Mr Clements

I am writing on behalf of the members of the Australian and New Zealand Ombudsman Association (ANZOA), the professional association and peak body for Ombudsmen in Australia and New Zealand.

ANZOA's comments address section 3.3 of the ACL Issues Paper, *Access to remedies and scope for private action*. One of the questions posed in this section is whether there are any overseas initiatives that could be adopted in Australia. The section also includes Case Study 14, which highlights developments in the United Kingdom (UK) and the European Union and the emergence in the UK in 2015 of both a Retail Ombudsman and a Consumer Ombudsman.

Under 3.3.1 which discusses effective dispute resolution, the ACL Issues Paper notes that "Australia has a well-established dispute resolution framework". This is true. Australia's consumer dispute resolution framework is among the world's best and, while the UK developments cited in the case study are noted, ANZOA believes Australia does not need to look overseas for industry-based Ombudsman best practice.

The ACL Issues Paper correctly highlights the establishment of industry-based Ombudsman offices¹ as effective examples of options available to Australian consumers for independent resolution of disputes. The Australian model of industry-based Ombudsman, now in its 27th year, is firmly underpinned by the *Benchmarks for Industry-Based Customer Dispute Resolution* (the *CDR Benchmarks*).

The *CDR Benchmarks* address six fundamental Ombudsman principles — accessibility, independence, fairness, accountability, efficiency and effectiveness. The Benchmarks document was reviewed and republished by the Australian Government in February 2015. ANZOA was pleased to support and contribute to that review. The *CDR Benchmarks* are now available in two parts from the website of The Treasury, Australia: *Principles and Purposes*² and *Key Practices*.³ They are also linked from the home page of the ANZOA website (www.anzoa.com.au).

ANZOA is aware of the UK's Retail Ombudsman and Consumer Ombudsman. Each was approved by the UK Government under *The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015*. The Retail Ombudsman deals with disputes between consumers and retailers (in-store and online), supermarkets, garden centres, restaurants and takeaways, hotels and leisure

¹ In financial services, energy, water, and telecommunications

² <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>

³ <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/key-pract-ind-cust-dis-reso>

providers, boiler installation and repair providers, and airlines.⁴ The Consumer Ombudsman (the former Ombudsman Services rebranded) deals with disputes about energy, communications, property and copyright licensing.⁵

In Australia, the dispute resolution role of the UK Retail Ombudsman is undertaken by the state and territory offices of Consumer Affairs/Fair Trading. Should the ACL Review conclude that there needs to be consideration of an Ombudsman model for consumer disputes with retail traders generally, development of the Ombudsman office must be undertaken in the context of correct use of the term Ombudsman and observe the principles and purposes of the *CDR Benchmarks*.

Correct use of the term Ombudsman is very important. The public understand an Ombudsman to be an independent office, which primarily has a complaint handling and investigation function. While Ombudsman offices commonly draw on their experience to facilitate dispute resolution between the parties, and to contribute to public policy discussions and consultations, Ombudsmen do not advocate for either side and they are not industry regulators. If an office is not going to operate as a true Ombudsman, it must not be called one.

ANZOA's guidelines for use of the term Ombudsman are set out in the association's February 2010 policy statement— *Essential criteria for calling a body an Ombudsman* — which is attached to this submission. The policy statement, together with extensive information about the origins, philosophy and role of the Ombudsman model of dispute resolution, is also available publicly on the ANZOA website.

As the peak Ombudsman body, ANZOA would be pleased to contribute its experience and expertise to any discussions about setting up Ombudsman offices, which may arise out of the ACL Review.

Please feel free to contact me on (03) 86008784 or through the ANZOA Secretariat at info@anzoa.com.au.

Yours sincerely



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⁴ <https://www.theretailombudsman.org.uk/>

⁵ <http://www.consumer-ombudsman.org/>

ESSENTIAL CRITERIA FOR DESCRIBING A BODY AS AN OMBUDSMAN

Policy statement endorsed 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**

More at www.anzoa.com.au

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 organisations 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 organisations 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 organisation 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 organisations 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 organisation 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 organisation 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 organisation 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.