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Promoting access in ADR

An alternative for who?

Access to ADR processes

Tania Sourdin

A body of research undertaken by the author over the past five years has revealed that there are a number of factors that impact upon the use and access to complaints and alternative dispute resolution processes by disputants. In particular, the research has suggested that many disputants who may have grievances or concerns do not access or use complaints and dispute resolution services. The research identified that complainants and disputants who tend to take action when they have a complaint or a dispute tend to be located in certain geographical areas, have a higher socioeconomic status, and that age and gender can be an important factor in determining whether disputants will access complaints and dispute resolution processes.

Introduction

The emergence of a wide range of industry, government and self-funded dispute resolution schemes has meant that disputes which may have otherwise been dealt with in a tribunal or court-based system are now increasingly settled or resolved through alternative dispute resolution (ADR) processes and complaints handling processes that are external to the formal court-based system. Research conducted into court-based schemes,¹ external dispute resolution schemes,² as well as research into consumers' experience in resolving their credit disputes at Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT),³ has found that disputants were often satisfied with the dispute resolution services offered by each of these schemes.

However, findings also suggest that not all potential disputants access these services or schemes. The research shows that characteristics of those who use ADR services are not representative of the general population (using ABS data) and they may not be representative of

the discreet population either.⁴ In addition, a lack of background and empirical research into the reasons why disputants decide to 'give up' on resolving their dispute, or which avenues disputants explore prior to lodging a complaint or dispute for resolution means that these issues have been largely unexplored or reported upon. Certainly, there are few statistics available on how effective or well-received any 'self-help' advice is or whether those that 'give up' do so because they find ADR schemes or services either difficult to access or too difficult to understand and engage with.

Of particular concern are findings which indicate that those who are most 'vulnerable' are those who are least likely to pursue resolution of their dispute through accessing or using ADR services.

ADR schemes and access

ADR schemes and services are often designed to provide disputants with more efficient, accessible and affordable dispute resolution options than litigation, when their dispute has failed to resolve. However, the schemes have not developed in a homogenous fashion, and as a result are arguably more susceptible to systemic design defects. Perhaps one of the most troubling aspects of this is that while schemes and services may satisfy large groups of disputants they may be unaware of those disputants who fail to access them.

Most schemes are designed to consider issues relating to access, as access is usually a key requirement in any dispute resolution scheme. For example, the *Benchmarks for Industry-Based Customer Dispute Resolution in 1997* articulates six benchmarks to consider in assessing system efficacy: accessibility; independence; fairness; accountability; efficiency; and effectiveness.⁵ The benchmark relating to accessibility requires that: 'The scheme makes itself readily available to customers by promoting knowledge of its existence,

being easy to use and having no cost barriers'.⁶ This benchmark can be broken down into: incorporating practices relating to awareness of the scheme; entry into the scheme; and cost and other barriers within the scheme (potentially including jurisdictional issues).⁷

In 2004 an International Standard on complaints management was produced.⁸ It sets out guiding principles such as visibility, accessibility, responsiveness, objectivity, charges, confidentiality, customer-focused approaches, accountability and continual improvement.⁹

Some research has been produced in relation to visibility which indicates that for some ADR services and processes may be neither visible nor accessible. Certainly, research conducted into public awareness of the Financial Industry Complaints Service (FICS) found that, as an ADR body, FICS was not particularly well known. A research project conducted into FICS's processes in 2000 and 2001 found that as the majority of referrals to FICS were from industry members, FICS relies on these referrals to ensure consumers have access to its dispute resolution services.¹⁰ In 2000 FICS commissioned its own research into awareness of its services and found that 8 per cent of industry members were willing to advise telephone complainants that there was no remedy available to them and 45 per cent named ASIC (or their regulator) as the key body for consumer protection and recourse, instead of naming FICS.¹¹

More recent research surveying Victorians' awareness of ADR services produced encouragingly high results. Consumer awareness was determined by reading interviewees a list of ADR service providers and asking them to indicate 'whether you have heard of any of them as a body that can help with a dispute'.¹² While members of the public may have heard of some of these ADR

service providers before, the small percentages of Victorians who reported having actually contacted one of them were markedly lower. For example, while 92 per cent of respondents had heard of CAV only 11 per cent reported ever contacting CAV; similarly, 79 per cent reported having heard of the Ombudsman Victoria but only 4 per cent had ever contacted it.¹³ This low contact rate is particularly concerning given the relatively high incidence of disputes reported.¹⁴

Conclusion

The combined findings from this research may indicate a significant gap in public awareness pertaining to the functions (and to a lesser extent the existence) of ADR service providers and highlight the potential value in promoting awareness of the range of ADR services, their differing jurisdictions and initial entry/contact points.

In addition to contributing to consumer confusion about where to lodge a complaint, a dispute resolution system with many elements which may not be sufficiently interlinked also means that each ADR scheme has its own establishment and running costs, as well as requiring individual publicity campaigns to ensure that the public not only knows of their existence but also their terms of reference.¹⁵ This can impact upon consumer access to schemes

‘Vulnerable consumers’ — that is, consumers who live in typically low socioeconomic, geographical regions or rural areas — have been found to experience additional barriers to accessing ADR schemes.¹⁷ In addition, information about other demographic indicators such as socioeconomic status, age and education reveals that access to financial services dispute resolution schemes may not be equitable in that consumers with certain demographic backgrounds appear to be unlikely to ever lodge complaints or pursue disputes. To address these issues, a more coherent approach to access is required by all providers and this is certainly an issue that researchers should factor into their research design. ●

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Endnotes

1. See Sourdin T and Matruglio T, *Evaluating mediation — New South Wales Settlement Scheme 2002*, La Trobe University, University of Western Sydney (Sydney, 2004).

2. See Elix J and Sourdin T, *Review of the Financial Industry Complaints Service 2002 — What are the issues?*, Community Solutions, La Trobe University, University of Western Sydney (Sydney, 2002).

3. The *Dispute Resolution Processes for Credit Consumers* was a research project conducted by the Conflict Resolution Research Centre at La Trobe

University, following funding from the Consumer Credit Fund at CAV. This article draws from material published in this research project, which can be downloaded at: <www.latrobe.edu.au/cr/research/cr-consumer/>.

4. For example, those accessing FICS might be expected to have certain characteristics as purchasers of financial services that would not be representative of the general Australian population.

5. See Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (August 1997), Canberra, also at <www.consumersonline.gov.au/downloads/selfreg/benchmarks/BMARK1.rtf> 24 January 2007. These benchmarks were developed prior to the Standard on Dispute Resolution and draw upon the earlier standard on complaints handling.

6. See Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (August 1997), Canberra — Benchmark 11 Accessibility at 11. Also at <www.consumersonline.gov.au/downloads/selfreg/benchmarks/BMARK1.rtf> 24 January 2007.

7. Above note 2 at 57.

8. ISO 10002: 2004, Quality Management — Customer Satisfaction — Guidelines for Complaint Handling in Organizations (2004).

9. Above note 8 at 3–4.

10. Above note 2 at 58.

11. *Financial Industry Complaint Service Bulletin*, June 2001 cited in Elix and Sourdin, above note 2 at 58.

12. Ipsos Australia Pty Ltd, *Dispute Resolution in Victoria: Community Survey 2007*, Department of Justice Victoria, Melbourne (2007) at 12.

13. Above note 12.

14. Above note 12 at iii.

15. Drake R, ‘Justice goes feral’, *Consuming Interest*, Summer (1995) 20 at 21.

16. Above note 15.

17. See generally: Sourdin T, *Dispute Resolution Processes for Credit Consumers*, La Trobe University (Melbourne, 2007); Sourdin and Matruglio, above note 1; and Elix and Sourdin, above note 2.

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as consumers that are continuously referred on are less likely to follow through with their complaints, particularly if they are required to pursue a single complaint through two separate ADR schemes.¹⁶ Moreover, the access issues resulting from a haphazard system design are likely to compound any access problems experienced by ‘vulnerable’ consumers.