



13 December 2011

Attn: Mr John Corker

Director
National Pro Bono Resource Centre
The Law Building, University of New South Wales
Sydney NSW 2052

By email: info@nationalprobono.org.au

Dear Mr Corker

Re: The National Pro Bono Resource Centre – Alternative Dispute Resolution and the possible role of pro bono lawyers (Discussion Paper)

Thank you for the opportunity to comment on the National Pro Bono Resource Centre (the Centre) – Alternative Dispute Resolution (ADR) and the possible role of pro bono lawyers. The Energy and Water Ombudsman (Victoria) (EWOV) welcomes the attention being given to the important and growing area of Alternative Dispute Resolution (ADR). We believe the Discussion Paper has identified many key benefits about ADR and the possible role of pro bono work within this process.

As identified in the paper, EWOV is an industry-based independent dispute resolution scheme that provides ADR services to Victorian energy and water consumers by receiving, investigating, and facilitating the resolution of complaints. EWOV's services are free to consumers and EWOV actively investigates the circumstances of complaints. This is in contrast with courts and tribunals, which are costly, adversarial in nature and make decisions based on submissions and evidence put before them by, or on behalf of, the parties. Even pro bono legal work is not necessarily free¹ and in some cases customers can still incur significant expenses. Accordingly, pro bono services are not an effective substitute for an ADR process, such as an Ombudsman service, which is completely free to consumers. In EWOV processes it is also unusual for a party to be represented by a professional advocate, although it is not unusual for complaints to be brought on behalf of customers by friends, family members or financial counsellors.

¹ Page 23 of the Discussion Paper, Section Six The role of pro bono - Identifying the gaps defines pro bono legal work as legal assistance that is free or at a substantially reduced fee.

Accessibility to dispute resolution services for consumers is crucial so that they are able to make complaints easily. As a member of the Australian New Zealand Ombudsman Association (ANZOA), EWOV is compliant with *The National Benchmarks for Industry Based Consumer Dispute Schemes*² and does not support a user pays or legalist approach to dispute resolution.

EWOV fully supports the National Benchmark that requires industry based dispute resolution schemes to:

- be free to customers
- maximise access
- discourage use of legal representatives (except under special circumstances)

In making this submission, as an industry Ombudsman scheme, EWOV's comments are based on our experience in providing ADR services to customers and our scheme participants.

Question 2: What types of ADR are most useful for disadvantaged and low-income clients?

There are many different types of ADR bodies, including industry Ombudsman schemes such as EWOV³, which are useful for disadvantaged and low-income clients.

Ombudsman schemes are particularly useful because they

- provide free services to customers
- offer tailored processes to resolve customer complaints
- are (highly) accessible to customers. Customers can usually raise complaints by phone, email, the internet, by an interpreter, or by a third-party representative.
- use an informal process. For example, EWOV does not require a written complaint, and the majority of customer complaints are resolved directly over the phone.
- have staff with specialist knowledge. In EWOV's case, the Conciliation Team has thorough knowledge about the energy and water sectors. This supports efficient, well informed, and tailored outcomes for each customer.
- help preserve a workable relationship between the parties in dispute
- generally resolve complaints quicker than litigation.

Disadvantaged and low-income consumers are best served by the free “one-stop shop” services such as EWOV, which have a minimum of financial and participatory barriers.

² Released by the Department of Industry, Science and Tourism, 1997, information about the accessibility benchmark can be found on pages 11 and 13.

³ Industry Ombudsman schemes include other state-based Energy and Water Ombudsmen schemes (e.g. the Energy and Water Ombudsman New South Wales (EWON), the Energy and Water Ombudsman Queensland (EWOQ), the Telecommunications Ombudsman (TIO), and the Financial Ombudsman Service (FOS).

Question 4: Can unequal bargaining power be overcome with legal representation and/or a skilled ADR professional?

EWOV strongly believes that a skilled, independent ADR professional can assist in significantly reducing the power imbalances between disputing parties.

This is certainly the case with industry Ombudsman schemes, such as EWOV, that redress power imbalances rather than create them. When there is a power imbalance between a complaining customer and their energy or water provider, EWOV redresses that imbalance through

- simple and easy complaint processes
- specialist knowledge of the relevant industry and the codes and regulations under which it operates
- access to decision-makers within the relevant business where the customer generally only has access to a business contact centre
- empowering consumers by translating complex and technical information into plain English for the customer. The fact that parties are generally not legally represented also assists in levelling the power imbalance by taking the focus away from legal rules (e.g. contract terms, which can more readily be taken advantage of by the business) and placing it on practical options for resolution of the problem.

Question 6: Is the impartiality of the ADR practitioner compromised if they act as both an advocate for a client and ADR practitioner in the same matter?

EWOV believes that the impartiality of an ADR practitioner is critical. In order to maintain this, an ADR practitioner must not act as an advocate for either of the parties in a dispute. Ideally, ADR practitioners should avoid any suggestion of bias or conflict of interest, and not act as advocates within the industries in which they operate. For example, a lawyer who acts for investment landlords should not be appointed as a mediator in a landlord/tenant dispute, despite not having acted for the particular landlord in question.

EWOV is both impartial and independent, and is neither a consumer advocate nor a spokesperson for the energy and water providers. EWOV achieves outcomes that are fair and reasonable and that consider good industry practice and the law⁴.

EWOV believes that if an ADR practitioner acts simultaneously as an advocate and an ADR practitioner, the perception of a fair outcome cannot be achieved, regardless of whether the outcome is in fact fair and reasonable. The dual roles are likely to result in the practitioner focusing primarily on the needs of one party over the other. The process would then lack procedural fairness and the ADR practitioner would be subject to claims of bias and conflict of interest.

⁴ Section 5.1 of EWOV's Charter.

We trust the above comments are helpful. If you require further information or have any queries, please contact Belinda Crivelli, Senior Research and Communications Officer, on 03 8672 4460.

Yours sincerely

A handwritten signature in cursive script that reads "Fiona McLeod".

Fiona McLeod
Energy and Water Ombudsman (Victoria)