ADR Scheme Harmonisation

Draft Decision Charter

December 2011

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Appendices 23

Executive Summary

Ofcom has been aware that Ombudsman Service (OS) and CISAS produce a different proportion of outcomes in favour of consumers. Considering all applications to the schemes in 2010, 88% of those sent to OS resulted in a positive outcome for the consumer, versus 64% at CISAS. Underlying these statistics are two trends:

1) CISAS settled a higher proportion of cases informally (and thereby provided the consumer with a positive outcome) in 45% of cases, versus 27% at OS.

2) Of the remaining cases which went to formal adjudication or investigation, in 84% of cases at OS produced outcomes in favour of consumers versus 35% at CISAS

Ofcom asked Mott MacDonald to evaluate the reasons driving the latter divergence in formal investigation and adjudication decisions.

In May 2011 Mott MacDonald completed an evaluation of the adjudication decisions of cases going to formal investigation and adjudication. Whilst no systemic issues were identified with decision-making at the schemes two issues were highlighted which make a marked contribution to the difference:

- OS's tendency to award small amounts of goodwill for customer service failings frequently and easily
- CISAS's tendency to take a slightly hard line regarding giving benefit of the doubt to the consumer, in situations where the word of the consumer conflicted with the CP

Mott MacDonald has therefore undertaken a specific review of these two factors at the schemes with a view to understanding the objectives and guiding principles of each ADR and how these are translated into the execution of fair and consistent decisions.

Mott MacDonald has identified that the schemes have much common ground with respect to their objectives and principles. Both organisations have sound structures in place, and place a high value on internal communication and consultation, to ensure consistency.

However, when it comes to decisions in commonly occurring cases in which evidence is lacking and the word of the consumer conflicts with that of the CP, there are some inconsistencies in approach both within and across the schemes.

Mott MacDonald has thus proposed the adoption of a Decision Charter, for use across the schemes, containing a set of clear and simple rules to be followed by decision-makers. The Decision Charter also contains a common framework for types and levels of award including a means of enabling a consistent approach to the provision of small awards for errors of maladministration.

The aim is to further consult, review and amend this draft Decision Charter, with a view to its adoption by the schemes as part of a programme of closer collaboration and communication between the schemes.

1. Introduction

1.1 Introduction

1.1.1 Differences between ADR schemes when resolving disputes

Ofcom has always been conscious that OS and CISAS have contrasting approaches to dispute resolution, and it recently became aware of evidence that suggests that the contrasting approaches of the two schemes might be resulting in material differences in outcomes for consumers. Statistics provided by each scheme show that in 2010:

- Of the applications to CISAS, 64% are likely to result in a positive outcome for the consumer:
  - 45% are settled informally between the CP and consumer
  - 55% go to adjudication, of which:
    - 65% are adjudicated in the CP's favour
    - 35% are likely to be in the consumer's favour (i.e. requires a remedy)

- Of the applications to OS, 88% are likely to result in a positive outcome for the consumer:
  - 27% are settled/mediated informally between the CP and consumer;
  - 73% go to a formal investigation, of which:
    - 16% are in the CP's favour; and
    - 84% are likely to be at least partially in the consumer's favour (i.e. requires a remedy)

Ofcom thus became concerned about what appeared to be a material difference between the prospects of success for a consumer going to either scheme (64% at CISAS vs 88% at Otelo). This difference was even more significant for those cases where the schemes were required to adjudicate the dispute (35% vs 84% respectively).

1.1.2 Mott MacDonald's (MM) Analysis of ADR Adjudications

As a result of the differences noted, in March 2011 Ofcom decided to undertake a review of the adjudication decisions at both ADRs with a view to understanding the drivers of the divergence. Ofcom thus commissioned Mott MacDonald to conduct analysis of a sample of data from both schemes (hereby "MM ADR Review 2011").

The main conclusions reached were:

- There did not seem to be a systemic problem with the adjudication process at either scheme. Both OS and CISAS made verdicts adjudged by Mott MacDonald to be Reasonable or Very Reasonable in over 80% of cases
- In spite of process differences at the two schemes, and nominally different approaches to the consumer, the evidence gathered from consumers was of an equivalent quality and the act of adjudication was very similar at both CISAS and OS
- However, there were two principal respects in which the adjudications made by CISAS and OS did differ, which had a direct bearing on the number of cases decided in favour of consumers.

  1. **CISAS displayed an occasional tendency to be too dismissive of the consumer's argument.**

     This was demonstrated through failing to give the consumer sufficient benefit of the doubt when their word conflicted with that of the CP. Instead of taking a middle ground, CISAS took the CP's viewpoint unduly in such cases. This resulted in a high number of outcomes entirely in favour of the CP (47% of cases).

  2. **OS displayed more of a tendency to award compensation / goodwill payments at the lower end of the scale.**

     The number of compensation / goodwill payments made by OS far outweighed the number at CISAS, and the majority of payments were for relatively small amounts. OS made 23 awards for sums less than £50, whilst CISAS only made 4 awards in this range. Some of these awards appeared to be for relatively minor infractions such as failure to respond to the odd letter or phone call, rather than persistent failings. It was also notable that in a few cases compensation awards were made to consumers in spite of the CP essentially having won the case.

- Mott MacDonald was of the view that both of these factors contributed to the difference in outcomes produced by the two schemes. Were both of these tendencies reduced the number of verdicts produced in favour of consumers would certainly become more equal across the schemes.

1.2 Objectives

As a result of these findings, Mott MacDonald made a number of recommendations designed to harmonise the approaches of the schemes so that they produce more consistent outcomes. In line with these recommendations, Ofcom's objectives for this project are to:

- Review, critique and establish common ground regarding the guiding principles governing adjudication decisions
- Work with the schemes to develop a common code of practice / set of guidelines to govern decisions made, in particular with regard to:
  a. Giving the benefit of doubt in cases where the consumer's word conflicts with the CP's word and / or terms and conditions
  b. Policy on compensation and financial remedies (the circumstances and size of awards).

1.3 Scope

This aim of this project is to focus on these two elements specifically, in order to put a framework in place for greater consistency with regards to these aspects, for development and use by both schemes.. The insights and recommendations of this report aim to address this focus, rather than wider considerations of the strengths, weaknesses and merits of each scheme.

Mott MacDonald is keenly aware that other factors also have an impact on the difference in outcomes produced by the schemes, for example:

- The difference in the member base of each scheme and the different mix of fixed, mobile and broadband CPs within this base
- The different approaches to informal settlement.

However, Ofcom have made it clear that it is intentionally not within the scope of this assignment to examine these factors directly. The focus is on the differences that exist in the actual act of adjudication – an act which, notwithstanding these factors – presents decision-makers with the same challenges and choices at both the schemes.

1.4 The Decision Charter

Whilst this draft report is a deliverable of the project, in essence the true deliverable at the heart of the project is the framework laid out in Appendix A: The Decision Charter.

The aim of this Decision Charter is to set out some common guidelines for the way in which decisions are actually reached. In doing so, Mott MacDonald has drawn upon many of the principles currently used by the schemes – some of which are inferred or implied at present, or passed on verbally during training and case review – but which are not all formally laid down. To a certain extent this is a process of reinventing the wheel, but consciously so – largely involving the formalisation and documentation of existing principles, rather than the invention of new ones. Several of the people interviewed commented on the gradual formalisation of procedures over time that has occurred at the schemes, and Mott MacDonald believes the Decision Charter can be seen as part of that continuing process.

However, whilst it draws on existing internal wisdom, the creation and common implementation of such a formal Charter would certainly be a departure. Mott MacDonald also believes that producing such a Charter is a useful means to debate and question some of the principles incorporated with the aim of agreeing a common understanding for future use.

It should be noted that the intention is not to replace or redraft existing documents such as OS's Terms of Reference or the CISAS Rules – which do touch in places on the process of adjudication but also with the governance of the organisations. The Decision Charter should be seen as complementary – although it is possible its adoption may require some appropriate alterations to those documents.

Finally, it is not expected that this first version of the Decision Charter will be complete or agreeable to all parties. The aim is to receive feedback from the schemes both directly and through engagement in a joint workshop, so that the Decision Charter can be scrutinised, refined and agreed.

A brief outline of the project methodology can be found in Appendix B.

2. Key Insights

2.1 Introduction

MM ADR Review 2011 established that many of the process differences between the schemes are incidental to the act of reaching a Decision. By this we meant that the type and quality of information considered by Investigation Officers and Ombudsmen at OS and by the Adjudicators at CISAS is very similar – despite differences in the path by which that information has arrived on their computer or desk. When it comes to making Decisions, the same evidence is considered in broadly similar ways.

However, as mentioned, there were some differences in outcomes relating to the burden of proof placed on consumers and the awarding of compensation. It was felt that this was partly a reflection of a difference in ethos at the schemes. Whilst both schemes purported to fulfil similar roles and with the same objectives, there was a different interpretation of these objectives when it came to the adjudication act.

Mott MacDonald's approach to analysing the reasons for this phenomenon was based around three areas of investigation:

- A review of the environment around decision-making at each scheme and the way in which this shapes decisions
- An analysis of the act of decision-making and the principles used to produce outcomes in the presence and absence of evidence
- An examination of policy and practices relating to the awarding of compensation.

Mott MacDonald's insights on each area are given in the sections which follow.

2.2 The Decision environment

2.2.1 Overview

Mott MacDonald was interested to examine several key aspects of the environment around decision-making, including:

- Remit and Objectives
- Terms of Reference / Rules
- Staffing
- Training
- Quality control
- Communication and Consultation

- Guidance materials

In conducting this review, Mott MacDonald studied documentation obtained from the schemes (see Appendix C for a list of Sources) as well as the comments made by interviewees.

It should be noted that it was not within the scope of this exercise to assess or critique the relative merits of all these elements with a view to operational or process improvement. For example, the two organisations have a different approach to staffing, which reflects the different culture of each scheme: CISAS employs professional adjudicators, many of which are legally trained; OS people from a range of backgrounds with the requisite adjudication skill-set. Since past research has indicated that there is a similar degree of accuracy and fairness in decision-making across the schemes, it is probably fair to infer that both are valid approaches. Both organisations naturally value people capable of assessing complex data, making sound judgements upon it, and able to communicate those judgements effectively to consumers and CPs.

Mott MacDonald has not probed more deeply into factors such as this at either scheme, except where it was felt to have a direct bearing on the making of Decisions. The aim was rather to distil from the documents provided and statements made a set of principles for incorporation in the Decision Charter.

2.2.2 Overall objectives

Mott MacDonald believes there appear to be more differences in perception than reality between the aims of the schemes. Indeed, there is a lot of common ground and the terms of reference and rules are broadly similar. The schemes have very similar objectives, as one would hope.

Principal amongst these are the desire to achieve fair and reasonable outcomes based on the evidence, the law and the circumstances of the case. This objective came across loud and clear from both internal documentation and the statements of interviewees.

Given the importance of the objectives as a foundation for the whole process of securing consistent outcomes, this is a positive finding for the creation of a common Decision Charter.

Underpinning these objectives were considerations regarding the mindset and perspective of the decision-maker in achieving a fair and reasonable outcome. Regarding this, three key principles could be observed:

- The importance of independence, integrity and impartiality
- The desire to level the playing field between the consumer and the CP
- The importance of not being a consumer (nor CP) advocate.

These three principles are considered below.

2.2.3 Independence, Integrity and Impartiality

These "3 I's" are the core principles of CISAS, but were equally emphasised by both schemes – both through their literature and the statements of the decision-makers interviewed. The importance of being independent was stressed time and again – in terms of being positioned clearly in the middle ground between the consumer and the CP – as was impartiality. The importance not only of being impartial but of appearing impartial was also felt to be important, as the integrity and credibility of the adjudicator can be undermined if such impartiality appears compromised by an impression of favouring one party over the other. The key was to have knowledge of and familiarity with the concerns and workings of CPs and consumers without being unduly swayed by either.

2.2.4 Levelling the playing field between consumer and CP

At the same time respondents were clear that there is a degree to which the schemes are there to level the playing field between the consumer and the CP. Interviewees recognised that there is an asymmetry between the two parties – in terms of resources, the ability to provide information and the ability to communicate.

Several ways are apparent in which the schemes could be considered to level the playing field:

- The very existence of the schemes, and the fact that they enable consumers to make complaints, helps to level the playing field
- The CPs are more likely to have the resources to fight a case in the courts. Moreover, the schemes have greater flexibility in terms of the remedies open to them (eg they can require an apology or corrective action)

- The way in which the schemes assist the consumer to put a case together (without putting words in their mouths or constructing their arguments) helps the consumer present a case better than they might if left to their own devices
- In ruling on cases a decision-maker can be mindful of the fact that the consumer and CP have different types of information at their disposal.

In terms of the act of decision-making, the last of these considerations is perhaps the most important. Mott MacDonald believes that levelling the playing field should not just mean providing a better channel for consumer complaints – but should imply a degree of tolerance with respect to the quality of the case put together by the consumer given the fact that the consumer has lesser means at their disposal.

2.2.5 Being neither a consumer, nor a CP advocate

However, both schemes stressed that a desire to level the playing field does not imply that they should operate as a consumer advocate. The consumer is not always right, and the schemes are not there to fight the consumer's corner. There is evidently a delicate balance to be struck between acknowledging the possible asymmetry between the parties and remaining fair to both. This goes back to the importance of being impartial and also relates to the importance of a consideration of the particular circumstances of a case (as discussed in section 2.3.2 below).

2.2.6 Reference made to past decisions

The decision-making culture at each scheme is founded on a robust formal training programme backed up by mentoring procedures and a QA process. More than anything, it is clear that at both schemes there is a high degree of communication and consultation regarding decision-making. There is constant, daily communication both between peers and senior staff, which was seen to be the crux of ensuring consistency at both schemes. The opinions of peers are sought on cases, including a consideration of their experience of similar past cases.

In this regard, the documentation which exists at both schemes regarding past cases is also highly valuable in ensuring consistency. Key documents at the schemes included:

- OS Guidance Notes – giving details not just of regulatory and technical aspects relating to testing case types – but importantly how to think about them from an adjudication perspective.
- OS Case Studies – sets of 2 complementary documents on a range of common and testing cases, which consider the details of the case, the CP's response and the Decision made
- OS Goodwill Matrix – A guide to offering goodwill for shortfalls in service
- CISAS Case Summaries – emails circulated of each Decision with a summary of each case and the Decision attached
- CISAS Case Studies – which give some advice on testing scenarios and a selection of recent interesting cases
- CISAS Compensation Summaries – a periodic report which not only summarises cases but orders them according to the size of the award made.

Reference to past cases – both through consultation with peers and referral to key documents – is evidently an important part of the Decision process. However, it should be noted that both schemes were clear that such consultation does not imply the use of precedent in any formal sense. Verdicts and award levels are still left to the discretion of the decision-maker rather than being bound by past rulings.

Mott MacDonald believes there would be great benefits to consistency from each organisation adopting the best practices of the other in this regard and sharing some of these resources across the schemes – either in their existing form or a new agreed format. This would be a valuable component of a process of closer collaboration, with the documents serving as a focus for regularly scheduled inter-scheme discussions and ideally more ad hoc communication.

2.2.7 Conclusions on Decision environment

Overall, therefore, sound structures are in place to make accurate and consistent decisions at both schemes, underpinned by the skill and aptitude of the decision-makers, a culture of consultation and valuable supporting materials. At both organisations Mott MacDonald also found there to be a genuine pride in, and enthusiasm for, the making of sound decisions.

Whilst this is to be applauded, it is nevertheless the case that some of the key wisdom required to make decisions is communicated verbally, and is gained from experience, or exists within the intellect of the decision-maker. This is to be expected, as decision-making is a matter of judgement; it is not a process one could automate.

However, it is also notable in this regard that:

1. There is no single document at either organisation in which all the objectives and principles of the scheme with regard to decision-making are laid down. In explaining fair and reasonable verdicts to consumers and CPs such a reference point would be useful – as well as being valuable to ensuring consistency across the schemes.
2. There appears to be little written guidance on how to interpret cases in which there is a lack of evidence, such as cases which turn on a consideration of the word of the consumer versus that of the CP.

Given the difficulty of making a fair and reasonable decision in such situations, which are not uncommon, Mott MacDonald feels more formal guidance could be given in this area. This could help to ensure that a) the reliance on judgement does not occasionally translate into different outcomes and b) adjudications are made in line with the stated objectives of the schemes.

2.3 Decision-making

2.3.1 Overview

Having examined the objectives, terms of reference and procedures in place at the organisations – all of which go towards creating an environment for consistently fair and reasonable decisions – the aim of this section is to analyse the act of decision-making itself.

2.3.2 The importance of evidence and circumstance

The first question asked of the key individuals interviewed at the two schemes with regard to the act of decision-making was to identify the key determinants of a decision. In other words: which essential factors should be considered to reach a fair and reasonable outcome?

It is clear that the simple answer is “the evidence” and this was emphasised by many interviewees. In defining what is meant by the evidence, respondents cited items such as the general conditions, any contracts in place, the relevant terms and conditions, copies of bills, correspondence, call recordings, system notes and the arguments made by the consumer and the CP.

To a certain extent this is obvious – although that does not mean the act is straightforward. Evidence can of course be complex and contradictory and skill in its evaluation is precisely where the knowledge and experience of the expert investigator, adjudicator or ombudsman come into play. In weighing up the evidence, the facts of the individual case and a consideration of the particular circumstances were stressed as being key.

However, whilst there was consensus that cases with complex evidence can be very testing, it is arguably even more difficult to produce fair outcomes in cases in which clear evidence is lacking. MM ADR Review 2011 identified that there was occasional inconsistency in these situations, with the consumer being given insufficient benefit of the doubt.

2.3.3 The law, regulations and terms and conditions

The law, relevant regulations, and the terms and conditions in place were understandably stressed as being an important reference point in determining the fair outcome of cases.

However, respondents also emphasised again the importance of considering the circumstances of the case and whether, in the given situation, it is equitable to enforce those terms. In past discussions with both CISAS and OS the schemes have both been clear that their objective is no more to ensure adherence to contractual requirements than it is to serve as a consumer advocate. In short, it is important to recognise the existence and importance of terms and conditions – and in some cases they give the CP a watertight case – but in considering them circumstances are also key.

2.3.4 The allocation of the burden of proof

The bottom-line position stated by many interviewees was that the onus is on the consumer to provide evidence to prove their case. This means that if a case boils down to a consideration of the consumer's word against that of the CP, it may be considered that the consumer has provided insufficient evidence to award them the outcome.

Whilst Mott MacDonald understands that it is incumbent upon the consumer to prove their case, it should be recalled that several of the statements made regarding the objectives of the scheme and the principles upon which they operate stress the importance of a fair and impartial position which gives due consideration to the evidence of both parties.

Mott MacDonald questions the extent to which it is fair always to place the burden of proof on the consumer, given the consumer often has less ability to provide evidence than the CP? Many of the statements made by the schemes emphasise the importance not just of considering the evidence of both sides, equally, but of levelling the playing field. Where neither party has provided compelling evidence, preferring the answer of the more powerful party would seem contrary to that intention.

To explore this issue with interviewees a number of scenarios were explored, but the key example was the following:

- A consumer has complained about the engineering charge levied by a CP for a visit by an engineer to their home. The terms and conditions state that the consumer is liable for this charge (of circa £100) if the fault identified is with the consumer's equipment (up to the box on the wall). However, the consumer is adamant that, when they reported the fault by phone and an engineer was ordered, the CP told them that there would be no charge for the engineer. The CP's case is that they would have told the consumer, but they have not provided a system note showing this was confirmed nor a call recording of the conversation.

In the case examined concerning engineering charges, the CP could have recorded a system note (e.g. BT's CAPC note) or retained a call recording, and the question should be asked: why did it not do so when this is within its power? The consumer has no such ability. Mott MacDonald understands the consumer has a responsibility to provide

evidence if making a claim, but felt that the schemes had a tendency to fall back a little too easily on the default position of "the burden of proof lies with the consumer". It is arguable also that requiring CPs to provide evidence where it is possible aids the process of ensuring they tighten up their procedures and improve their service levels, thus benefitting consumers overall.

When pressed on this matter further a number of decision-makers expressed the view that there were situations in which the burden of proof should shift to the CP. Where a charge or term is in place the CP must provide evidence to prove that term was agreed and applies in the specific case in question. As stated in section 2.3.3, terms and conditions are clearly an important reference point and if they are clearly relevant and agreed this makes the CP's case watertight, but some respondents indicated that they can be varied by verbal agreements made by the parties in some situations. The circumstances of the case always need to be considered in assessing what is reasonable and fair.

Mott MacDonald would welcome further discussion to define situations in which the burden of proof shifts, but a starting-point is for decision-makers to be mindful that this can happen.

2.3.5 Ruling on the balance of probabilities

One recourse referred to by many interviewees, of relevance in situations where evidence is contradictory or lacking, is to make a ruling based on the balance of probabilities. Several interviewees emphasised the importance of being able to step back from the evidence to read between the lines and interpret what is really likely to have gone wrong. This would seem both admirable and necessary.

However, whilst Mott MacDonald believes that ruling on the balance of probabilities is an important decision-making principle, care needs to be taken that the assumptions made regarding probability are also fair and reasonable to both parties. In looking to identify the probable cause and sequence of events attention needs to be given to any evidence which is effectively being assumed. The following sections examine two examples of this.

2.3.6 Assumptions regarding the "usual" behaviour of the CP

The documents and statements on principles of adjudication emphasised, many times, that the outcome of cases must be dependent on the facts of the particular case, in the circumstances.

In this context, it is interesting to note that almost all the interviewees from OS stated that, in the absence of concrete information from either side (for example in the engineering charges example cited above) one of the foremost considerations would be: what would that particular CP normally do? Several respondents emphasised a high level of familiarity with individual CP procedures, including in some cases knowledge of the scripts used by CP advisors, giving the decision-maker a means to establish what is most likely to have happened.

Mott MacDonald questions whether it is fair and reasonable to rely upon the *usual* behaviour of the CP – in other words, the behaviour of the CP generally or in other cases and not specifically this one. In the example explored with regard to engineering charges the CP had not provided evidence of agreement regarding the charge – through the recording of a system note or call recording. In this situation, if one rules in favour of the CP based on its usual behaviour, one is *assuming* facts. Whilst it was argued that making such an assumption enabled a decision based on the balance of probabilities, Mott MacDonald questions whether that is a sound application of that principle.

Whilst it is important to understand the workings of the industry and the practices of key players, care needs to be taken not to accept a version of events in a given scenario because a major CP has informed the scheme that this is how it *always* operates. It is arguable that in effect this enables the CP to make a case for itself through a different channel to the consideration of the individual facts of a given case – something which would not be consistent with ensuring a level playing field.

This also raises questions regarding the degree to which familiarity with the workings of a large CP represents a level playing field if there is a lesser degree of familiarity with the workings of a smaller CP. Two identical cases could potentially receive different verdicts thanks to greater familiarity with one CP compared to another, even if the

evidence presented by the CP in each case is identical. This would not be fair either to the small CP or the consumer.

2.3.7 Credence given to the consumer's word

The reliability of consumers was called into question by a number of decision-makers, based on the fact that consumers do sometimes forget information or lie about it. Some respondents stated that, even if the consumer is adamant they have been told there will be no charge for an engineer's visit, you can be confident that they will have been told.

Mott MacDonald would concur that past studies have indeed demonstrated "customer confusion." But just as it is reasonable to assume that consumers do not always recall the events accurately or tell the truth about them, so it is also reasonable to assume that sales and customer service reps do not always adhere to scripts or follow procedures. They are human too and as capable of "confusion". Some CPs outsource elements of their sales and service activities to third parties. It is impossible to know if the rep in question is experienced or on their first day in the role.

Preferring the CP's argument to that of the consumer on this basis implies a judgement on the relative reliability of a rep's conduct in comparison to a consumer's. Is it fair to make this judgement in favour of the CP simply because one is more familiar with CP procedures than with the individual consumer concerned? If so, this would not seem consistent with the stated desire to level the playing field. It also would not seem consistent with the stated desire to reach a verdict based on the facts.

Relying on the scripts and procedures of the CP is different from relying on their systems. For example, in the guidance on Disputed Call charges in OS's "Training Notes" document, it states:

"The charging system used by SP to record calls is totally automatic and is only activated when someone makes a call from their telephone line. It is incapable of generating a call and charging it to a customers' telephone account. SP cannot be held responsible where the calls have emanated from C's system."

This would seem reasonable, and implies one would side with the CP in a dispute on this matter, almost regardless of the consumer's statements to the contrary. However it is not the case that a CP sales or service rep is similarly "incapable" of error or omission. The fact that there are scripts and procedures is no guarantee that they were followed.

There was also evidence of a contradictory and unfair position with regard to the credence given to the word of the consumer and the CP when it came to correspondence. On one hand there was the feeling that if a CP had said it had sent out a letter it probably had, and that the CP should not be held liable if the consumer claimed not to have received it. On the other there was scepticism regarding statements from consumers about having sent letters to the CP – with hard evidence required to prove the consumer had sent a letter out and of it having been received. This seems to represent an inconsistency with regard to the burden of proof required of consumer and CP which would neither seem to be fair nor to reflect a level playing field.

2.3.8 Conclusions on Decision-making

As MM ADR Review 2011 indicated, there is certainly no systemic problem at either scheme with regard to the making of sound, fair and reasonable decisions. In the vast majority of cases decision-makers do a difficult job very well.

However, when it comes to ruling in cases in which evidence is lacking and the word of the consumer conflicts with that of the CP, Mott MacDonald's further analysis did reveal some inconsistencies between the stated objectives of the schemes and the practices they adopt. Mott MacDonald believes the principles stated in the Decision Charter will help to iron out these inconsistencies, so that outcomes are consistent across the schemes and with regard to the schemes' stated aims.

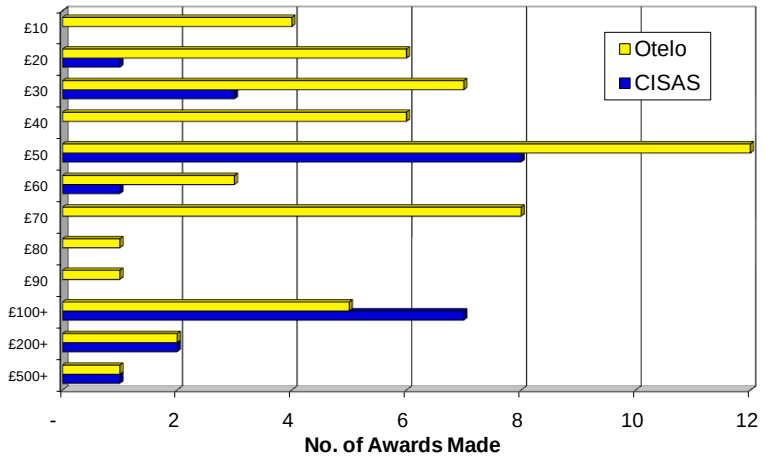
2.4 Compensation

2.4.1 Overview

MM ADR Review 2011 revealed an inconsistency between the two ADR schemes in the policies for awarding compensation. OS showed a tendency to offer small sums, under £50, as goodwill payments. CISAS offered very few awards of £50 and under and did not award goodwill at

all. This pattern across the cases analysed in that study is illustrated in Figure 2.1.

Figure 2.1: Compensation / goodwill awards by size



Source: Analysis of ADR Adjudications Report, May 2011

One of the key objectives of this current project is to review the policies at the schemes for awarding compensation with a view to identifying common ground and recommending a common approach. The aim of this would be to promote greater consistency in the awarding of compensation so that for similar cases consumers could expect similar remedies from the schemes.

2.4.2 Types of compensation

From the previous project and the current research it is apparent that both schemes recognise two types of compensation:

- Sums paid in redress as a corrective action
- Sums paid to compensate for shortfalls in service, failures in duty of care and for stress and inconvenience caused by the CP.

There is certainly some overlap between OS and CISAS in the way that compensation is considered, with recognition at CISAS that compensation can be paid for stress and inconvenience as well as redress. Both organisations both offer significant sums for loss of amenity and stress and inconvenience. However, even within this definitions do differ between the schemes, resulting in the different patterns mentioned above.

At OS, goodwill payments cover a multitude of sins – from significant and repeated failures in duty of care to relatively minor indiscretions relating to the poor handling of cases. The smaller goodwill payments are seen as important fine tuning in the determination of outcomes, similar in scale and effect to sending a bunch of flowers. OS emphasised that although small goodwill payments are not going to change someone's life, they do help. They are a means of acknowledging that something has gone wrong, that there has been a shortfall in terms of an expectation not being met.

One justification for making awards of this type was linked to the idea of giving compensation for maladministration – something traditionally considered by an Ombudsman. For example, with regard to public bodies The Crossman List defines maladministration as: bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness. OS also pointed out, in reference to MM ADR Review 2011, that in discussion with Ofcom, and in Ofcom's training of OS's staff on the new Ofcom Codes of Practice for Handling Complaints, it was made clear that, no matter the substance of the complaint, OS would be expected to consider whether the communication providers had followed the codes. Failure to comply with the codes would constitute 'maladministration'.

In its paper "Useful tips on proving your claim" CISAS defines three types of compensation: Actual Loss, Consequential Loss and Stress and Inconvenience. There is considerable overlap with OS here in spite of the use of different terms. However, it is at the "bunch of flowers" end of the spectrum that CISAS policy differs. From a practical point of view, CISAS adjudicators cannot award goodwill because it is not allowed by the Rules.

Moreover key decision-makers pointed out that a key reason stress as an inconvenience is not compensated by CISAS is because the law does not allow it. As a result of such legal considerations, CISAS stated

its belief that a consideration of compensation for minor stress and inconvenience – such as along the lines operated as a policy by OS – would be “treading on the boundaries of where the law allows us to go”, and that there was an indication from CPs that such a stance would not be easily accepted.

For there to be complete consistency with regard to compensation there would need to be a policy shift in this area, therefore, on the part of one of the organisations.

2.4.3 Levels of tolerance regarding customer service failings

In exploring the policy on awarding compensation, and mindful of the different approaches to awarding smaller sums for stress and inconvenience, Mott MacDonald was interested to canvass opinions on the degree of tolerance allowed for customer service failings. To what extent is it fair to expect anyone, let alone large commercial organisations, to respond to every request or answer every letter written? Where should the line indicating failure be drawn?

At present the organisations draw the line in different places with regard to tolerance of customer service failings. However, both felt that the key to determining where the line should be drawn is establishing failure against some commitment, obligation or duty. It is not enough for the consumer to feel aggrieved at the result of a case, or the response they have received from the CP, if this lack of response does not represent a failure to meet any commitment. Given there is a broadly similar outlook in principle here, if not in application, Mott MacDonald feels there is potential for the organisations to operate in a similar manner – if a common policy on the offering of small compensation awards can indeed be agreed.

2.4.4 The link between remedy and request

The schemes have traditionally seen this issue very differently, with CISAS adamant that the law and natural justice oblige a claimant to specify what they are seeking in order for a defendant to respond to a claim. Moreover, requiring the claimant to quantify what they are seeking aids informal settlement.

OS, on the other hand, believes that while it is desirable to know what a customer is seeking, it should not be a pre-requisite for making an

award the decision-maker deems to be fair. In its view, the consumer is not always in a good position to understand what they might be owed or if they are likely to be owed anything. They might not be very knowledgeable about telecoms, for example, or their case may be very complicated. They might complain about the bill, but the underlying problem may be something different. The investigator or Ombudsman is in a much better position to judge the situation and implications. Consumers are all very different – some make exaggerated compensation claims with little justification and request the maximum amount, others are more prudent but may actually have been treated very badly. All deserve to be treated equally.

There was agreement that it is desirable to have an indication of what the consumer is looking for, as this can aid informal settlement. But OS does not believe it should serve as any kind of restriction.

Mott MacDonald understands why it is useful and desirable to ask a consumer to state their claim, and if possible to identify an amount of compensation they feel might provide redress. Stating such a figure can indeed be an aid to informal resolution. However, Mott MacDonald does not believe that consumers who are unwilling or unable to state such a figure should be penalised for not doing so by the elimination of the possibility of an award or by this award being capped. The adjudicators, investigation officers and ombudsmen remain the best judges of the fair level of any award. Freeing them to make such an award regardless of the existence or size of a request will ensure greater consistency internally and across the schemes.

It is notable that the current Rules at CISAS throw up a situation whereby adjudicators end up making a Recommendation of an award, but are not able to require one, suggesting a conflict between what the adjudicators think is fair and reasonable and the current Rules.

2.4.5 The introduction of a common compensation framework

MM ADR Review 2011 recommended the establishment of a common compensation guide for use across the schemes, as means of ensuring greater consistency in the awarding of remedies. Mott MacDonald was keen to explore this proposition with the schemes to learn of their views.

There was tentative agreement that a common guide to compensation across both schemes could be a way forward, although it was felt that reaching a common viewpoint would not be easy. There was recognition that the schemes have different cultures and might approach the setting of awards differently – quite apart from the obvious difference regarding the awarding of small amounts of goodwill.

On this issue neither scheme felt the setting of a minimum bar for compensation payments – for example at £50 – would be a sound move, given that it was valuable to be able to award sums below this level. Whilst CISAS does this far less frequently, it still felt such a restriction would be artificial. The consensus was that a better approach would be to develop a consistent policy of some kind to govern this level of award.

Both schemes stressed that any joint compensation framework introduced would have to operate as a broad guide to setting compensation rather than being something rigid and prescriptive. It is felt vital to preserve the ability of the individual decision-maker to make decisions based on the circumstances of the case in question – circumstances which might justify a complete departure from the standard.

However, some did feel that, if it could be achieved, a common compensation guide would benefit consumers through aiding consistency across the schemes. Also, as with the current CISAS Compensation Guides, it could be a useful reference point not just for the schemes themselves buy also for consumers and CPs.

2.4.6 It was also suggested that key decision-makers at the two schemes were very capable of analysing award patterns and working out what the bands might be. This could potentially be achieved through a sharing of information, communication and round-table discussion. One view was that it might be better to develop such a framework through such a process of consultation, rather than imposing such a structure from outside. If this could be achieved, through the use of case examples from both schemes, a common compensation guide could be a useful tool. The Postal Redress Service compensation model

One solution proposed to iron out the discrepancy in policy over the awarding of small amount of compensation, would be to adopt a model similar to that used by the Postal Redress Service (POSTRS). Written into the rules of this scheme is the provision for consumers to raise complaints about the manner in which their complaint has been handled or the failure to respond to it. Proven claims can receive an award of up to £50 for a shortfall in this regard.

Mott MacDonald feels that the formal introduction of such a system, by both schemes, could help to ensure a common approach to awarding small sums of compensation for stress and inconvenience caused specifically by the poor handling of a complaint – thus standardising awards at the “bunch of flowers” end of the scale. This would require changes to the rules and terms conditions of each scheme, acceptance by CPs – as well as any appropriate alterations to their own terms regarding the handling of complaints. If agreed, such a move could help to enshrine the right to award small amounts for maladministration – in clearly defined circumstances for concrete failings.

Mott MacDonald believes it is also important to ensure that, even at this lower end of the compensation scale, the definition of a breach is clearly defined and that safeguards are introduced to make sure that awards are not being given where they are not deserved or as a means of making consumers feel better in situations where they have lost their case.

2.4.7 Conclusions on compensation

Mott MacDonald believes there is sufficient overlap in the compensation policies of the two schemes to give grounds for optimism with regard to the possibility of using a common framework for compensation.

Whilst OS uses the term goodwill to cover a multitude of sins, in many cases the schemes appear to be awarding broadly similar sums for the same things. CISAS does award compensation for stress and inconvenience – as clearly stated in many Decisions. It is only at the bottom end of the scale, where payments are closer to a proxy of a "bunch of flowers," that there is a significant difference in policy.

The incorporation of a model similar to that used by the Postal Redress Service is one solution to this situation which Mott MacDonald believes should be considered.

2.5 The concept of the Decision Charter

As a result of the analysis conducted, Mott MacDonald believes a Decision Charter for decision-making, defining some common objectives and principles and laying out a common approach to compensation would be of great value. Mott MacDonald's proposed draft of this Decision Charter (version 1.0) is included in Appendix A.

It should be noted that this charter is not assumed to be perfect by any means, and there will are elements which merit debate with Ofcom and the schemes, prior to revisions being made. The intention is for this version to serve as a starting point for joint discussion and debate, with a view to producing a version of the Decision Charter agreeable to both schemes and their respective CP subscribers. The intention is also for this charter to serve as a focal point for closer collaboration and communication between the schemes.

2.6 Next Steps

Mott MacDonald proposes the following next steps are undertaken:

Short-term

- Ofcom, OS and CISAS to review the current document, including the draft Decision Charter.
- Schemes to provide feedback to Ofcom and Mott MacDonald in a scheduled conference call
- Conduct a joint workshop with representatives from OS and CISAS on December 15th, with the aim of:
  - Debating the pros and cons of the Decision Charter
  - Proposing and initiating practical changes
- Revise the draft Decision Charter in accordance with discussions at the workshop and further consultation with the schemes.

Medium-term

- Develop a common compensation guide
- Develop a set of common case studies / guidance notes
- Make appropriate changes to terms of reference / rules
- Enshrine use of the Decision Charter in training and internal procedures
- Post Decision Charter on website
- Progress with information sharing across the schemes
- Establish a timetable and format for regular communication
  - Conference calls
  - Periodic meetings on key issues

Appendices

Appendix A. [1]Decision Charter (version 1.0)

A.1. Objective of the Schemes

To resolve disputes between consumers and communications providers by producing a fair and reasonable outcome based on the law, the evidence and the individual circumstances of the case (see 2.2.2).

A.2. Guiding principles

To achieve a fair and reasonable outcome, the Decision should:

1. Be taken with complete independence, integrity and impartiality (see 2.2.3)
2. Seek to level the playing field between the CP and the consumer by being mindful of the asymmetry that may exist in information, resources and the ability to communicate (see 2.2.4)
3. Not seek to advocate the position of the consumer nor the CP (see 2.2.5)
4. Be mindful of, but not bound by, past rulings in similar cases (see 2.2.6)
5. Consider only the evidence presented by the individual parties in the specific circumstances (see 2.3.2)
6. Recognise the prevailing regulations, law and terms and conditions (see 2.3.3)
7. Place the same burden of proof on both parties (see 2.3.4)
8. Be based on the balance of probabilities in the absence of conclusive evidence (see 2.3.5)
9. Exclude assumptions about the usual behaviour or practices of either the CP or consumer (see 2.3.6)

[1] OFCOM EDITORIAL NOTE: This appendix is an early draft of the Principles contained in the consultation document published alongside this report. Ofcom is not seeking views on this draft.

10. Give equal credence to the word of the consumer and the word of the CP (see 2.3.7)

The schemes should agree and share common reference materials illustrating the application of these principals in a range of typical and testing cases. (see 2.2.6).

A.3. Compensation framework

With all types of compensation awarded the decision-maker should be able to clearly express:

- What breach has triggered the award
- Why this breach is sufficient to justify an award
- The precise level of the award
- The reasoning for setting the award at this level.

A.3.1. Types

Three types of compensation should be in operation:

- Actual Loss
- Shortfalls in duty of care
- Maladministration.

The following parameters should be observed with regard to each.

A.3.2. Actual Loss

Before deciding on whether Duty of Care or Maladministration award is appropriate, adjudicators should address the quantifiable sums relating to actual losses incurred by the consumer. This means loss or damage experienced as a direct result of the CP's failure or error. Examples include:

- An incorrect charge
- The actual cost of a service not provided
- Call charges or other identifiable costs directly incurred.

Evidence must be identified to prove and quantify the sums awarded.

A.3.3. Shortfalls in Duty of Care

Secondly adjudicators should consider whether there has been a failure in duty of care owed to the consumer. The following would constitute a failure in duty of care:

- Unreasonable behaviour in dealing with problems
- Causing stress and inconvenience through concerted, repeated or sustained failure to respond to a consumer – when there was a clear commitment to do so
- Causing stress and inconvenience clearly above the levels normally to be expected in pursuing a complaint
- Unauthorised and unwarranted cancellation, suspension or disruption of service
- Slamming, mis-selling and misconduct during the sale and / or transfer of a service
- *[This list should be extended to include further examples]*

Whilst the schemes should seek to determine the level of compensation sought by a consumer, the specification of an amount should not be a pre-requisite for making an award and neither should the amount requested serve as a cap on the figure awarded (save for the overall £5,000 limit on the schemes).

The level of compensation to be awarded for the above and comparable shortfalls should be guided by a common compensation matrix for use across the schemes.

This matrix should be produced through a process of information sharing, communication and cross-comparison between the schemes, using a selection of past decisions as reference points.

A.3.4. Maladministration

Thirdly adjudicators should consider whether there have been instances of maladministration in the handling of the complaint. Examples of maladministration include:

- Delays that could have been avoided
- Faulty procedures, or failing to follow correct procedures
- Giving advice which is misleading or inadequate
- Refusing to answer reasonable questions
- Rudeness and not apologising for mistakes
- Mistakes in handling claims.

Where such shortfalls can be tangibly demonstrated in the handling of the complaint, adjudicators may award compensation / goodwill of up to £50.

The schemes should take care to ensure that compensation for maladministration is only awarded where there has been a clear breach of complaints procedures or the CP's duty to efficiently handle a complaint.

Appendix B. Methodology

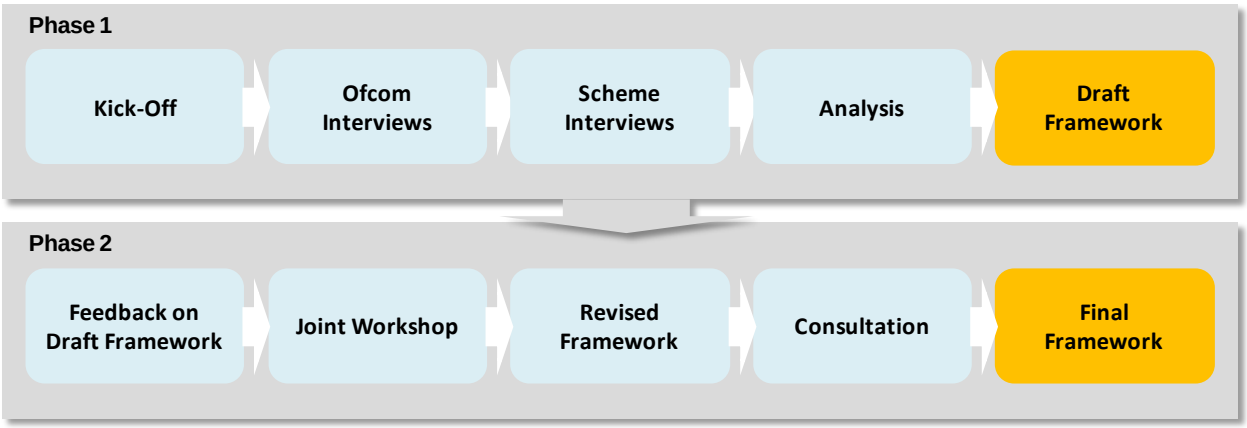
B.1. Approach

The plan is to complete this project in two phases:

- Phase 1: Consultation and draft framework development
- Phase 2: Workshop and framework completion.

An overview of this methodology is given in Figure 2.2:

Figure 2.2: Methodology



This draft report represents the final stage of Phase 1.

B.2. Key tasks completed

In line with the methodology depicted in Table 2.1, Mott MacDonald completed the kick-off and interviews with Ofcom, followed by interviews at the schemes. The following individuals were interviewed:

Table 2.1: Interviewees at each scheme

CISAS		Ombudsman Service	
Name	Title / Role	Name	Title / Role
[redacted] [redacted]	Consultant / former MD New MD	[redacted]	Chief Ombudsman
[redacted]	Senior CISAS adjudicator on the external panel	[redacted]	Telecoms Ombudsman
[redacted]	IDRS adjudication trainer and a CISAS external adjudicator	[redacted]	Assistant Telecoms Ombudsman

CISAS		Ombudsman Service	
Name	Title / Role	Name	Title / Role
[redacted]	IDRS Lead adjudicator	[redacted]	Head of Investigations
[redacted]	CISAS adjudicator	[redacted]	Investigation Officer - Training emphasis
[redacted]	CISAS adjudicator	[redacted]	Investigation Officer – Formal Stages
[redacted]	Director of Service and Development	[redacted]	Investigation Officer - MAS
		[redacted]	Director of Corporate Services
		[redacted]	Director of Operations
		[redacted]	Head of Enquiries
		[redacted]	HR (Training)

Mott MacDonald also analysed a number of documents obtained from the schemes and on their websites. A full list of the documents reviewed is given in Appendix C.

Appendix C. Sources

The following are the principal documentary sources reviewed from the schemes.

C.1. OS Sources

C.1.1. Corporate and Policy documents

- Ombudsman Services – Generic Terms of Reference (including Annex 1: Terms of Reference: for Ombudsman Services: Communications).
- Service Guide Communications
- Ombudsman Service Booklet
- Otelo Annual Report 2010
- Otelo Statutory Annual Report 2010
- Otelo Customer Satisfaction Report 2010
- OS Communications Sector Report 2011
- OS Communications Customer Satisfaction Report 2011
- OS Statutory Annual Report 2011
- Corporate Strategy 2011-2014
- Service Standards 2011
- Articles of Association 2011
- Privacy Policy
- Sector Liaison Panels, Terms of Reference
- Unacceptable Actions Policy
- Board Report – September 2011

C.1.2. Guidance materials

- Step-by-step guide to short form reporting
- Step-by-step guide to analysis
- FAQs, February 2011
- OS Communications, Ad Hoc paragraphs
- Goodwill Awards, April 2010
- Ofcom LLU presentation
- MZ Telco training, January 2011
- Standard Paragraphs
- Telco codes of practice
- Telco presentation technical information
- Training notes handout
- 18 Guidance notes
- 8 Case Study documents (situation and decision versions of each)

C.2. CISAS Sources

C.2.1. Corporate and Policy documents

- CISAS Rules
- Useful tips on proving your claim
- Proposed revision to CISAS Rules, June 2011
- IDRS Consumer Adjudication Course description
- The Postal Redress Service Rules
- Complaints procedure July 2011
- Implementing our values
- Quality Management Procedure 2011 and Annexes
- Sample contracts for Lead Adjudicator, External Adjudicator, Consumer Redress Adjudicator and model contract
- Job Descriptions: MD and Director of Service and Development
- The Slip Rule
- Mack v Glasgow case description
- Profile of the Adjudicators (from website)
- Online application form
- 3 examples of email summaries of Decisions
- Chartered Institute of Arbitrators, The Guidance
- The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members
- Example of breakfast meeting topics for discussion
- Decision reformat document
- Discussion paper on rule 5 (f)
- Customer Service and Satisfaction Survey 2009
- Annual Report 2010
- Discussion paper on Stress and Inconvenience
- Breakdown of cases settled in full
- Complaint breakdown stats Q1-4 2010
- Operational data reports Q1-4 2010

C.2.2. Guidance materials

- 9 Case studies documents
- 2 Case studies compensation summaries.