

Consumer Panel response to CAA Consultation on Policy for ADR applicants and approved ADR entities, CAP1324

Introduction and background

1. The Panel welcomes this [CAA consultation](#): its subject matter and the proposals in it are of considerable relevance to consumers and of great interest to the Consumer Panel. The CAA states that it has been in discussions with stakeholders on further potential enhancements to the ADR policy, both to make ADR work better for consumers and to encourage airlines that do not currently participate in ADR to consider the merits of the schemes that are offered by the two CAA-approved ADR bodies (namely CEDR and AviationADR).
2. The key focus of the consultation is about allowing complex or novel issues with wider implications (for example, airline strikes) to be determined through a process involving the CAA, or ultimately by the courts. The consultation document also proposes trust account arrangements for paying consumer awards, the opportunity to handle claims on a flight basis, and safeguards in non-regulated ADR schemes.
3. It is possible that airlines that are not currently members of an ADR scheme would be willing to join following the proposed changes. In our view this would be in the interests of consumers. For example, Ryanair was a member of AviationADR, but it left when that scheme decided that flight cancellations caused by strikes by Ryanair's own staff could not properly be classed as attributable to "extraordinary circumstances", and that therefore consumer compensation complaints should be upheld. The underlying issue of cancellations caused by airline strikes is awaiting final determination in a legal case between Ryanair and the CAA – precisely the way that the Consultation Paper proposes big issues like this should be determined. In a [response](#) to the DfT's Aviation Strategy 2050 in June 2019, Jet2 detailed its concerns about the current way major issues would be decided by an ADR scheme, but indicated that if changes along the lines of those proposed in the Consultation Paper were made, it would consider joining one of the schemes.

Poor presentation of this Consultation

4. The Consumer Panel was made aware by the CAA of the general ideas behind the proposal for novel and complex cases in August 2019 and made comments to the CAA in September and October. The Panel heard nothing more of the proposal until it was notified that this Consultation had been launched. The Panel was not given the opportunity to comment on it in advance. The Panel is strongly critical of the way that this Consultation has been presented. Although placed on the [Citizen Space](#) of the CAA website, it has clearly not been drafted or presented with citizens or consumers in mind. There is little excuse for this. The substantive proposals have been under consideration by the CAA for nearly a year. This is nevertheless a public consultation and the CAA should be

and be seen to be consulting everyone: ADR schemes, airlines and airports, consumers, consumer organisations, and other stakeholders such as claims management companies and specialist lawyers and legal firms.

5. The 'Overview' section does not begin to explain the effect of the proposals, merely stating that they are designed to encourage non-ADR-participating airlines to sign up to an ADR scheme. The 'Why We Are Consulting' section just appears to apologise for consulting airlines and airports rather than merely the ADR schemes. There is no mention of consumers. The text of the consultation is simply the legal text of CAP1324 with the proposed amendments shown in track changes. There is no text to explain how the effect of the proposals would work in practice or how they would affect consumers who might have claims that could be impacted.
6. The Consultation has been so poorly presented that consideration was given to whether to propose that it should be withdrawn and re-issued as a redrafted and better presented consultation that complies with good practice guidelines for public consultations. However, despite the inadequate presentation, the reluctant conclusion was that the balance of advantage for consumers lies in for pressing on and ultimately seeing these two airlines, and perhaps others not currently ADR scheme members, actually joining or re-joining a scheme. However, the Panel believes that changes should be made to the detail of the proposed arrangements in order to recognise consumer interests properly. Given the poor presentation, it would be helpful for the CAA to publish an in-depth response to this consultation, setting out its response to the issues and questions posed by respondents and setting out a proposed way forward. The CAA should not publish such an inadequately presented paper for public consultation again.

How often would the arrangements for complex and novel issues be needed?

7. The CAA states that on very rare occasions, an individual passenger complaint will raise an issue that is genuinely complex and novel in terms of its broader applicability. Such cases might involve circumstances that have not previously occurred, and/or where there is no established case law or clear principles for determining the outcome of the case. In such cases an alternative approach that incorporates the views of the CAA as well as those of the airline, the ADR body and the passenger, may be more appropriate, it says. For those complex and novel cases where a consensus cannot be reached between the CAA, the ADR body and the airline, the CAA's view is that the issue, and by extension the complaint, would be most appropriately resolved through the courts. In the CAA's view, only one or two complaints each year are likely to be considered complex and novel in this sense.

Should the new arrangements for "novel and complex" cases be part of the requirements for ADR schemes?

8. The CAA does not propose to require approved ADR schemes to adopt the new arrangements. It merely proposes that if an ADR scheme decides to offer

arrangements for deciding novel or complex issues outside the normal ADR process, the scheme and the relevant airlines must comply with the requirements set out in a new appendix to the Policy. One of the two schemes might decide to do so and the other not – or indeed neither might decide to do so. Although the CAA states that it has been in discussion with the schemes, it does not indicate whether either or both schemes are likely to be interested in adopting the new arrangements. While recognising the constraints of the ADR Regulations in which the CAA has to operate, nevertheless it would be helpful for the Consultation Paper to consider the effect if one scheme adopts these proposals but the other does not.

The steps in the process proposed to be adopted in potentially novel and complex cases.

9. The proposals lay down an elaborately choreographed set of steps to be followed involving initially just three parties – the airline, the ADR body and the CAA.

Deciding whether the matter is genuinely novel or complex

10. The initial move begins with an airline that is notified by an ADR body of a complaint that it (the airline) considers raises complex and novel issues. The airline has 14 days in which to notify the ADR body of its view. Within the next 7 days, the ADR body must tell the CAA, and must confirm whether it (the ADR body) agrees that the matter is novel or complex. The CAA will then arrange a discussion involving the CAA, the airline, and the ADR body and in the following 21 days it will seek to reach agreement. If agreement cannot be reached, then the member airline can instead confirm its view that the complaint raises genuinely complex and novel issues. If it is agreed that the matter is novel or complex the complaint file will be transferred to the CAA for it to put forward a view on the application of the “extraordinary circumstances” test. In the meantime, the person variously referred to as “the complainant” or “the passenger” is told by the ADR body that consideration of the complaint will “be informed by the CAA assessment”. At this point all other cases concerning the same issue will be put on hold, pending the outcome of the assessment.
11. However, the CAA does not explain what happens if no agreement is reached and the airline insists that the matter is novel or complex. There appears to be some kind of stalemate. The CAA should explain what is expected to happen in this situation.

The CAA’s assessment process

12. Once it is agreed that the complaint does raise a novel or complex issue, the complainant/passenger is for the first time permitted to be involved. The complainant, the airline and the ADR body may then make submissions on the main question as to whether the circumstances encountered by the airline

should properly be classified as extraordinary or not. These submissions should be made to the CAA within 35 days, with all these submissions being shared with all parties. The CAA may hold discussions or meetings with “the parties” and will consider whether to invite parties to reply to submissions made. Any meetings or further submissions must happen within 28 days of the expiry of the 35 day deadline. The CAA is then to issue its assessment to the parties as soon as reasonably practicable.

13. If the CAA’s assessment does not support the airline’s position, the airline has 14 days in which either to accept the assessment in which case the ADR scheme will finalise its adjudication; or to lodge an objection and then notify the CAA that it will issue legal proceedings, in which case these must be issued within three months of the assessment. Should it fail to confirm this, or fail to subsequently issue proceedings within the time period specified, the ADR scheme rules will set out that the member airline will be deemed to have accepted the CAA’s view and the final adjudication by the ADR body. The member airline will then have 14 calendar days to comply with the adjudication and to provide evidence which satisfies the CAA of compliance.

The Panel’s view: transparency

14. When the Panel was first informed of the general ideas behind these proposals, it urged the CAA to incorporate transparency into these arrangements. What is proposed is far from transparent. There is no suggestion in the Consultation Paper that any of this process would be open to public comment or scrutiny, despite the fact that these proposals are designed to affect potentially large numbers of other people and organisations. The tripartite discussions or submissions are all apparently to be private.
15. Under the heading ‘Transparency’, the CAA states that the CAA, the airline and the ADR body will share with each other relevant correspondence. It does not mention the complainant/passenger. This is a very limited model of transparency. Only when the ADR scheme has made a final adjudication does the CAA propose that details of the case be made public on the ADR body’s website.
16. The outcome – the CAA’s final assessment – represents a significant regulatory policy decision following private tripartite discussion. That is not the way regulatory policy decisions should be made. Public policy demands that such decisions should be preceded by open public consultation. Although not technically binding, that decision will have implications for the other stakeholders, including consumers and consumer bodies, other airlines, and the other ADR scheme, none of whom, it appears, will have been made aware of these discussions – or necessarily the outcome. Although public consultation would increase the timeframe, on balance the Panel considers that transparency is key here.
17. In particular the Panel urged the CAA to consider the position of consumers who have potential claims that may turn on the issue under scrutiny, or who

have made such claims but they have been rejected and now have the option to refer them to an ADR body. Should they spend the time and effort to pursue a claim, or to refer the matter for ADR, only for their claims to be put on hold? The CAA should ensure that the entire process is transparent to consumers and to their advisers at whatever stage they might be. This issue of publishing material whether on novel/complex issues or regularly encountered issues is considered below.

The Panel's view: fair balance for the consumer interest

18. The proposals envisage the CAA considering the legal and technical detail of the case under consideration, taking into account evidence from the airline and the ADR body, in order to come to a decision on the interpretation of the legal point in question. We would expect the CAA to identify a mechanism to ensure the consumer interest is taken into account in these considerations and we look forward to hearing how they intend to do this.

The Panel's view: fair process management

19. When the CAA is considering its assessment, the proposals envisage having *“meetings with the parties to discuss their evidence and submissions, and whether to invite replies to the other parties' evidence and submissions, on a case by case basis”*. As stated above it is important that the consumer interest is considered as part of this process. The process envisaged should be clarified and should ensure that natural justice, that requires all parties to be heard on an equal basis, is not breached. Separate representation of the consumer could be an example of a way of addressing the imbalance we perceive here.

The Panel's view: timescales

20. The proposals outline a sequence of time limited steps involving requirements on the various parties. These precise time limits give the impression of a driven process that admits of no excuses for delay, when the final part of the process – the assessment decision of the CAA - is subject to no time limit at all. Meanwhile all the consumer claims are on hold, the airline and the ADR body have to manage ongoing claims and enquiries. To give this process credibility, the CAA should also set itself a time limit for arriving at its assessment.

21. A key principle of any complaint handling process is that it should be **responsive, timely and flexible**¹. Complaints need to be dealt with promptly avoiding unnecessary delay and in line with clear and transparent timescales, which are communicated to complainants when their complaint is received. Where there are particularly complex cases, complainants need to be kept informed of reasons for the delay, and how long the process is likely to take. Staff dealing with complaints should have sufficient authority and autonomy to

¹ <https://www.qmu.ac.uk/media/5454/complaints-handling-guide-online.pdf>

make decisions about complaints early in the process where appropriate. It is advisable to have room for some flexibility within the process, where the circumstances require this. It would be useful to have a clear timescale for delivery of the assessment to avoid any unnecessary delay for the complainant and, importantly, for all of those whose claims have been placed on hold. The Consumer Panel's view is that this assessment should be provided in a specified period of time.

22. The Panel is similarly critical of the time allowed for an airline to issue proceedings. Three months is longer than an airline's lawyers need to draft an appropriate claim. The airline has already had time to consider with its lawyers whether to take this course of action. Proceedings could be issued much more quickly and the Panel would urge the CAA to consider imposing a shorter timescale.

The Panel's view: consumer cases on hold

23. Any further passenger complaints submitted to the ADR body concerning the same complex and novel issue are to be put on hold by the ADR body until the issue has been resolved. The fact that future complaints on the same issue will be put on hold should be transparent and visible on the ADR body's website to potential complainants. The ADR body is to advise individual passengers whose cases are on hold accordingly, *"including that they may take legal action themselves against the airline"*. Although nothing in a process of this kind can bind a consumer not to launch court proceedings, they should be informed that by taking proceedings while the case is being determined via a different mechanism, they could be at financial risk. The ADR body should also ensure that it can easily identify the complaints on hold and that it has the contact details of relevant complainants to provide updates. It should be required to update complainants on a regular basis.

Distinguishing issues that are genuinely complex and novel from those where established principles or case law should be sufficient

24. In providing for the possibility of a different route for the handling of cases of broad applicability that all turn on an issue that may be "novel or complex", the CAA has had to ensure that this possibility is not abused. Most cases, it suggests, involve circumstances that have previously occurred, and/ or where there is established case law or there are clear principles for determining the outcome of the case. It has therefore had to identify what are the commonly occurring types of cases where there are already clear principles or decided case law, and the new route should not be available to airlines. In other words, they are issues on which there is established principle and decided case law.
25. The route that the CAA has taken is to publish, alongside this Consultation, a [draft list of 23 commonly occurring issues relating to "extraordinary circumstances"](#) of the kind that might or might not entitle an airline to reject a compensation claim for a cancelled or delayed flight. These, it states, are covered by established principles or case law and should not therefore be

treated under the new process. These 23 issues include matters such as bird strike, ground damage to aircraft, airport system failure, weather, and crew shortage. The issues listed include circumstances that the CAA regards as both extraordinary and non-extraordinary. The list does not distinguish between what is regarded as extraordinary and what is not. It would be helpful to have a clear breakdown on the CAA website and/or that of the ADR websites. It would also be helpful to relate this to other material on the CAA's website on exceptional circumstances.

26. Panel members stressed to the CAA the importance of transparency so that consumers could understand how their complaints might be handled before referring a complaint to an ADR scheme. In particular, the Panel said, there should be more clarity about the approach to commonly occurring scenarios. We look forward to seeing the CAA do this.

Knowledge about extraordinary circumstances

27. These established principles and case law may be familiar to those in the industry, to lawyers, to the ADR schemes, to claims management companies and to the CAA, but they will not be familiar to individual consumers wondering whether to lodge a claim or to refer a rejected claim to an ADR scheme. Nor is there any easily accessible material – although the CAA clearly has a developed understanding of it. This is precisely where the Panel urged greater transparency to assist consumers. It is disappointing that the CAA appears not to have viewed this aspect of these proposals from a consumer viewpoint.
28. The Panel's advice to the CAA was to see how this question of publishing information about the approach to commonly encountered issues was handled in other sectors and by other ADR schemes - and in particular ombudsman schemes where best practice can be found.
29. The Panel's policy is that there should be a single ombudsman scheme for aviation complaints. It has pointed out that all ombudsman schemes aim to do more than just decide complaints - they aim to help consumers with information and industry to raise standards by being transparent with their decision-making and feeding back the results and lessons of what they see in the complaints they handle, so reducing the causes of complaints. They see this as part of a public service.
30. Unfortunately, the aviation schemes do little of this. They see themselves as offering a limited private commercial dispute adjudication function rather than a public service. In particular they do not publish information about their approach to regularly occurring cases, seeing this as commercially confidential intellectual property. No doubt each scheme has developed its decision-making approach to common issues. Both aviation ADR schemes in their latest reports [here](#) and [here](#) point to the extensive training materials each provides to its staff on such matters – none of which either publishes. Each scheme also is likely to make its member airlines clearly aware of its

approach, and the member airlines will no doubt be the best-informed critic of whether the approach taken is consistent with established principle and case law. Without transparency of this information however individual consumers will see only the reasoning applied in their own cases.

31. The cause of this lack of transparency is that there are two competing ADR schemes, and they are currently inhibited from providing this wider service by the fact that they are in competition with each other and have no incentive to cooperate for the benefit of consumers. We recognise that mandating a single scheme is not within the CAA's gift, although the Panel's position has long been that this would be an improvement for consumers. In the absence of legislation, the CAA could further strengthen its authorisation standards for schemes and we would be pleased to work with the CAA to do this.
32. It would be helpful if the CAA would take this opportunity to publish clear and more detailed guidance about the established principles and case law that it sees as applicable in regularly encountered circumstances, showing how different factors lead to different outcomes. It should draw on the experience and training materials of the ADR schemes and of its own PACT scheme. This more discursive material would form a more natural background, and place in context, the unexpected emergence of any novel or complex issue that might have implications for large numbers of actual or potential claims. The material should be kept regularly up to date in the light of new decided case law or changing circumstances. Where substantial changes potentially affecting large numbers of consumers are proposed, these should be subject to proper public consultation.
33. Following the Panel's October 2019 meeting the CAA was provided with information on how UK ombudsman schemes in other sectors aim to raise industry standards and to be transparent about their approach to decision-making. This is contained in Appendix A.

Other Proposals

34. Other proposals concern *trust account arrangements* for paying consumer awards – there is a new standard form trust deed to allow the CAA-approved entity to hold funds on behalf of a scheme member for the purpose of paying consumer awards. The Panel welcomes these proposals since they should have the effect of speeding up the payment of compensation to consumers.
35. There are also proposals for *handling claims on a flight basis*, which the Panel also welcomes.
36. Finally, there are proposals to avoid consumer confusion where ADR entity offers both *regulated and non-regulated* ADR schemes. While the Panel welcomes these proposals to improve signposting for consumers, we reiterate our support for strengthening the redress system and processes by proposing a single mandatory ombudsman scheme which would simplify consumer access to redress.

Summary of the Panel's recommendations

1. CAA consultations should follow the good practice guidelines for public consultation in future. (para 6)
2. While recognising the constraints of the ADR Regulations in which the CAA has to operate, nevertheless it would be helpful for the Consultation Paper to consider the effect if one scheme adopts these proposals but the other does not. (para 8)
3. The CAA does not explain what happens if no agreement is reached and the airline insists that the matter is novel or complex. There appears to be some kind of stalemate. The CAA should explain what is expected to happen in this situation. (para 11)
4. We would expect the CAA to identify a mechanism to ensure the consumer interest is taken into account in their consideration and we look forward to hearing how they intend to do this. (para 18 & 19)
5. The CAA should specify a time period within which it will complete its assessment decision. (para 20)
6. If an airline proposes to take proceedings to challenge the CAA's assessment, these should be issued quickly and the Panel would urge the CAA to consider imposing a shorter timescale than that proposed. (para 22)
7. If cases are put on hold the ADR scheme must regularly update the complainants affected. (para 23)
8. The CAA should publish clear and more detailed guidance for consumers about the established principles and case law that it sees as applicable in regularly encountered circumstances, showing how different factors lead to different outcomes. It should draw on the experience and training materials of the ADR schemes and of its own PACT scheme. This explanatory material should place in context any unexpected emergence of a novel or complex issue that might have implications for large numbers of actual or potential claims. The material should be kept regularly up to date in the light of new decided case law or changing circumstances. Where substantial changes potentially affecting large numbers of consumers are proposed, these should be subject to public consultation. (para 32)

APPENDIX A: Ombudsman schemes in other sectors

The **Financial Ombudsman Service** outlines on its website its approach to types of complaints. The link below shows how it explains for instance its approach to insurance cases, listing different types of insurance and its approach in each main area.

<https://www.financial-ombudsman.org.uk/businesses/complaints-deal/insurance>

The **Legal Ombudsman** already gives a fair amount of information on its site and recently published a consultation paper on how it might become more transparent and report its impact.

<https://www.legalombudsman.org.uk/wp-content/uploads/2019/10/Transparency-discussion-paper-October-2019.pdf>

It offers training courses to legal service providers to improve complaint handling and offer feedback <https://www.legalombudsman.org.uk/raising-standards/>

The **Local Government and Social Care Ombudsman** publishes all its decisions

<https://www.lgo.org.uk/decisions>

It also provides training courses for councils and care providers

<https://www.lgo.org.uk/training>

The **Energy Ombudsman** describes common areas of complaint

<https://www.ombudsman-services.org/sectors/energy> and has done more since Ofgem commissioned a review of the scheme

https://www.ofgem.gov.uk/sites/default/files/docs/2015/09/review_of_ombudsman_services_energy_2.pdf

As that report stated "*There is a potentially much wider role for the [Energy Ombudsman] than the one it is currently focussed on – which involves learning from the people who do complain and using this information to reduce the **causes** of complaints. This would benefit everyone, those who do complain, those who complain initially but do not pursue their claim, and those who do not complain.*"

The **Office of the Independent Adjudicator for Higher Education** publishes a Good Practice Framework as a guide to handling student complaints

<https://www.oiahe.org.uk/resources-and-publications/good-practice-framework/>

The **Housing Ombudsman Service** provides online training, case studies and complaint handling workshops for landlords and other material for residents

<https://www.housing-ombudsman.org.uk>

The **Independent Football Ombudsman** publishes its adjudications

<https://www.theifo.co.uk/adjudications.html> and an Annual Report [https://www.theifo.co.uk/docs/IFO_Ann-Rep_2018-19\(Web\).pdf](https://www.theifo.co.uk/docs/IFO_Ann-Rep_2018-19(Web).pdf) that reports on issues and makes recommendations in addition to its Annual Activity Report.

The **Waterways Ombudsman** publishes summaries of completed investigations

<https://www.waterways-ombudsman.org/publications/case-summaries/2019-20-case-summaries/>

The **Property Ombudsman** hosts industry and consumer forums, runs annual conferences, provides training, issues guidance notes, oversees the internal complaints procedure of its members, conducts member compliance surveys of members' internal complaint handling, and publishes case studies
<https://www.tpos.co.uk/about-us>

The **Rail Ombudsman** (which has only recently started) publishes cases studies, and says that in addition to investigating complaints it aims to support the rail industry to improve standards <https://www.railombudsman.org>

The **Adjudicator's Office's** (deals with complaints about HMRC and the Valuation Office Agency) website publishes information on how it provides feedback to consumers and to HMRC and VOA

<https://www.gov.uk/guidance/how-the-adjudicators-office-supports-hmrc-and-the-voa-to-learn-from-complaints>

The **Furniture Ombudsman** publishes consumer advice on particular topics, runs specialist training courses (eg on handling complaints about mattresses and beds).

It aims not just to deal with complaints, but to raise standards across the industry.

<https://www.thefurnitureombudsman.org>

The **Pensions Ombudsman** publishes all its decisions. It also provides guidance on commonly seen issues such as overpayments, ill health, misleading information etc.

<https://www.pensions-ombudsman.org.uk/guidance/>