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The Treasury

Key Practices for Industry-based Customer Dispute Resolution



KEY PRACTICES FOR INDUSTRY-BASED
CUSTOMER DISPUTE RESOLUTION

Key Practices

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Released by the Hon Bruce Billson MP
Minister for Small Business

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FOREWORD



The Australian Government is pleased to release the *Key Practices for Industry-based Customer Dispute Resolution*. Dispute resolution services are good business practice, providing industry sectors with an external, cost-effective option to resolve disagreements with consumers.

Many of these Key Practices originated in the *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (the CDR Benchmarks) established in 1997. The CDR Benchmarks were designed as a non-regulatory standard for industry-based, external dispute resolution, which was then emerging as an accessible alternative to the court system.

Since that time, the CDR Benchmarks have proven to be timeless ideals for dispute resolution services in general.

As a result, the Benchmarks principles and their underlying purposes have been enshrined as the *Benchmarks for Industry-based Customer Dispute Resolution*. While adherence to the CDR Benchmarks is largely voluntary, they have been adopted by a large number of dispute resolution services.

The Key Practices are complementary to the *Benchmarks for Industry-based Customer Dispute Resolution*, which are described by many stakeholders as ‘immutable’ standards for industry-based dispute resolution in Australia and New Zealand. The Key Practices provide dispute resolution service providers practical ways to implement the benchmarks into their schemes. By establishing the Key Practices as a separate document, these practices can be revised as necessary in response to stakeholder feedback, or to incorporate changes in technology and the community at large.

The Key Practices were drafted to be flexible and not prescriptive or onerous. Industries are encouraged to develop further guidance material for their own industry sectors to further assist dispute resolution schemes and participating organisations to apply the Benchmarks.

Stakeholders are encouraged to write to the Commonwealth Consumer Affairs Advisory Council (CCAAC) at CCAAC@treasury.gov.au. CCAAC will then suggest revisions and updates to the Key Practices to the Government.

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BENCHMARK 1: ACCESSIBILITY

PRINCIPLE

The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.

PURPOSE

To promote access to the office on an equitable basis.

KEY PRACTICES

Awareness/Promotion

- 1.1 The office¹ seeks to ensure that those in the community who may require its services are aware of its existence.
- 1.2 The office promotes its services in the media or by other means.
- 1.3 The office produces readily available material in simple terms explaining:
 - a) how to access the office;
 - b) how the office works;
 - c) the major areas with which the office deals; and
 - d) any limits on the office's powers.
- 1.4 The office requires participating organisations² to inform customers³ about the office.⁴ This may include providing information at the point of service (for example, in displays or brochure stands), in contracts, codes of practice and customer service charters, on websites and in newsletters and correspondence forwarded to customers.
- 1.5 The office ensures that information about its services, procedures and scope is made available to customers by participating organisations when the participating organisation responds to a complaint.⁵

1 The 'office' refers to a person or organisation providing external dispute resolution services. The type of office established will differ according to the size and nature of the industry in which it operates.

2 'Participating organisation' refers to an organisation which participates in a customer dispute resolution service or are within the jurisdiction of the office.

3 The term 'customer' is used to refer to any consumer who purchases or has purchased goods or services from participating organisations, and may also refer to someone affected by the participating organisation.

4 This key practice relates to a general promotion of the services of the office by participating organisations. The circumstances in which individual customers are required to be informed about dispute resolution services is dealt with in key practice 1.5.

5 A 'complaint' is an expression of dissatisfaction about an organisation, related to its products and services, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected; see the Standards Australia Standard on Customer Satisfaction: Guidelines for complaints handling in organisations, AS ISO 10002 – 2006.

- 1.6 The office also ensures that this information is made available by participating organisations:
- a) when customers are not satisfied in whole or in part with the outcome of the internal complaints mechanism⁶ of a participating organisation;
 - b) when the participating organisation refuses to deal with a complaint; or
 - c) when a reasonable time⁷ has passed for the participating organisation to resolve a complaint, and the complaint remains unresolved, whichever first occurs.
- 1.7 The office promotes its services in such a way as to be sensitive to and inclusive of customers with particular requirements, including those experiencing disadvantage. This includes making information available in appropriate languages, and in alternative formats such as large text and audio.
- 1.8 The office focuses its promotion efforts on areas where a customer is likely to seek information in the event of a dispute; for example, the websites of consumer agencies and advocacy services.

Access

- 1.9 The office seeks to ensure access to any person who may require its services.⁸
- 1.10 The office provides appropriate facilities and assistance to enable participation by complainants across the community, including those with particular requirements and those experiencing disadvantage. This includes allowing contact in a range of modes (in person, by telephone, telephone typewriter, fax, email or online), providing interpreter services, providing text in simplified English and/or available in large print format.
- 1.11 Complainants can make initial contact with the office orally or in writing.⁹
- 1.12 There are arrangements for participating organisations to refer a complaint to the office in appropriate circumstances.¹⁰
- 1.13 The jurisdiction of the office is expressed clearly.¹¹
- 1.14 The office seeks to minimise any 'virtual barriers' to complainants, for example, by providing 24-hour contact options such as an online complaint form.

6 An 'internal complaints mechanism' refers to the system set up within a participating organisation to handle complaints by customers or complainants.

7 'Reasonable time' will depend on a number of factors, including the requirements of any internal dispute resolution procedure, the nature of the complaint and the inquiries required.

8 Maximising access to the office could include measures such as providing toll free telephone access for consumers/complainants.

9 In most cases, office staff will help a complainant reduce a complaint to writing where the complainant requires assistance to do so.

10 Any arrangements for referrals by a participating organisation must consider relevant privacy laws and any other legal requirements.

11 The jurisdiction of an office, setting out the functions of the office including the complaints the office can and cannot deal with, may be included in documents such as legislation creating the office, the terms of reference for the office, or the charter or constitution of the office.

Cost

- 1.15 There is no application or other fee or charge required from a complainant before a complaint is dealt with by the office, or at any stage in the process.¹²

Staff Assistance

- 1.16 The office's staff have the ability to handle complaints and are provided with adequate training in complaints handling.
- 1.17 The office's staff explain to complainants in simple terms:
- a) how the office works;
 - b) the major areas it deals with;
 - c) any limits on its powers; and
 - d) the timelines applicable to each of the processes in the office.
- 1.18 The office's staff assist complainants to make a complaint, where complainants need assistance to do so.

Use

- 1.19 The office's processes are simple to understand and easy to use.
- 1.20 The office provides for a complainant's case to be presented verbally or in writing, at the discretion of the decision-maker.
- 1.21 The office provides for complainants to be supported by another person at any stage in the office's processes where necessary.

Acceptance by Office

- 1.22 The office assesses complaints received for timely and appropriate action: for referral to an alternative avenue for justice, or a regulator; for liaison where there may be an overlap in jurisdiction with another dispute resolution office; or for acceptance as a case by the office.
- 1.23 The office follows a defined and transparent process for excluding potentially vexatious or frivolous complaints to ensure appropriate use of the office's resources and minimise the risk of unreasonable cost increases.

¹² In special cases, where an office agrees to provide services that are outside its jurisdiction at the request of a complainant, there may be a limited exception to this rule.

Non-adversarial Approach

- 1.24 The office uses appropriate techniques including conciliation, mediation and negotiation in attempting to settle complaints.¹³
- 1.25 The office provides for informal proceedings which discourage a legalistic, adversarial approach at all stages in the office's processes.

Legal or other Representation

- 1.26 Parties should not be prohibited from having a support person in attendance.
- 1.27 Legal representation will generally only be allowed with the permission of the office. Unless legal representation is required, having regard to the nature of the dispute and issues involved, it will generally be discouraged by the office.¹⁴
- 1.28 Where an office agrees to one party being legally represented:
- a) the office will provide the opportunity for the other party to be legally represented; and
 - b) the office will require the participating organisation to pay the legal costs of complainants where the participating organisation is the first party to be legally represented.

Legal Proceedings

- 1.29 A participating organisation will not commence legal proceedings before a court, tribunal or other forum in respect of a complaint before an office, except in special circumstances. Special circumstances may include:
- a) where the legal limitations period for bringing legal proceedings is about to expire; and
 - b) where the complaint is to be used as a test case in legal proceedings.

13 While the focus of the scheme is mainly on alternative dispute resolution, it may also have a function allowing the making of a final determination about a dispute where a dispute cannot be resolved by alternative dispute resolution techniques. Such functions may include arbitration. Initially, complainants are encouraged to discuss their complaint with the participating organisation and use any internal complaints mechanism that is available. Offices are then encouraged to attempt to settle complaints before they are referred for a final determination. The office does not have to use all of the listed alternative dispute resolution techniques listed – those listed above are recognised techniques.

14 At times, it may be appropriate for a paid representative to act for a consumer in the dispute resolution process; for example, when a consumer experiences communication difficulties.

BENCHMARK 2: INDEPENDENCE

PRINCIPLE

The decision-making process and administration of the office are independent from participating organisations.

PURPOSE

To ensure that the processes and decisions of the office are objective and unbiased, and are seen to be objective and unbiased.

KEY PRACTICES

The Decision-maker

- 2.1 The scheme has a decision-maker¹⁵ who is responsible for the final determination of complaints.
- 2.2 The decision-maker is appointed to the office for a fixed term.
- 2.3 The decision-maker is not selected directly by participating organisations, and is not answerable to participating organisations for final determinations.¹⁶
- 2.4 The decision-maker has no relationship with the participating organisations that funds or administer the office which could give rise to a perceived or actual conflict of interest.

Staff

- 2.5 The office selects its own staff. Office staff are not answerable to participating organisations for the operation of the office.

15 The 'decision-maker' refers to the individual, panel of individuals or other entity which is responsible for the final determination of a complaint. For most offices, the decision-maker will be the Chief Executive Officer of the office. The decision-maker most commonly has the title of Ombudsman or Commissioner. For some offices, a decision-maker may include a panel of persons charged with making a decision.

16 Where the decision-maker consists, for example, of a panel of individuals, only the chair or the individual, who controls the decision-making process, is required to be independent of an industry or consumer interests and be appointed by the entity which oversees the independence of an office's operation. Where the decision-maker consists of more than one individual, the chair ensures the independence of the decision-making. This allows for the relevant industry to be represented on the decision-making entity, as long as a balance between consumers and industry is maintained.

Overseeing Entity

- 2.6 There is a separate entity set up formally to oversee the independence of the office's operation.¹⁷
- 2.7 Where the office is established as a company, the overseeing entity must have a balance of consumer, industry and, where relevant, other key stakeholder interests involved in governance.
- 2.8 Representatives of consumer interests on the overseeing entity¹⁸ must be:
- a) capable of reflecting the viewpoints and concerns of consumers; and
 - b) be a person in whom consumers and consumer organisations have confidence.
- 2.9 As a minimum the functions of the overseeing entity should include:
- a) appointing or dismissing the decision-maker;
 - b) making recommendations for or approving the office's budget;
 - c) receiving complaints about the operation of the office;¹⁹
 - d) recommending and being consulted about any changes to the office's jurisdiction;
 - e) receiving regular reports about the operation of the office; and
 - f) receiving information about systemic problems.

Transparency

- 2.10 The office manages any actual or perceived conflicts of interest and bias in a transparent manner.

Funding

- 2.11 The office has sufficient funding to enable its caseload and other relevant functions to be handled in accordance with the Benchmarks for Industry-based Customer Dispute Resolution.

17 There are a variety of arrangements which may be put in place to meet this requirement. For example, an overseeing entity may include a council or other body usually consisting of an independent chair, consumer member or members, member or members from participating organisations and, where relevant, other stakeholder member or members. Offices established under statute may have specified the arrangements to make sure the office is independent, and these offices may be subject to arrangements including accountability to Parliament, a Parliamentary Committee or a Minister, in addition to, or instead of, an overseeing entity. Smaller industry sectors or those with few complaints may not have the ability or need to devote large resources to setting up such an entity. Other types of overseeing entities are not precluded as long as they allow for suitable independence or a balance of competing interests.

18 Suitable consumer representatives can be ascertained by a number of methods, including the relevant consumer organisation providing a nominee, advertising for representatives, or the relevant consumer affairs agency or Minister responsible for consumer affairs nominating a representative. Suitable industry and other stakeholder representatives can be sought from the relevant industry association or stakeholders respectively.

19 The receipt of complaints about the office's operation (by the entity which oversees the independence of the office's operation) does not extend to receiving appeals against the determinations of the decision-maker.

Terms of Reference

- 2.12 Changes to jurisdiction of the office are made in consultation with relevant stakeholders, including participating organisations, industry and consumer organisations and government.
- 2.13 Participating organisations do not have a power or right to veto a proposed change to the jurisdiction of the office, or to significant rules and procedures of the office.

BENCHMARK 3: FAIRNESS

PRINCIPLE

The procedures and decision-making of the office are fair and seen to be fair.

PURPOSE

To ensure that the office performs its functions in a manner that is fair and seen to be fair.

KEY PRACTICES

Final Determinations

- 3.1 The decision-maker bases final determinations²⁰ on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law.

Procedural Fairness

- 3.2 The office's staff advise complainants of their right to access other redress mechanisms at any stage if they are dissatisfied with any of the office's decisions²¹ or with the decision-maker's final determination.
- 3.3 The office provides information to both parties at the same time, including timely ongoing communication on the progress of the investigation and decision.
- 3.4 Both parties can put their case to the decision-maker.
- 3.5 Both parties are told the arguments, and sufficient information to know the case of the other party.
- 3.6 Both parties have the opportunity to rebut the arguments of, and information provided by the other party.
- 3.7 Both parties are told of the reasons for any decision in writing.
- 3.8 Both parties are told of the reasons why a complaint is outside jurisdiction or is otherwise excluded.

Provision of Information to the Decision-Maker

- 3.9 The decision-maker encourages, but cannot compel,²² complainants to provide information relevant to a complaint.

20 The term 'final determination' is used to refer to the final decision made by the decision-maker when determining a complaint. For some offices, a final determination may be in the form of a recommendation to a participating organisation.

21 The term 'decision' is used to refer to any decision made by the office's staff other than a final determination.

22 An exception to this requirement may occur where an office has been established under statute, and the statute provides for the office to compel the production of information.

- 3.10 The decision-maker can demand that a participating organisation provide all information which, in the decision-maker's view, is relevant to a complaint, unless that information identifies a third party to whom a duty of confidentiality or privacy is owed,²³ or unless it contains information which the participating organisation is prohibited by law from disclosing.

Confidentiality

- 3.11 Where a participating organisation provides information which identifies a third party, the information may be provided to the other party with deletions, where appropriate, at the discretion of the decision-maker.
- 3.12 The office ensures that information provided to it for the purposes of resolving complaints is kept confidential, unless disclosure is required by law or for any other purpose specified in the Benchmarks for Industry-Based Customer Dispute Resolution.

Review of Decisions and Determinations

- 3.13 The office establishes a process to review decisions and determinations for consistency and compliance, such as selective sampling and auditing of cases.

²³ Where a duty of confidentiality or privacy is owed to a third party in relation to information sought by the decision-maker, the participating organisation can seek the permission of the third party to release that information to the decision-maker in full or with deletions as appropriate.

BENCHMARK 4: ACCOUNTABILITY

PRINCIPLE

The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.²⁴

PURPOSE

To ensure public confidence in the office and allow assessment and improvement of its performance and that of participating organisations.

KEY PRACTICES

Procedures

- 4.1 The office makes available to participating organisations, complainants and other interested bodies its guidelines and policies for dealing with complaints.

Final Determinations

- 4.2 The office makes available written reports of final determinations and the reasons for the decision²⁵ to participating organisations and any interested bodies for purposes including:
 - a) educating participating organisations and the community; and
 - b) demonstrating consistency and fairness in decision-making.
- 4.3 Public reports of final determinations do not name parties involved.

Responding to Complainants and Participating Organisations

- 4.4 The office uses comments received from complainants and participating organisations to inform the continuous improvement of their internal processes and procedures, and to inform their public reporting.

24 Systemic problems can refer to issues or trends arising either out of many complaints about one participating organisation or out of many complaints (which are essentially similar) about more than one participating organisation.

25 Written reports of final determinations can consist of a concise summary of a decision-maker's determination and reasons for the decision. It is not necessary to make all written reports of all determinations made by the decision-maker publically available. The final determinations that are reported should be left to the office's discretion. It is not envisaged that written reports would necessarily be provided of other decisions (apart from final determinations) made by the office.

Annual Report

4.5 The office publishes a detailed and informative annual report containing specific statistical and other data about the performance of the office, including:

General information

- a) a description of the jurisdiction of the office (for example, a list of participating organisations and outline of complaints that can be received);
- b) information about how the office works;
- c) information about how the office ensures equitable access;
- d) information about new developments or key areas in which policy or education initiatives have been undertaken or are required;
- e) a list of participating organisations supporting the office, together with any changes to the list during the year; and
- f) where the office's jurisdiction permits, the names of those participating organisations which do not meet their obligations as members of the office.²⁶

Information about complaints

- a) the number and types of complaints it receives and their outcome, including information outlining the complaints received and outcomes for each of the participating organisations;
 - b) the time taken to resolve complaints;
 - c) any systemic problems arising from complaints;
 - d) examples of representative case studies and reports on investigations; and
 - e) in appropriate cases, information about any participating organisations which do not meet their obligations.
- 4.6 The annual report is to be made public, including through distribution to participating organisations, relevant stakeholders and otherwise made available upon request.

²⁶ The office's jurisdiction should state whether it will disclose the names of participating organisations which do not meet their obligations to the office. Examples of where a participating organisation does not meet its obligations to the office will include where it does not provide information when requested or where it does not comply with a final determination.

BENCHMARK 5: EFFICIENCY

PRINCIPLE

The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

PURPOSE

To give the community and participating organisations confidence in the office and to ensure the office provides value for its funding.

KEY PRACTICES

Appropriate Process or Forum

- 5.1 The office will only deal with complaints which are within its jurisdiction. The office will generally not deal with complaints that have been dealt with, or are being dealt with, by another dispute resolution forum.²⁷ The office will generally only deal with complaints:
 - a) which have been considered, and not resolved to a person's satisfaction, by a participating organisation's internal dispute resolution mechanism; or
 - b) where a participating organisation has refused, or failed within a reasonable time,²⁸ to deal with a complaint under its internal dispute resolution mechanism.
- 5.2 Any provision in the internal dispute resolution mechanism of a participating organisation requiring a complaint to reach a deadlock before it can be dealt with by the office must be reasonable, and must allow the office to deal with a complaint where it is clear that it has not been resolved to the satisfaction of the person making the complaint in reasonable time.
- 5.3 The office has mechanisms and procedures for referring complaints that are not within its jurisdiction to other, more appropriate, forums.
- 5.4 The office liaises with other forums where there is a complaint entailing a potential overlap in jurisdiction.
- 5.5 The office has mechanisms and procedures for dealing with systemic problems that become apparent from complaints, including by investigating these issues or referring them to relevant participating organisations, or to regulators or policy makers.
- 5.6 The office excludes vexatious and frivolous complaints, at the discretion of the decision-maker.

²⁷ Complaints which have been made to one office but are found to be more appropriately dealt with by another office can be dealt with by the latter office. It is where a complaint has been subsequently considered by one scheme that a complainant is discouraged from forum-shopping.

²⁸ 'Reasonable time' will depend on a number of factors, including the requirements of any internal dispute resolution procedure, the nature of the complaint and the inquiries required.

Timeliness

- 5.7 The office considers timeliness in all of its processes and procedures, including the timeliness of acknowledging and responding to an initial complaint, time taken to investigate a complaint, and the time taken to make a decision.

Tracking of Complaints

- 5.8 The office has a reasonable time limit set for each of its processes which facilitate speedy resolution without compromising quality decision-making.
- 5.9 The office has mechanisms to ensure compliance with time limits, as far as possible.
- 5.10 The office has a system for tracking the progress of complaints.
- 5.11 Office staff keep parties informed about the progress of their complaint.

Monitoring

- 5.12 The office sets objective targets against which it can assess its performance.
- 5.13 The office keeps systemic records of all complaints and enquiries, their progress and their outcome.
- 5.14 The office conducts regular reviews of its performance.
- 5.15 Office staff seek periodic feedback from complainants and participating organisations about their perceptions of the performance of the office.
- 5.16 The office reports to the overseeing entity on the results of its monitoring and review.

Professionalism

- 5.17 The office recruits staff with the requisite skills, qualifications and experience to perform the work efficiently.

BENCHMARK 6: EFFECTIVENESS

PRINCIPLE

The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

PURPOSE

To promote community confidence in the office and ensure that the office fulfils its role.

KEY PRACTICES

Coverage

- 6.1 The scope of the office and the powers of the decision-maker are clear.
- 6.2 The scope of the office (including the decision-maker's powers) is sufficient to deal with:
 - a) the vast majority of complaints in the relevant industry or service area and the whole of each such complaint; and
 - b) complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of customer transactions in the relevant industry.²⁹
- 6.3 The decision-maker has the power to make monetary awards of sufficient size and other awards (but not punitive damages) as appropriate.³⁰

Systemic Problems

- 6.4 The office has mechanisms for referring systemic industry problems, based on cases brought to dispute resolution, to an appropriate regulator for action if required.
- 6.5 The office has mechanisms to determine when to bring systemic problems to the attention of policy agencies or other relevant bodies, such as industry associations.

Office Performance

- 6.6 The office has appropriately qualified staff to undertake its functions, and provides ongoing professional development and appropriate resources and processes to allow staff to effectively undertake their functions.

²⁹ This requirement applies only where a monetary limit is specified. Because the loss arising from the determination of a complaint may vary according to the industry or service area concerned, the Benchmarks Key Practices do not specify a monetary limit above which complaints are excluded from the office.

³⁰ A monetary award includes a final determination.

- 6.7 The office has procedures in place for:
- a) receiving complaints about the office; and
 - b) where appropriate, referring complaints about the office to the overseeing entity for action.
- 6.8 The office responds to complaints and any recommendations of the overseeing entity in a timely and appropriate manner.

Internal Dispute Resolution Mechanisms

- 6.9 The office requires participating organisations to set up internal dispute resolution mechanisms, and to inform those affected by the organisation's services about the mechanisms.³¹
- 6.10 The office has the capacity to advise participating organisations about their internal dispute resolution mechanisms.

Compliance

- 6.11 The office has mechanisms to encourage participating organisations to cooperate with the office, and to abide by the rules of the office.³²
- 6.12 Final determinations of the decision-maker that are not recommendations are binding on the participating organisation if complainants accept the determination.
- 6.13 The office has methods to mandate or improve compliance with decisions, and ensure redress for customers when a participating member is non-compliant with an office's final determination, decision or recommendation.

Periodic Independent Review

- 6.14 The operation of the office is reviewed regularly by an independent party at set periods.
- 6.15 The review, undertaken in consultation with relevant stakeholders, includes:
- a) the office's progress towards meeting the Benchmarks for Industry-based Customer Dispute Resolution;
 - b) whether the scope of the office is appropriate;
 - c) participating organisation and complainant satisfaction with the office;
 - d) assessing whether the dispute resolution process used by the office are just and reasonable;

31 The Standards Australia Standard on Complaints Handling AS 4269-1995 can assist participating organisations to set up appropriate internal dispute resolution mechanisms.

32 Mechanisms for encouraging participating organisations to abide by the rules of the office could include statutory requirements, contractual obligations of the participating organisation, or naming in annual reports or otherwise those participating organisations which do not abide by the rules of the office.

- e) the degree of equitable access to the office; and
- f) the effectiveness of the statute, charter, terms of reference or other document establishing the office, its jurisdiction, functions, rules and procedures.

6.16 The results of the review are made available to relevant stakeholders.