



Australian Government  
The Treasury

**B E N C H M A R K S**  
for  
Industry-Based  
Customer Dispute  
Resolution Schemes

Released by  
Senator the Hon. Chris Ellison  
Minister for Customs and  
Consumer Affairs  
August 1997

# Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes

Issues paper

April 2013

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## FOREWORD

At the 6 July 2012 COAG Legislative and Governance Forum on Consumer Affairs meeting, Ministers considered that it would be timely for the *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (the Benchmarks) to be reviewed for ongoing relevance and possible enhancement. To facilitate this process the Assistant Treasurer, the Hon David Bradbury MP, has issued the Commonwealth Consumer Affairs Advisory Council (CCAAC) with terms of reference for a review of the Benchmarks.

Consumers rely on a range of mechanisms to ensure that they get what they pay for when purchasing goods or services. Consumer laws provide core protections for all consumers, while other arrangements – such a business’ participation in accreditation schemes or voluntary codes of practice – provide consumers with greater confidence that goods and services are likely to meet their expectations. When a consumer considers that a business has failed to act in accordance with its obligations, they may wish to make a complaint.

Consumers may be motivated to make a complaint for a number of reasons. They may simply wish to draw attention to their grievance, or they may complain to seek redress for a perceived injustice.

For consumers to have confidence that a business is committed to meeting its obligations, it is important for the business to have processes in place to ensure that customer complaints are taken seriously. Participation in an industry-based customer dispute resolution scheme is a useful way for businesses to demonstrate such a commitment. Industry-based customer dispute resolution schemes play an important role in ensuring that consumers have access to credible, efficient and flexible dispute resolution.

In Australia and New Zealand, the Benchmarks play an important role in guiding effective practice for such schemes. There have been a number of developments since the Benchmarks’ release in 1997. Changes in technology, dispute resolution methodologies as well as an increasing number and diversity of schemes mean that there is value in re-examining the Benchmarks.

This paper has been prepared to gain a deeper understanding and further insight on how the Benchmarks are used in Australia and New Zealand, and to determine how they can best serve the community into the future.

CCAAC looks forward to hearing the views of interested stakeholders.



**Colin Neave**  
**Chairman, Commonwealth Consumer Affairs Advisory Council**



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# THE COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL

## CCAAC TERMS OF REFERENCE

CCAAC is an expert advisory panel, which provides advice to the Assistant Treasurer on consumer policy issues.

CCAAC's terms of reference are to:

- consider issues, reports and papers referred to it by the Minister and report to the Minister on their consumer policy implications, and in doing so take account of the need for well-functioning markets with confident consumers;
- identify emerging issues affecting Australian markets and consumers and draw these to the attention of the Minister; and
- when considering consumer policy issues, take account of their competition and other relevant economic implications.

## Membership

The membership of CCAAC consists of:

- Mr Colin Neave AM (Chair);
- Ms Carolyn Bond AO;
- Professor Stephen Corones;
- Ms Lynda Edwards;
- Ms Deborah Healey;
- Mr Peter Kell;
- Mr Gordon Renouf;
- Dr Rhonda Smith; and
- Mr Ray Steinwall.

## REQUEST FOR COMMENTS

The CCAAC has developed this Issues Paper, *Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes* to:

- raise issues being considered by CCAAC in relation to the review; and
- seek public and stakeholder comments in relation to these issues.

Responses are requested by 5:00pm on **24 May 2013** and can be submitted to:

CCAAC@treasury.gov.au

or

CCAAC Secretariat  
c/- The Manager  
Consumer Policy Framework Unit  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

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### **Confidentiality**

It will be assumed that submissions are not confidential and may be made publicly available on the CCAAC website (*see* <http://www.ccaac.gov.au>). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* for a submission marked confidential to be made available will be determined in accordance with that Act.

Generic email disclaimers, for example as part of a signature block, may not be taken to imply confidentiality on submissions that are attached.

## GLOSSARY

Alternative Dispute Resolution (ADR)	An umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.
External Dispute Resolution (EDR)	Dispute resolution processes that are external to the business or organisation for which the complaint relates.
Industry scheme	Any entity established by an industry to consider complaints made by that industry's customers, including those that do not currently apply the Benchmarks' principles and key practices (but may be capable of doing so).
Terms of reference (for an industry scheme)	An industry scheme's jurisdiction, purpose and objective whether understood formally through a written document issued to it by an overseeing entity or informally through a common understanding amongst stakeholders.

## TERMS OF REFERENCE

The Assistant Treasurer, on behalf of the COAG Governance and Legislative Forum on Consumer Affairs (CAF), requests CCAAC to review the *Benchmarks for Industry-based Customer Dispute Resolution Schemes* document (the Benchmarks Document) that was issued by the then Commonwealth Minister of Customs and Consumer Affairs in August 1997.

For the review, CCAAC is requested to:

- review the current function and use of the Benchmarks Document;
- consider for each benchmark, the ongoing relevance and usefulness of the underlying principles, purposes and key practices;
- assess whether the Benchmarks Document is meeting the objective of acting as a guide to effective practice for those industry sectors with customer dispute resolution schemes; and
- consider how the Benchmarks Document could be modernised or enhanced, including through the development of implementation guidance.

CCAAC is requested to consider the views of interested stakeholders.

## BACKGROUND

The Benchmarks Document states the principles, purposes and key practices for the benchmarks of Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness. The Benchmarks Document guides effective practice for those industry sectors with schemes to resolve disputes between their industry members and individual consumers. The Benchmarks Document also serves as a guide for consumers as to what they should expect from dispute resolution schemes.

The benchmarks are referenced in both Australia and New Zealand for the approval of dispute resolution schemes where participation is required by legislation for some industry sectors.

The Benchmarks Document was developed with the assistance of industry sector dispute resolution schemes, consumer groups, government and regulatory authorities.

## PART I — INTRODUCTION AND CONTEXT

As part of Australia and New Zealand's commitment to effective dispute resolution, the *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (the Benchmarks) were released to support industry when developing and improving customer dispute resolution schemes. Published in 1997 by the then Department of Industry, Science and Tourism, the Benchmarks were developed with the assistance of dispute resolution schemes, consumer groups, government and regulatory agencies.

### EMPOWERING CONSUMERS AND THE NATIONAL CONSUMER POLICY OBJECTIVE

Confident and empowered consumers are an important part of a dynamic economy by driving business innovation and supporting competition. Commonwealth, state and territory Ministers for Consumer Affairs regard consumer empowerment as being important to consumer wellbeing and effective competition. The COAG Legislative and Governance Forum on Consumer Affairs<sup>1</sup> (CAF) National Consumer Policy Objective is:

*[to] improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly.<sup>2</sup>*

The objective is supported by six operational objectives one of which is to provide accessible and timely redress where consumer detriment has occurred.<sup>3</sup> This review concerns access to redress through industry-based dispute resolution processes.

Effective dispute resolution at the industry level is an alternative to government regulation and the judicial system. The *OECD Consumer Policy Toolkit* highlights that access to dispute resolution and redress is a key component of practical policy options that can be taken to address a consumer policy objective (as illustrated in Figure 1). For example, dispute resolution and redress are important complements to supply-side policy tools such as codes of conduct (also referred to as codes of practice), as well as licensing and accreditation.

The Benchmarks are capable of supporting organisations or industries that seek to develop the complaints handling elements of these tools. Here, the Benchmarks can also be considered alongside other guidance publications including those published by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).<sup>4</sup>

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<sup>1</sup> Formerly the Ministerial Council on Consumer Affairs.

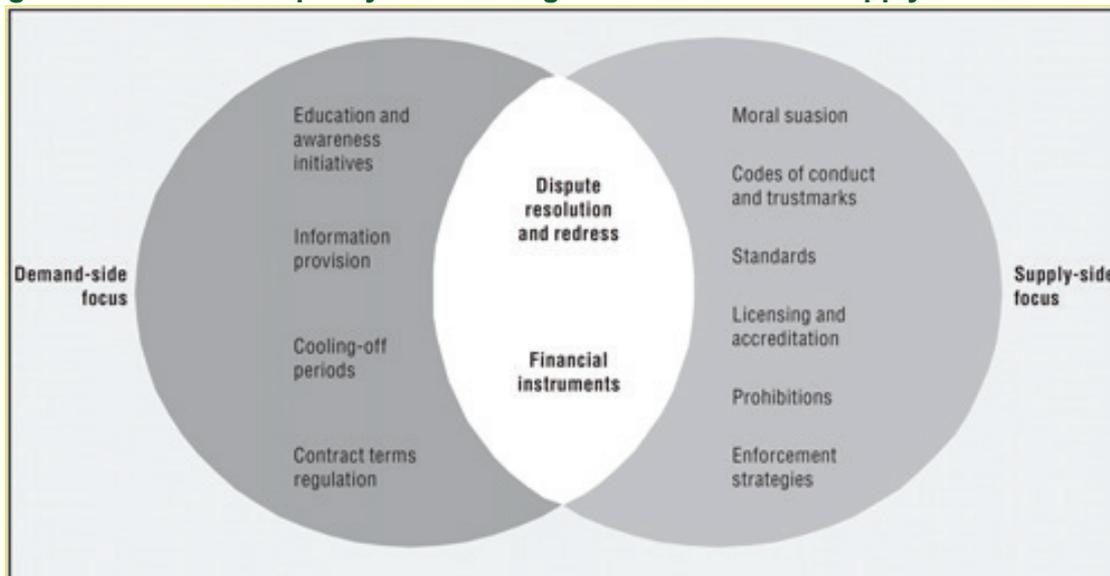
<sup>2</sup> Ministerial Council on Consumer Affairs 2009, *A new approach to consumer policy: Strategy 2010-2012*.

<sup>3</sup> Council of Australian Governments 2009, *Intergovernmental agreement for the Australian Consumer Law*.

<sup>4</sup> For example, see ACCC 2011, *Guidelines for developing effective voluntary industry codes of conduct*, Canberra, viewed 19 March 2013

(see <http://transition.accc.gov.au/content/item.phtml?itemId=658186&nodeId=8c401ba4a594710cd4cb4bcd45c13340&fn=Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>).

**Figure 1 — Consumer policy tools to target the demand and supply side of markets**



Source: OECD Consumer Policy Toolkit

## THE BENCHMARKS

The Benchmarks act as an objective guide to effective practice for those industry sectors which operate, or are in the process of establishing customer dispute resolution schemes (industry schemes). Consumers are also able to refer to the Benchmarks in informing their expectations from such schemes.

The Benchmarks outline six benchmarks, including their underlying principles, which are intended to apply to industry schemes. The six benchmarks include:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency; and
- effectiveness.

These benchmarks are broadly consistent with the access to justice principles outlined in the Australian Government's *Strategic Framework for Access to Justice*.<sup>5</sup>

As noted in the Terms of Reference, the six benchmarks are referenced in both Australia and New Zealand for the approval of dispute resolution schemes where participation is required by legislation for some industry sectors. The Benchmarks are also the basis of eligibility criteria to the Australia and New Zealand Ombudsman Association which is a professional

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<sup>5</sup> Available at: <http://www.ag.gov.au/LegalSystem/Pages/Accessstojustice.aspx>.

association for Ombudsmen, including industry-based Ombudsmen, which operate in Australia and New Zealand.

While a part of this review is to assess whether the Benchmarks are meeting the objective of acting as a guide to effective practice for those industry sectors with customer dispute resolution schemes; CCAAC acknowledges, at the outset, that the Benchmarks have had successes in this regard (including through their application as part of regulatory frameworks).

The Benchmarks offer a principle, purpose and outline of key practices for each benchmark and are available to download from the CCAAC website.<sup>6</sup>

## **ABOUT THIS ISSUES PAPER**

This consultation paper has been prepared for the purposes of inviting interested stakeholders to comment on the issues being considered by CCAAC.

Part II provides an overview of customer dispute resolution, and the purpose and application of the Benchmarks. Part III examines the best practice framework provided by the Benchmarks with reference to the six benchmarks and their underlying principles and key practices. Part IV considers the usefulness of additional implementation guidance materials to support stakeholders when using the Benchmarks.

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<sup>6</sup> Available at: [http://ccaac.gov.au/files/2013/04/Benchmarks\\_DIST1997.pdf](http://ccaac.gov.au/files/2013/04/Benchmarks_DIST1997.pdf).

## **PART II — DISPUTE RESOLUTION AND THE BENCHMARKS**

When offering goods or services, businesses are required to meet certain obligations that are afforded to their customers. Consumer laws across Australia and New Zealand also provide core consumer protections in relation to misleading or deceptive conduct, unconscionable conduct, unfair contract laws, product safety and consumer guarantees. For example, in Australia and New Zealand, businesses are required to provide guarantees for goods including that:

- they are of acceptable quality and safe;
- they are fit for any particular purpose the consumer makes known or the supplier represents;
- they comply with any description, sample or demonstration model; and
- there is reasonable access to facilities and spare parts to repair goods.

For services, there is a guarantee that they are supplied with reasonable skill and care.

In addition, some industry sectors are subject to industry-specific regulation, for example, electricity safety, food labelling and telecommunications. Other businesses may be subject to other customer service obligations including those provided for through customer service charters and voluntary codes of practice.

### **CUSTOMER DISPUTE RESOLUTION**

When engaging in the marketplace, consumers and businesses may encounter disagreement on their respective rights and obligations, including in relation to consumer laws and other voluntary or sector specific arrangements. For example, a dispute may arise if a customer's expectations about a product are not satisfied and there is disagreement about whether or how the customer should be compensated. For a business, there is a clear benefit to avoiding disputes as they can lead to a loss of business and reputation. However, for any business it is inevitable that disputes will occasionally arise.

#### **Internal dispute resolution**

There is a range of different processes and methods that can be adopted to resolve disputes between parties. A consumer's first option for redress usually involves bringing their concerns to the attention of the retailer or service provider. It is common practice for businesses to adopt internal dispute resolution processes in order to resolve customer complaints quickly, and to the satisfaction of both parties. In some cases, internal dispute resolution processes may be driven by broader objectives (such as maintaining good customer relationships) and customer complaints may be resolved to the satisfaction of the customer even where the business is not obligated to do so under the terms of an agreement or contract. For other businesses, internal dispute resolution processes may be applied strictly in accordance with the business' understanding of its obligations.

Internal dispute resolution processes may be unsuitable for resolving disagreements about a business' obligation to resolve a complaint to the customer's satisfaction (such as where a

customer considers that a business is obligated to resolve their complaint; however, at the conclusion of an internal complaints handling process, the business concludes that it is not obligated and is unwilling to do so).

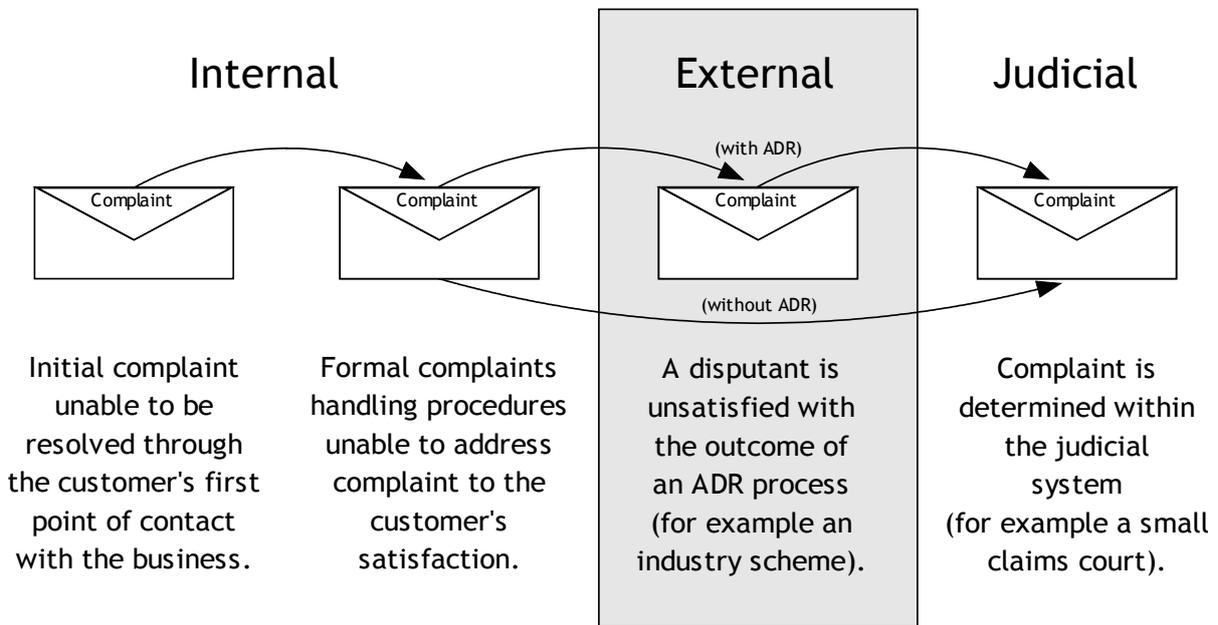
### Alternative Dispute Resolution and industry-based customer dispute resolution schemes

In most circumstances, where customers are dissatisfied with the outcome of an internal complaints handling process Alternative Dispute Resolution (ADR) processes may be available. If a complaint is unable to be resolved, in whole or in part, using ADR processes, it may be further considered through judicial dispute resolution processes (for example by initiating a matter in a small claims court or tribunal).

ADR is an umbrella term<sup>7</sup> for processes, other than judicial determination, in which an impartial person assists parties in resolving a dispute. A subset of ADR includes EDR which specifically refers to dispute resolution processes that are external to the business or organisation for which the complaint relates. The terms ADR and EDR may often be used interchangeably. For the purposes of this review, ADR is taken to include dispute resolution processes that are external to the business for which the complaint relates, but that are distinct from judicial dispute resolution processes.

Where internal dispute resolution opportunities have been exhausted, ADR mechanisms allow an unsatisfied complainant to further pursue their complaint without having to rely on judicial dispute resolution processes (see Figure 2 for an example complaints handling process).

**Figure 2 — An example complaints handling process**



<sup>7</sup> As described in: NADRAC 2008, *Dispute Resolution Terms*, Canberra, viewed 21 February 2013 (<http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/Dispute%20Resolution%20Terms.pdf>).

While informal dispute resolution processes can include direct negotiations between disputants, a common feature of ADR is the participation of an independent third party that may informally support negotiation processes, or act more formally through the making of determinations.

ADR is often viewed by parties as a preferable alternative to judicial dispute resolution as it is generally more flexible, less costly and easier to pursue. Accordingly, many industries have developed industry schemes to support member businesses and their customers. Industry schemes provide industry participants with an effective and efficient method through which they are able to resolve complaints about the products or services provided by the industry. For customers, these schemes operate to provide an additional mechanism through which to resolve their complaint about a good or service supplied by an industry participant, usually at no-cost to the complainant.

Dispute resolution schemes organised to service a specific industry have a number of advantages. Industry schemes are able to develop expertise and knowledge about an industry's products as well as specific rules that apply (for example regulatory frameworks or codes of practice). This is particularly valuable where the products offered by an industry are subject to unique challenges associated with consumers' use of those products.

Industry schemes may be established in response to regulatory frameworks that require businesses operating in specific sectors to participate in such schemes (for example in the telecommunications, finance and credit sectors). However, industry schemes may also be established on a voluntary basis to serve the interests of industry businesses. Other industry schemes may be established to administer voluntary codes of practice and may play a limited role in resolving other related disputes.

Examples of industry schemes in Australia include the Financial Ombudsman Service, the Telecommunications Industry Ombudsman, as well as state and territory-based Energy and Water Ombudsmen. In New Zealand, examples include the Banking Ombudsman Scheme, the Insurance and Savings Ombudsman Scheme and the Telecommunications Dispute Resolution Service.

For the purposes of this review, industry schemes are taken to include any entity established by an industry to consider complaints made by that industry's customers, including those that do not currently apply the Benchmarks' principles and key practices (but may be capable of doing so).

## **THE BENCHMARKS' ROLE AND PURPOSE**

Industry schemes can take a number of forms and operate under a variety of governance arrangements and procedures. For example, industry schemes may have varying degrees of involvement from scheme members in the operation of the scheme. Funding arrangements, jurisdictional limits, operating procedures and terms of reference may also vary between schemes.

The Benchmarks establish and promote best practices for industry schemes. Industries looking to offer credible and robust dispute resolution services to its customers are able to consider the Benchmarks when designing a scheme. Alternatively, industries with existing schemes are able to refer to the Benchmarks when evaluating the scheme's operations.

Industries that wish to demonstrate their commitment to good practice are able to commit to the six benchmarks and their underlying principles and key practices.

## Other standards

The Benchmarks operate in addition to other guidance materials that exist to support entities offering dispute resolution services. A number of standards operate to support organisations that engage in customer dispute resolution. For example, the International Organization for Standardization (ISO) publishes guidelines for complaints handling within organisations<sup>8</sup> as well as guidelines for dispute resolution external to organisations<sup>9</sup>. Standards Australia has also adopted the international standard for complaints handling within organisations, subject to minor modifications.<sup>10</sup>

The National Alternative Dispute Resolution Advisory Council (NADRAC) has also prepared a set of principles outlining an approach to dispute resolution. The *National principles for resolving disputes*<sup>11</sup> aims to assist in promoting ADR methods of resolving disputes so as to support access to justice and social inclusion as well as to raise awareness of and to encourage consistent and best practice ADR use.

## Consultation questions

- 2.1 How widely are the Benchmarks used by industry schemes? Are there any examples of how the Benchmarks are used?
- 2.2 To what extent do the Benchmarks act as a useful guide for industry schemes as well as consumers and industries that access such schemes? Are there any ways in which they could be improved to more effectively fulfil this role?
- 2.3 Are there any other standards or guidelines that are commonly used by industry schemes to deliver and determine best practice operations? If so, how are they applied in conjunction with or as an alternative to the Benchmarks?
- 2.4 Are the Benchmarks consistent with other standards or guidelines and if not, in what respect are they inconsistent?

In addition, NADRAC and the Attorney-General's Department have collaborated to develop the publication: *Your guide to dispute resolution*.<sup>12</sup> The guide contains information to help users improve their understanding about managing and resolving disputes.

Complaints handling standards and other dispute resolution principles are not a direct substitute for the Benchmarks. While there may be some functional overlap, the Benchmarks

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<sup>8</sup> See International Standard ISO 10002:2004 *Customer satisfaction – Guidelines for complaints handling in organizations*.

<sup>9</sup> See International Standard ISO 10002:2004 *Customer satisfaction – Guidelines for dispute resolution external to organizations*.

<sup>10</sup> See Australian Standard AS ISO 10002-2006 *Customer satisfaction – Guidelines for complaints handling in organizations (ISO 10002:2004, MOD)*.

<sup>11</sup> Available at:

[http://www.nadrac.gov.au/about\\_NADRAC/NADRACProjects/Pages/NationalPrinciplesandGuide.aspx](http://www.nadrac.gov.au/about_NADRAC/NADRACProjects/Pages/NationalPrinciplesandGuide.aspx).

<sup>12</sup> Available at: <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>.

apply specifically to institutions that offer industry-based dispute resolution and relate to governance arrangements as well as complaints handling processes.

## APPLICATION

While the Benchmarks describe key practices that are intended to be adopted by industry schemes, it is recognised that the application of the Benchmarks' practices will not always be practical. Industry schemes are able to apply the Benchmarks flexibly; however, the use of the Benchmarks by all customer dispute schemes is encouraged.

There is no broad requirement for industry schemes to adopt the key practices outlined within the Benchmarks. However, for some industry sectors in Australia and New Zealand the Benchmarks are used as a basis for the approval of industry schemes where membership is required by industry businesses. In these industry sectors, the Benchmarks are more formally applied through regulatory arrangements. Such arrangements exist in a number of industries across Australia and New Zealand.

### Formal application of the Benchmarks in Australia

In Australia, the Benchmarks are formally applied in the financial and credit industry sectors where complaints schemes operate within a quasi-regulatory framework. ASIC is responsible for licensing and regulating the disclosure and conduct obligations of financial and credit product and service providers.<sup>13</sup>

As a key condition of their licence, financial and credit industry participants must have a compliant dispute resolution system for handling their consumer and financial investor complaints. This dispute resolution system must consist of internal dispute resolution procedures and processes that meet ASIC's approved standards and requirements as well as membership of an ASIC-approved EDR scheme (that can consider complaints other than those that may be dealt with by the Superannuation Complaints Tribunal).

ASIC also approves and oversees the two financial and credit industry complaints schemes, the Financial Ombudsman Service Limited (FOS) and the Credit Ombudsman Service Limited (COSL) in accordance with its powers in the Corporations and National Credit Consumer Protection laws. Both FOS and COSL are approved by ASIC to handle financial and credit complaints under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*.

ASIC provides detailed guidance on how it will approve and continue to oversee FOS and COSL in ASIC Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139). RG 139 aligns with the principles, purposes and key practices provided for in the Benchmarks. ASIC also provides detailed guidance to industry participants on how they can meet their dispute resolution obligations in ASIC Regulatory Guide 165 *Licensing: internal and external dispute resolution* (RG 165). In setting ASIC's approved internal dispute resolution standards and requirements, ASIC has regard to AS ISO 10002-2006.

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<sup>13</sup> The types of industry participants ASIC licences and regulates includes investment product issuers, managed investment scheme operators, superannuation funds, traditional trustee company service providers, general and life insurers, insurance brokers, financial advisers, stockbrokers, banks, credit unions, other lenders and credit intermediaries.

## Formal application of the Benchmarks in New Zealand

In New Zealand, the Benchmarks are formally applied in the financial and credit industry as well as the electricity and gas industries. The *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ), the *Electricity Industry Act 2010* (NZ) and the *Gas Act 1992* (NZ) (the Acts) require all financial service providers who offer financial services to retail clients, electricity distributors and retailers, and gas distributors and retailers to be a member of a dispute resolution scheme. Those dispute resolution schemes need to be approved by the New Zealand Minister of Consumer Affairs under the relevant Act.

The Acts reference the Benchmarks' principles when providing for the purpose of dispute resolution schemes, for example in the *Electricity Industry Act 2010* (NZ) the purpose of the dispute resolution scheme is to ensure that:

- a) *any person...who has a complaint about a member has access to a scheme for resolving the complaint; and*
- b) *the scheme is accessible, independent, fair, accountable, efficient, and effective.*

The Acts also refer to the Benchmarks' principles in the mandatory considerations the Minister must have regard to when considering an application to become an approved scheme under the legislation. For example, the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ) states that the Minister must consider an application in light of the principles of accessibility, independence, fairness, accountability, efficiency, and effectiveness.

Prior to the Benchmarks' principles being referenced in legislation, the New Zealand electricity and gas industry regulators used the Benchmarks to determine an evaluation framework when making a recommendation on the preferred single dispute resolution scheme to the New Zealand Minister of Consumer Affairs.

### **Case Study 1 — External dispute resolution and the Financial Ombudsman Service**

The FOS is an ASIC-approved EDR scheme offering industry-based dispute resolution services in the financial services sector. This includes, for example, disputes relating to banking, credit, loans, general insurance, life insurance, financial planning, investments, stock broking, managed funds and pooled superannuation trusts.

The FOS operates in accordance with its terms of reference which outlines the powers and duties of the Ombudsmen. The FOS is also governed by a constitution that provides for the purpose and objectives of FOS, including how dispute resolution rules and processes are developed, agreed and implemented. Through their membership of the FOS, participating financial services providers commit to having customer complaints considered in accordance with these rules and processes. The FOS regularly reports on its complaints handling activities, including on determinations as well as the identification of systemic issues.

Membership levies apply to participating financial service providers, however, customers can have complaints considered without charge. The FOS is run independently of its members and is accountable to an overseeing entity which includes consumer representatives.

The FOS is an example of an industry-based scheme that has been established to provide credible dispute resolution services that offer an alternative to the judicial system. As the FOS is an ASIC-approved scheme, it must also offer dispute resolution services in accordance with best practices, including those provided for in the Benchmarks.

### **Case Study 2 — The Group Buying Code of Conduct**

The Group Buying Code of Conduct (the Code) is a voluntary industry code developed by the Association for Data-driven Marketing and Advertising (ADMA). The Code promotes compliance with existing laws as well as fair, honest and ethical business practices within the group buying industry. One objective of the Code is to increase consumer confidence when dealing with group buying platforms.

The Code includes a complaints handling process which is managed by the ADMA code authority. The ADMA code authority investigates unresolved consumer complaints made in relation to signatories of the Code. It is operated independently of ADMA members and is overseen by industry and consumer representatives.

As a voluntary code of practice, participation of the Code is not provided for through regulatory frameworks. In addition, the ADMA code authority is not required to operate in accordance with the Benchmarks.

The Code (including the ADMA code authority in its capacities relating to the Code) is an example of an industry-based scheme that has been established, in part, to respond to consumer concerns about an industry. In establishing and reviewing the ongoing performance of such schemes, the Benchmarks have the potential to provide guidance to scheme organisers.

## PART III — PRINCIPLES, PURPOSES AND KEY PRACTICES

For industry schemes, benchmarking involves the comparison of a scheme's processes, performance, terms of reference and governance arrangements with best practices adopted by other industry schemes as well as other organisations offering ADR services. The Benchmarks provide an additional framework to establish best practices for industry-based dispute resolution services.

### A BEST PRACTICE FRAMEWORK

Each of the six benchmarks includes a principle with key practices suggested to support industry schemes in meeting the benchmark. The suggested key practices are useful to the extent that they help schemes to satisfy the underlying purpose of each benchmark. For some industry sectors, the Benchmarks' key practices may not always be necessary or appropriate. Accordingly, the Benchmarks (page 1) state that:

*... it is recognised that some key practices in the benchmarks may not be applicable to the smaller sectors of industry or those sectors where there are few complaints. Every key practice does not have to be adopted by each industry sector.*

Industry schemes may also be able to meet a benchmark by applying practices other than those outlined in the Benchmarks.

This section provides a brief summary of each of the six benchmarks. The summaries provide an overview of the Benchmarks' principles, purposes and key practices. Interested stakeholders are encouraged to refer to the Benchmarks for a more comprehensive description of each benchmark.

### Accessibility

The benchmark of Accessibility promotes customer access to industry schemes on an equitable basis. Key practices outlined in the Benchmarks for Accessibility include that industry schemes:

- promote their existence;
- ensure that the scheme can be accessed nation-wide including by those customers with special needs;
- provide their services at no monetary cost to the customer;
- have trained staff that can assist complainants;
- provide simple and flexible processes for complainants to use, including the ability to be supported by another person and to make a complaint orally or in writing;
- adopt a non-adversarial approach to dispute resolution; and
- discourage a legalistic approach to dispute resolution including through legal representation.

## Ongoing relevance

Accessibility is a desirable feature of an industry scheme as it maximises the number of customers who are able to make use of the scheme. In addition, it ensures that there are multiple ways in which customers can engage with and benefit from industry schemes.

There are certain trade-offs associated with achieving accessibility. For example, industry schemes may have limited resources when promoting their services to the industry's customers. Industry schemes need to assess which elements of Accessibility are likely to be important to its industry's customers and determine the best way to service their needs.

The broad objectives that are currently set out under the benchmark of Accessibility have ongoing relevance; however, there may be opportunities for more targeted guidance in the light of advancements in technology.

Technology has changed the way in which customers interact with industry schemes. In particular, the proliferation of the internet has meant that many complainants may look to an industry scheme's website as a first point of contact. While the internet has allowed industry schemes to be more easily found, an important element of Accessibility is that schemes can be accessed by customers who may have special needs. Accordingly, to ensure that industry schemes are accessible, it is important for schemes to maintain a presence across a variety of platforms including where customers wish to rely on traditional technologies.

## Consultation questions

3.1 To what extent do the underlying principles and key practices under the benchmark of Accessibility remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

## Independence

The benchmark of Independence is intended to ensure that the processes and decisions of the scheme are objective, unbiased and are seen to be so. Key practices outlined in the Benchmarks for Independence include that industry schemes:

- maintain a decision-maker that is not answerable or selected by scheme members, appointed to the scheme for a fixed term, and free from actual or perceived conflicts of interest;
- employ staff that are not answerable or selected by scheme members;
- are overseen by a separate entity comprised of representatives from a balance of stakeholder interests with responsibilities for appointing or dismissing the decision maker;
- have sufficient funding to enable its relevant functions to be handled in accordance with the six benchmarks; and
- consult relevant stakeholders when making changes to the scheme's terms of reference.

## Ongoing relevance

Independence is an important benchmark as it allows complainants to have confidence that their complaint will be considered fairly and free from conflicting interests. In this regard, it is also important that industry schemes purporting to offer unbiased dispute resolution services are actually independent as well as seen to be independent by community stakeholders.

The Benchmarks provide best practice governance arrangements that assist in ensuring an industry scheme's independence. These governance arrangements are appropriate to the needs of industry schemes where independence is an essential institutional feature, for example, those schemes that have been established to support compliance with regulatory arrangements. For other schemes – such as those that have been established on a voluntary basis independent of regulatory frameworks – the key practices for Independence may not always be desirable for the participating businesses. While independence is important for any organisation offering ADR services, some industry schemes may look to achieve it through governance arrangements that differ from those described in the Benchmarks.

Independence remains an important best practice benchmark for industry schemes that look to provide credible ADR services. While the key practices outlined under the benchmark of Independence may not be universally applied by industry schemes, they assist in establishing best practice for industry schemes.

## Consultation questions

3.2 To what extent do the underlying principles and key practices under the benchmark of Independence remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

## Fairness

The benchmark of Fairness is intended to ensure that the decisions of the scheme are fair and seen to be so by observing the principles of procedural fairness with determinations made in accordance with specific criteria. Key practices outlined in the Benchmarks for Fairness include that industry schemes:

- provide that the decision-maker makes determinations on what is fair and reasonable having regard to good industry practice, relevant industry codes of practice and the law;
- apply the principles of procedural fairness including by providing both parties with the appropriate opportunities to present their case;
- can demand that scheme members provide information that is relevant to a complaint and encourages but does not compel complainants to do so; and
- handles information confidentially.

## Ongoing relevance

Complainants accessing ADR services are likely to expect that their complaint will be considered fairly and on its own merits. In achieving procedural fairness, it is important that

decisions are made based on predetermined criteria and that all parties have been given the opportunity to present their case accordingly.

The Benchmarks state the importance of fairness in the determination of a complaint. While industry schemes offering dispute resolution services do so more informally than judicial alternatives, the credibility of schemes will depend on whether they are seen to consider complaints by applying consistent processes and in accordance with objective criteria. In this regard, the Benchmarks highlight that industry schemes should make determinations in accordance with relevant industry codes of practice and the law. The benchmark of Fairness also allows for the decision-maker to consider what is fair and reasonable having regard to good industry practice. The specific criteria and process used by an industry scheme to make determinations will depend on its terms of reference and is not provided for in the Benchmarks.

While it is important that decisions are made in accordance with objective criteria, some elements of the benchmark of Fairness may be subjective in nature. For example, the Benchmarks provide that the decision-maker should make determinations that are fair and reasonable having regard to good industry practice. What is fair and reasonable with respect to good industry practice may vary between industries and stakeholder views may not always be convergent.<sup>14</sup> Fairness remains an important best practice benchmark for industry schemes that look to provide credible ADR services, however, the Benchmarks do not provide specific detail as to how determinations should be made.

Another key practice under Fairness is that scheme members can be compelled to provide information to the decision maker. This allows for the decision maker to minimise any doubt about the circumstances surrounding a complaint. This requirement, in part, reflects the nature of such schemes. Industry schemes often require scheme members to commit to the scheme's dispute resolution processes and the provision of information upon request can be seen as part of that commitment. While such an obligation is not imposed on the complainant, the decision maker is able to request and encourage them to provide additional information where required.

### Consultation questions

3.3 To what extent do the underlying principles and key practices under the benchmark of Fairness remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

### Accountability

The benchmark of Accountability is intended to ensure public confidence in industry schemes and to allow assessment and improvement of its performance. Key practices outlined in the Benchmarks for Accountability include that industry schemes:

- regularly provide written reports of determinations to scheme members and interested bodies; and
- report on an annual basis with specific statistical and other data about the performance of the scheme.

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<sup>14</sup> For example, consumer and industry stakeholders may not agree on what is meant by good industry practice.

## Ongoing relevance

Accountability is important for any organisation seeking to continually improve its performance. In the absence of accountability, industry schemes may lack the incentive to consider how they can better serve their stakeholders. The Benchmarks suggest that industry schemes can ensure public confidence by reporting on determinations and other information and data relating to the performance of the scheme. This information improves transparency and provides a basis for external stakeholders to make an assessment about whether the scheme is operating in accordance with its terms of reference.

There are many ways in which industry schemes can report on performance. Some schemes may follow a more qualitative approach while others may focus more on quantitative reporting. Qualitative and quantitative reporting methods are complementary to each other. Quantitative reports alone may not wholly explain how an industry scheme has operated to fulfil its terms of reference. For example, data on the number of complaints received and their outcome may depend on factors outside of the scheme's control. Accordingly, effective reporting requires the identification of performance indicators that are both meaningful and suitable to the scheme's operations.

The benchmark of Accountability also provides for the naming of scheme members that do not meet their obligations as members of the scheme.

## Consultation questions

- 3.4 To what extent do the underlying principles and key practices under the benchmark of Accountability remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

## Efficiency

The benchmark of Efficiency is intended to give customers and scheme members confidence in the scheme and to ensure the scheme provides value for its funding. Key practices outlined in the Benchmarks for Efficiency include that industry schemes:

- ensure that complaints are only considered when they are within the scheme's terms of reference and when the scheme is the most appropriate forum for the complaint to be considered;
- track and consider complaints within a reasonable timeframe; and
- monitor performance with respect to objective targets and feedback from stakeholders.

## Ongoing relevance

Efficiency is an important benchmark ensuring that an industry scheme offers the most benefit to its stakeholders. Scheme members are likely to expect that any funds paid to support the scheme are used appropriately to their purpose, while complainants benefit from having their case considered in a timely and professional manner.

The Benchmarks' key practices include that processes which facilitate timely resolution should not compromise the decision-making process. While some processes can be made

more efficient without compromising the integrity of a scheme, there are some trade-offs associated with the pursuit of efficiency. For example, some processes that support a scheme's quality control efforts may be resource intensive, however, in their absence some errors may occur.

Efficiency can also be achieved by focussing on activities or processes that deliver the most benefit to the industry scheme's stakeholders. For example, by focussing resources on identifying systemic issues for rectification by industry businesses, an industry scheme may be able to reduce the number of complaints received.

Organisations that wish to improve the efficiency of their operations are able to do so by regularly reviewing performance and keeping track of key performance indicators. The Efficiency benchmark provides for the regular monitoring of performance to support continuous improvement of an industry scheme's processes.

### Consultation questions

- 3.5 To what extent do the underlying principles and key practices under the benchmark of Efficiency remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

### Effectiveness

The benchmark of Effectiveness is intended to promote customer confidence in the scheme and to ensure that the scheme fulfils its role. Key practices for Effectiveness include that industry schemes have:

- the appropriate power to deal with the vast majority of customer complaints in the industry including the power to make monetary awards of sufficient size;
- mechanisms for referring systemic industry problems to the overseeing entity where they are not appropriately dealt with by the industry;
- procedures in place for receiving complaints about the scheme and referring complaints about the scheme to the overseeing entity;
- requirements for scheme members to set up internal complaints mechanisms and a capacity to advise scheme members on such mechanisms;
- mechanisms to encourage scheme members to abide by the scheme's rules and that determinations are binding on the scheme member; and
- processes in place for the scheme to be independently reviewed.

### Ongoing relevance

The benchmark of Effectiveness concerns an industry scheme's capabilities. Many industry schemes rely on the powers vested to it by its scheme members. Other schemes rely on power afforded to it through regulatory frameworks. Irrespective of where a scheme derives its power, a scheme must possess sufficient capabilities in order for it to provide meaningful outcomes for its stakeholders. For example, a scheme may be less effective at its task of

resolving customer disputes if it does not possess the authority to enforce a determination on a scheme member.

Where an industry scheme relies on the voluntary participation of scheme members, there is likely to be a trade-off between the scheme's powers and its ability to attract new participants. Some industry schemes may have limited powers so as to appeal to a broader range of industry businesses that may be unwilling to join a scheme with stronger powers. On the other hand, some industry businesses may see benefit in belonging to a scheme that is seen to be a strong and independent as it provides additional confidence to its potential customers.

Irrespective of whether there are trade-offs associated with increasing a scheme's powers, key practices provided for in the benchmark of Effectiveness are important for industry schemes seeking to offer credible ADR services.

### **Consultation questions**

- 3.6 To what extent do the underlying principles and key practices under the benchmark of Effectiveness remain relevant and appropriate to the needs of industry scheme stakeholders? How can they be improved?

## MODERNISING THE BENCHMARKS

As the Benchmarks were released in 1997, there may be opportunities to modernise them in accordance with subsequent developments in ADR processes and terminologies. For example, inconsistencies may exist between the Benchmarks and standards (relating to complaints handling) that have subsequently been issued. While any inconsistencies are likely to be minor in nature, there are benefits in ensuring that the Benchmarks and other guidance publications can work together. Other opportunities for modernisation may come from the inclusion of new technologies or processes that have been widely adopted by organisations offering ADR services.

Online Dispute Resolution (ODR) is one such new development. ODR involves the use of processes whereby disputes are substantially considered via the internet. While the six benchmarks may be equally important to ODR services, there may be a need to adapt the key practices with respect to alternative processes that are used in handling disputes.

There is also an opportunity to consider whether each of the six benchmarks is likely to continue to be appropriate as part of a best practice framework for industry-based dispute resolution services, or whether there is an opportunity to consider the inclusion of any additional benchmarks.

### Consultation questions

- 3.7 Could any element of the Benchmarks, including terminology or key practices, be modernised in the light of subsequent developments in ADR processes or technologies?
- 3.8 Do each of the six benchmarks remain appropriate as part of a best practice framework for industry-based dispute resolution services, and are there any additional benchmarks (and associated key practices) that could be included?

## **PART IV — IMPLEMENTATION GUIDANCE**

### **PRACTICAL SUPPORT FOR INTERPRETING AND APPLYING THE BENCHMARKS**

The Benchmarks offer a range of practical measures to support industry schemes when interpreting and applying the Benchmarks. However, for some schemes, it may be unclear how the six benchmarks' principles apply to their organisational needs. Furthermore, the Benchmarks have been developed to focus on broad principles rather than prescriptive requirements with an emphasis on outcomes rather than processes. Such an approach is necessary given the diversity of industries that may look to the Benchmarks for guidance on the development of industry schemes.

Industry schemes may benefit from the development of implementation guidance to support schemes that wish to adopt the Benchmarks. Implementation guidance is distinguished from the key practices outlined within the Benchmarks. Implementation guidance could be more prescriptive and could be targeted to specific categories of industry schemes. Most importantly, implementation guidance would not be intended to establish the meaning or intent of the Benchmarks, but rather to offer a practical interpretation of the Benchmarks to support industry schemes.

The development of implementation guidance materials would also allow for the principles within the Benchmarks to be enshrined with the ability for practical guidance to be updated to consider changes in technology or contemporary ADR practices.

Implementation guidance could take a range of forms and the level of detail and required content would depend on the needs of stakeholders. Implementation guidance could also be supplemented by supporting materials for complainants wishing to access industry schemes as well as consumers more broadly.

### **Who would develop implementation guidance?**

Implementation guidance could be developed with the assistance of stakeholders including consumer and industry representatives as well as existing industry schemes. For example, a working group with the oversight of CCAAC could be established to recommend guidance materials for endorsement by CAF Ministers.

As with the Benchmarks themselves, any implementation guidance would be prepared for industry schemes to follow on a voluntary basis. The main purpose of any additional implementation guidance would be to offer additional support and clarification of the Benchmarks to support industry schemes.

### **Is there a need for implementation guidance?**

The preparation of implementation guidance would have the potential to broaden the appeal and application of the Benchmarks. Implementation guidance could recognise the different objectives and needs of industry schemes, and could offer support to industry schemes that do not currently look to the Benchmarks to guide their operations. However, the need for additional implementation guidance depends on the extent to which industry schemes would benefit from its publication.

### **Consultation questions**

- 4.1 Would industry schemes benefit from additional implementation guidance and if so, how?
- 4.2 Are there any elements of the Benchmarks where additional implementation guidance would be particularly beneficial?
- 4.3 Are there any principles or processes that if followed, would improve the quality and usefulness of implementation guidance materials?
- 4.4 Who should be involved in the development of additional implementation guidance?