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GOOD PRACTICE PRINCIPLES

Consumer advocate involvement and expectations of development and reviews of industry codes and external dispute resolution (EDR) schemes

BACKGROUND

Consumer advocates commit significant resources to the development and reviews of industry codes and EDR schemes. Industry codes and EDR schemes exist in many service markets, including financial services and credit, energy and water, telecommunications and others. The effectiveness of these mechanisms relies on the input of consumer representatives.ⁱ

The processes undertaken by the various bodies charged with developing or reviewing industry codes and EDR schemes are inconsistent. This document offers guidance to industry bodies and EDR schemes about good practice in ensuring effective consumer input, including good practice in involving the consumer sector. It also sets out consumer sector expectations for review processes. It does not provide guidance about the adequacy of the content of codes or related matters.

EXISTING GUIDANCE

The Australian Competition and Consumer Commission (ACCC) and the Australian Securities & Investment Commission (ASIC) have issued guidance about development and review of industry codes of conduct and EDR schemes. This guidance includes commentary about the involvement of consumer representatives and expectations for processes, but there is no comprehensive statement of good practice.

ASIC has issued *Regulatory Guide 183: Approval of financial services sector codes of conduct*.ⁱⁱ This guide outlines the key processes ASIC considers should be followed in developing a code. These include:

- identifying all relevant stakeholders, including affected consumers, relevant community and consumer groups;
- effectively consulting with all stakeholders to identify issues and debate appropriate responses; and
- adopting transparent procedures (e.g. issuing a discussion paper, recommendations and/or a draft code for public consultation).

ASIC considers that in most cases, it will be necessary to appoint an independent party to conduct public consultations and/or to make public recommendations about the code. ASIC also requires that a code it approves be independently reviewed at intervals of no more than three years. The role of an independent reviewer is to consider, without bias, the broad range of stakeholder views. The review and implementation of any recommendations must be completed within a reasonable timeframe to maintain confidence in the process and for the code to retain ASIC's approval.

ASIC's *Regulatory Guide 139: Approval and oversight of external complaints resolution schemes* provides guidelines for ASIC's initial and ongoing approval of EDR schemes.ⁱⁱⁱ This document requires schemes to consult on the development of and changes to terms of reference and also sets out expectations for independent reviews of EDR schemes. The guide does not, however, provide detailed guidance on the nature and extent of consultation and involvement of consumer groups.



The ACCC has published *Guidelines for developing effective voluntary industry codes of conduct*.^{iv} The ACCC's role with codes of conduct generally involves granting authorisation of certain conduct that may otherwise be anti-competitive on public benefit grounds. The ACCC also administers a number of mandatory industry codes of conduct, including the Unit Pricing Code.

The ACCC's guidance states that codes of conduct tend to be more effective when the self-regulatory body charged with administering the code comprises representatives of the key stakeholders, including consumers, consumer associations, the government and other community groups. The ACCC guide suggests certain processes to be followed in drafting or reviewing an industry code of conduct. These include identifying and consulting with relevant stakeholder groups, including user, consumer and public interest groups.

The ACCC guidance notes that consumers play an important role in development of codes, code administration and consumer dispute resolution schemes. It states that it is important to ensure that consumer representatives possess specific skills that extend beyond an individual's own personal experience as a consumer. They must be able to demonstrate that they are:

- capable of reflecting the viewpoints and concerns of consumers;
- people in whom consumers and consumer organisations have confidence.

Other regulators do not appear to have issued guidance on the development or review of industry codes of conduct or EDR schemes.^v

The Federal Government has issued Benchmarks for Industry-based Customer Dispute Resolution. The Benchmarks (and the supporting Key Practices) do not, however, provide guidance about the involvement of community or consumer representatives in the development and review of EDR schemes, beyond stating that reviews should be undertaken with relevant stakeholders.^{vi}

GOOD PRACTICE PRINCIPLES

Our recommendations for good practice regarding consumer involvement and processes for the development and review of industry codes of conduct and EDR schemes are as follows:

1. INDEPENDENCE OF PROCESS

Industry codes of conduct are generally 'owned' or 'administered' by an industry association. The industry association should appoint an independent person or reviewer to develop or review a code of conduct.

The board or overseeing entity of an EDR scheme generally appoints a reviewer to conduct regular reviews of the operation of the scheme. The reviewer should be independent.

Independence requires that the person does not have any direct relationship with the relevant industry or EDR scheme. The person should be also capable of conducting the work with fairness, equity and impartiality independent of the interests of the body that nominated the person. The independent person should be adequately resourced through support people or a secretariat.



The independent person needs to have the capability including relevant expertise to conduct the review. In general, we consider that non-specialist consulting firms are rarely an acceptable choice for projects that require specialised understanding of the operation of Codes of Practice and EDR Schemes.

It is good practice for the nominating body to consult with consumer representatives about the selection of an independent person or reviewer.

2. EVALUATING IMPACT

As part of a review process, there should be an independent assessment of the impact and effectiveness of existing code provisions or EDR schemes. This assessment should consider the extent to which the code has achieved stated objectives.

In addition to consulting with stakeholders (see point 3), this could involve:

- independent research or analysis of relevant complaints or files;
- conducting audits or mystery shopping exercises;
- close consideration of relevant processes adopted by code bodies or EDR schemes (for example, file reviews or audits of processes).

3. APPROACH TO CONSUMER ENGAGEMENT AND CONSULTATION

The consultation or consumer engagement process should be meaningful, genuine and efficient. The process should be capable of identifying and examining the issues of concern to consumers of the relevant industry. Generally, this should require an open process at the outset to identify all relevant issues, before narrowing on approaches to address those issues.

Consultation processes could involve:

- A broad call for submissions about relevant concerns, usually supported by an initial open issues paper or discussion paper.
- Targeted consultation with particular groups that have specific experience or knowledge on particular topics (this should include casework organisations)
- Public forums
- The publication of an interim report, with a further call for submissions on its findings and/or recommendations
- Opportunities to review and comment on drafts of code wording or changes to EDR scheme terms of reference. This would normally take the form of a draft code or terms of reference for comment.

Consumer representatives can become directly involved in the development of codes or terms of reference, including by sitting on development or drafting committees or as an observer. This can be an effective way to provide input. Consumer representatives retain independence, however, and their participation should not be taken as support for final positions or code/terms of reference wording unless specifically provided.



4. RESOURCING CONSUMER ENGAGEMENT

The consumer sector endeavours to prepare joint consumer submissions during review processes where it is effective to do so. This should also benefit the review process, by making the consumer viewpoint clear.

To support this, it is good practice for the relevant industry body or EDR scheme to resource the consumer sector to participate in the review (unless there is an existing source of resourcing for that participation). This recognises the limited resourcing available in the consumer sector. Resourcing also allows the coordinating consumer body to effectively consult with consumer representative colleagues and to process and organise their input into a clear and cogent submission. Resourcing consumer participation should be a key part of a properly costed consultation process. Additional resourcing should be provided where the process takes longer than expected or more input is required.

Consumer organisations have frequently chosen to work through Consumers' Federation of Australia (CFA) to coordinate the development of joint consumer submissions by receiving relevant resourcing and appointing a CFA member to undertake the necessary work.^{vii}

5. TIMEFRAMES FOR CODE DEVELOPMENT AND REVIEW

A clear and realistic timeframe for a process should be identified upfront, and clearly communicated to stakeholders. It is useful to identify dates for key milestones.

A process should not be rushed. It should be sufficient to ensure the relevant body is 'really listening' to stakeholders. However, a process should not drag on. A completion date is helpful to focus all stakeholders.

Timeframes for submissions should acknowledge the need for consumer groups to consult with their colleagues and members. Six weeks is generally an appropriate minimum period to respond to a call for submissions. Longer consultation periods are necessary when they fall around holiday periods.

6. IMPLEMENTING RECOMMENDATIONS FROM REVIEWS

Following an independent review, a report with recommendations is generally provided to the relevant industry association or board/overseeing entity of the EDR scheme. This report should be made public, both online and circulated to stakeholders. It should summarise stakeholder positions on key issues and indicate, with reasons, whether or not the reviewer supports that position.

This body should respond publicly to the review in a reasonably short timeframe. The response should clearly set out how it will respond to the recommendations. If a recommendation is not accepted or implemented (including if only partially accepted), reasons should be given.

The body should conduct additional consumer consultation as necessary, for example, if there is changing to specific code wording or EDR scheme terms of reference. Timeframes for implementing recommendations should be identified, and the body should also provide regular updates publicly about its progress in implementing recommendations that have been adopted.



ⁱ The Productivity Commission has stated that that an effective consumer policy framework relies on consumer advocacy and input into regulatory development: Review of Australia's Consumer Policy Framework, No 45, 30 April 2018, Vol 2, p 274.

ⁱⁱ <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/>

ⁱⁱⁱ <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/>

^{iv} <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>

^v One exception appears to be the Victorian Building Authority: http://www.vba.vic.gov.au/_data/assets/pdf_file/0012/61302/Development-and-Approval-of-a-Code-of-Conduct-20170804.pdf

^{vi} <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution/>

^{vii} CFA has a policy on consumer representation, available at: <http://consumersfederation.org.au/representing-consumers/cfa-representatives-policy/>