
GUIDELINE FOR DEVELOPING A CODE OF PRACTICE

Consumers are exposed on a daily basis to issues of fair trading, product safety, product quality, service performance, and disputes resolution. To promote fair practices in these areas, business behaviour is often regulated. Regulation is the process of making rules which govern behaviour. Regulation can mean one of, or a combination of, the following measures

- formal government regulation to deal with serious, systemic, or chronic problems
- encouragement of self-regulation, including codes of practice, to deal with problems within a specific market, or with particular business activities
- education and other operational strategies to enhance consumer and trader understanding of acceptable trading standards
- a 'hands off' approach governed by the belief that the interaction between consumers and businesses will in itself ensure that problems will be reduced.

In this guideline we look at how to develop a code of practice which is properly conceived and properly drafted. The guideline refers to the need to consider whether a code of practice is the appropriate way to deal with problems. The decision whether or not to go with a code of practice will depend on the problem and the outcome that is being sought.

Codes of practice are often considered when

- government regulation is unlikely to occur or is inappropriate, for example where only a segment of the market is affected
- overarching legislation exists and the objective is to assist or promote compliance within a particular industry
- there is widespread acknowledgment of the need for, and commitment to, the development of controls to improve trading standards within a particular industry
- the objective is to provide customer focused benefits beyond the minimum standards provided by the law.

A code of practice can advance consumer confidence in products and individual companies, and also promote good business practices. However, it does not necessarily stand alone. Good codes build on general legal requirements and may be supported by information and education activities for both consumers and businesses. Good codes accurately identify real problems, and provide solutions which are practical and workable in the industry and for consumers. If properly conceived and drafted, codes are as much a positive tool for industry as a safeguard for consumers.

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CRITERIA FOR A GOOD CODE OF PRACTICE

A GOOD CODE OF PRACTICE WILL HAVE THE FOLLOWING FEATURES

- 1 The benefits of a code of practice to the industry and consumers outweigh the costs of setting it up, implementing it, and maintaining its operation.
- 2 The code is developed in consultation with industry members, consumers, and government agencies to ensure that
 - problems are accurately identified and are real and
 - solutions offered are practical and workable in the industry and for consumers.
- 3 The code impacts on the industry's day-to-day dealings with consumers.
- 4 The code is in plain language and set out so that it is easily followed by both people working in the industry and consumers.
- 5 The code is one cohesive document and the
 - **statement of purpose** or mission statement provides a clear and brief summary of the reason why the code is needed and what the operation of the code is intended to achieve
 - **objectives** of the code expand on the statement of purpose and describe specifically what the code is intended to achieve
 - **principles** set down the basic values which the industry will apply to meet the intentions expressed in the statement of purpose and objectives
 - **rules** apply the principles and spell out the specific actions and procedures required of industry members to ensure that the intentions expressed in the statement of purpose and objectives are achieved.
- 6 The administration system in the code ensures that the
 - code will continue to operate as intended over a long period of time
 - code will be publicised continuously
 - operation of the code will be monitored continuously
 - code will be regularly reviewed.
- 7 The code requires participants to make sure that their staff are trained in how it operates and what it means to their business.
- 8 The complaints and disputes procedures are accessible to the consumer, fair to all parties, efficient, and accountable to the industry and consumers.
- 9 The procedures set down to monitor, review, and update the code ensure that the code remains relevant, credible, and robust in its operation.

IS A CODE OF PRACTICE A GOOD OPTION?

A code of practice is usually considered when there are problems in an industry which need to be addressed. But a code of practice may not be the best option in all circumstances. Nor is it a cheap option. The costs and benefits of developing a code should first be assessed.

When is a code of practice a good option?

A code of practice is a good option when

- the industry agrees about the need to improve standards
- the industry agrees about the standards it wants to promote
- the industry is a cohesive group
- the industry is easy to demarcate
- the problems can be fixed within the industry – that is, the industry is not dependent on outside players to assist with the solution
- the benefits to the industry and its customers are obvious and clear
- the benefits of the code outweigh the costs of developing, implementing, and maintaining a code of practice
- a less expensive option will not deliver a comparable result.

Problem(s) a code of practice can address

A code of practice can address a wide range of problems especially in terms of performance standards for products or service and dealings with consumers.

A code can address

- ways to assist an industry to comply with its general legal requirements
- quality and performance of products
- consumer information – is it accurate, relevant, and understandable?
- after-sales service and guarantees – do you deliver what you promise?
- complaints handling – is it prompt, fair to all, and easy to use?

THE BENEFITS OF A CODE

A code of practice is only a good option when the benefits to the industry and its customers outweigh the costs of developing, implementing, and maintaining it. The benefits are

- **Clearly defined industry practice**
A code can set a benchmark by defining clearly the rights and obligations of sellers and buyers including the way general rules and laws, such as the Fair Trading Act, apply. This can be an important mechanism in the competitive process but the code must not lessen competition – see Appendix 1.
- **A mechanism for quality control**
If a code helps to identify industry-wide consumer complaints or issues, it can function as an important mechanism for ensuring the quality of that industry's products or services. It can serve as a signal to consumers that these products and services meet certain standards.
- **Improved customer loyalty**
A code can improve customer loyalty to an industry when it improves the handling of complaints amongst individual operators and provides uniform industry-wide disputes resolution procedures beyond that. Research has shown that dealing with complaints effectively has a positive impact on brand loyalty.
- **Competitive advantage**
A code of practice offers an opportunity to raise the industry's reputation in the eyes of the community. Setting standards in the market can positively differentiate the industry in the eyes of consumers and provide a competitive advantage to the industry.
- **Provision of low-cost training mechanisms**
If a code of practice provides an understanding of what are good industry practices, it can be a useful tool for training staff and for designing company procedures and communications material.
- **Little or no court costs**
If a code of practice promotes compliance with legislation then it can reduce the costs of deadlocked disputes. These include Court or Disputes Tribunal costs as well as intangibles, such as poor customer relations and adverse publicity.

Codes of practice can build customer confidence and trust in an industry's trading integrity. When this happens, those who subscribe to the code (the subscribers) can benefit from increased sales, repeat sales, and higher profits.

THE COSTS OF A CODE

It is important to identify the costs involved in a code of practice. Assessing the costs involved is an important element in ensuring that industry members become committed to complying with the code. The industry's members need to understand not only the overall level of costs but also why these costs are being incurred. It also signals to the public that the industry has a real commitment to higher standards. Significant costs include

1 Developing the code

Costs will include

- consultation with consumers
- consultation with industry members (a cost for industry and individual operators)
- developing the draft, and final code
- publishing the code.

2 Implementing the code

Costs will include

- setting up a body to manage the code (the Executive)
- setting up a complaints and disputes process (and perhaps office)
- developing education and training material for code subscribers
- training staff (a cost for individual operators).

3 Administering the code

Costs will include

- meetings of the Executive and fees for consumer representatives
- maintaining the operation of the code (ongoing administration, publicity, training)
- operating the complaints and disputes process
- regular monitoring
- review
- updating the code.

Is there a more cost-effective alternative?

Codes of practice are not an answer to every problem. The same benefits can possibly be achieved at a lower cost by some other mechanism (or it may be that the code will not effectively deal with the problem).

Less than a code

It may be too expensive to introduce a code of practice where a problem involves only a few businesses or is confined to a limited or specialised area of the industry. In this case, a lighter-handed approach may be more effective. Options include direct contact with the businesses concerned, or the use of specific guidelines or campaigns to educate businesses.

More than a code

When the industry group is not cohesive, or when the scope of the problem is wider than the industry segment, it may be difficult to enforce the provisions of a code. In situations like this, government regulation may be more cost-effective than a code of practice.

DEVELOPING A CODE OF PRACTICE

CONSULT - ASK, LISTEN, TAKE ADVICE

A good code of practice will

- accurately identify real problems and
- offer solutions which are practical and workable for the industry and for consumers.

When to consult

Consultation should happen in three phases.

- 1 As part of making a decision to introduce a code. This will help to ensure that a code is the most appropriate option to deal with problems identified.
- 2 Before the drafting process has been done. This will help to identify the real problems and get some ideas about the kinds of solutions which may work.
- 3 After the first draft of the code has been completed. This will help to test the rules and show whether they are practical and will impact on the problems identified.

Most of all, consultation will help to ensure that the proposed code does not create any new problems.

Consulting all the players

To identify the real problems and develop solutions which are practical for the industry and for consumers, the views of all players must be gathered. Consult

- the people who own the industry
- the people who manage the industry
- the people who work in the industry and deal with consumers
- consumers (perhaps through organisations which represent consumers) and
- agencies which have an overview of the market for example, government agencies.

Who to consult

Consultation does not need to cover a large number of people, **but choose who to talk to carefully**. Talk to a representative sample of each group. If there are large and small businesses involved in the industry, note the proportions and include both on a reasonable basis in terms of their industry proportions. When choosing which consumer groups to consult, choose the ones which have direct feedback about the industry and which have credibility with consumers.

AND

Be systematic in the questioning

Ask everyone about the same range of things. Set the questions before consultation starts. But there is no need to be rigid. If it becomes clear during consultation that a valuable question has been missed, add it in. Then go back with extra questions to groups consulted earlier.

Ask industry

- What are the five most important issues in the industry or what are the five/ten/twenty questions most frequently asked by consumers?
- How can the code be of practical relevance to businesses within the industry?
- What are the most common areas of dispute between consumers and businesses in the industry?

Ask consumers

- What are the five most important issues for them or what are the five/ten/twenty questions they most frequently ask?
- How can the code be of practical relevance to consumers?
- What are the most common areas of dispute between consumers and businesses in the industry?
- What do they think are reasonable performance standards for products or service delivery?

Ask government agencies about the

- legal requirements for businesses operating in the industry
- government's concerns
- concerns of other political groups.

A N D

Record everything

This will create a lot of notes but they can easily be sifted. They will provide a reminder of specific conversations. Solutions are not always where they are expected to be.

The place, the time, and the patience

If consultation is happening through written correspondence, make sure that the information provided to those being consulted is understandable. Test the information first on a sample group. Allow a good amount of time for responses – for community groups¹, for example, a time frame of three months is appropriate to allow them time to consult with their members.

If consulting with people face to face

- offer them a place and a time which suits them
- give them enough time to talk
- talk to people in the places where they are comfortable and feel able to talk freely
- choose a time when they are not under pressure to do other things
- allow enough time to listen to everyone
- give them enough time to tell it in their way. Welcome anecdotes. They are easy to remember and often hold the key to solutions because they are real.

Good consultation, especially at the beginning, will save time later on.

Who pays for consumer representation?

The industry people will be funded by the industry but consumer representatives will often not be paid a fee and they will not have their costs met. The Ministry recommends that the industry *at least* meet the consumer representatives' costs. This will not fully compensate them for their time but it may ensure their continuing availability.

¹ See the Ministry of Consumer Affairs pamphlet, *Guidelines for Consulting Community Organisations*.

WRITING THE CODE OF PRACTICE

The first rule of the code must be that it is

- **WRITTEN IN PLAIN LANGUAGE** and
 - **SET OUT IN AN ACCESSIBLE MANNER** so that both the subscribers (those who agree to abide by the code) and consumers can easily understand it.
- Consider publishing the code (or at least sections that are especially pertinent to consumers) in languages other than English.**

Structure

A code of practice should have a logical structure. Every code of practice needs to include

1 Statement of purpose or mission statement

This is a clear and brief summary of the reason(s) why the code is needed and what the operation of the code is intended to achieve.

2 Objectives of the code

The objectives of the code expand on the statement of purpose and describe specifically what the code is intended to achieve.

3 Principles

The principles set down the basic values which the industry will apply to meet the intentions expressed in the statement of purpose and the objectives.

4 Rules

The rules apply the principles, and spell out the specific actions and procedures required of industry members to ensure that the intentions expressed in the statement of purpose and objectives are achieved. The rules put the statement of purpose, objectives, and principles into action.

5 Administrative procedures for the code

The administrative procedures will be used to implement the code and then maintain its operation. The code must establish a body (the Executive) which is responsible for the operation of the code, and then procedures to

- administer the code continuously
- publicise the code
- ensure training of staff occurs
- resolve complaints and disputes
- monitor the operation of the code
- review the code
- update the code.

1 Statement of purpose or mission statement

The purpose statement or mission statement is a clear and brief summary of the reason why the code is needed and what the operation of the code is intended to achieve overall. For example, to improve or clarify standards in all trading activities or to improve or clarify standards for particular transactions, such as telephone sales, or after-sales service.

Use the purpose statement

- as a focus point when promoting the code to industry members, consumers, and the media
- as a point of reference when decisions need to be made about the objectives, principles, and rules of the code
- as a benchmark against which to measure the conduct of code subscribers when customer complaints are received.

AN EXAMPLE OF A PURPOSE STATEMENT

"The purpose of the code is to promote

- good banking practice
- and
- good customer relationships with effective means of inter-communication."

(Code of Banking Practice, 2nd edition, 1996).

2 Objectives of the code

The objectives of the code expand on the statement of purpose. They describe specifically what the operation of the code is intended to achieve. They describe the desired outcomes and should be measurable.

There should be at least one objective for each activity in the code. This means that objectives will describe the

- levels of product or service performance the code intends to ensure (there may be a number of objectives covering this)
- style of administration which will be adopted for the code
- intention of any staff training requirements imposed by the code
- intention of any publicity about the code
- intention behind any complaints and disputes procedures
- purpose of any monitoring of the operation of the code and
- purpose of any review of the code.

EXAMPLES OF OBJECTIVES

- To improve the understanding of the rights and obligations of both customers and businesses.
- To set up agreed standards of service performance.
- To set up a uniform process for handling customer complaints.
- To set agreed standards of conduct for dealings between industry members, and between industry members and their customers.
- To set up mechanisms for handling complaints about breaches of the code.
- To continuously monitor the operation of the code.
- To periodically review the operation of the code against its purpose statement.

3 Principles

The principles of the code set down the basic values which the industry will apply to meet the intentions expressed in the statement of purpose and the objectives. Principles communicate the values which will govern conduct within the industry.

EXAMPLES OF PRINCIPLES

- All information given to consumers will be accurate, up to date, easy to understand, and not misleading in any way.
- All personal information given by consumers to subscribers will be treated confidentially.
- Suppliers covered by the code will carry out all transactions in good faith and on the basis of fair dealing.
- Consumer complaints will be handled promptly, fully, fairly, and with due respect to complainants throughout the process.

Some examples of principles from existing codes

“We will act fairly and reasonably towards you, our customers, in a consistent and ethical manner.”
(Code of Banking Practice 1996)

“We will act fairly in settling all disputes and complaints.”
(Fair Insurance Code 1994)

4 Rules

The rules of a code apply the principles and spell out the specific actions and tasks that must be carried out to ensure

- compliance with the code's principles and
- that the intentions expressed in the statement of purpose and objectives are achieved.

Rules must be specific and

- should specify *what* actions must be performed and *when*
- should not prescribe *how* the action must be performed (they must be flexible enough to allow for individual innovation)
- must be measurable, with performance benchmarks.

For example, rules often state that subscribers to the code should provide their customers with accurate information, but then fail to specify when or how the information is to be given. A good rule might specify that information will be given via direct communication, or by newspaper advertising. It will also specify when or how often this is done for example, annually, or when a contract is made.

If the principle is "to act fairly and reasonably towards customers" in a given activity area then the rules should set down the actions that define fair and reasonable behaviour.

Note If the objective is to provide "excellent standards in customer service", the principles and rules should not be simply a restatement of minimum legal requirements.

EXAMPLES OF RULES

- Every advertisement, brochure, receipt, or other contract document issued by a code subscriber shall contain the firm's full name, street and postal address, phone and fax numbers.
- All prices quoted or estimated orally, or in any documentation, shall be GST inclusive.
- When goods are returned by the consumer for repair whilst under company or statutory guarantee, the consumer will be informed of the time required for repair. If the time required for repair exceeds X days, the consumer shall be entitled to the use of temporary replacement goods during that period.
- Every code subscriber shall maintain a consumer complaints log containing the following information
 - 1 the date of the complaint
 - 2 the specific nature of the complaint and area of code it relates to
 - 3 the name and contact details of the complainant
 - 4 the follow-up action promised to the complainant
 - 5 the resolution of the complaint.

5 Administrative procedures for the code

The administrative procedures will be used to implement the code and then maintain its operation. The code must establish a body which is responsible for the operation of the code, and establish procedures to

- administer the code continuously
- publicise the code
- ensure training of staff occurs
- resolve complaints and disputes
- monitor the operation of the code
- review the code and
- update the code.

ESTABLISHING AN EXECUTIVE

There needs to be an active Executive body to make sure that the code operates *effectively*. This body should be established in a separate part of the code.

Think about

- the size and membership of the Executive
- its role, responsibilities, and powers
- its potential workload and
- the need for any sub-committees, and their roles and responsibilities.

Membership of the Executive

The Executive may be an entirely new body or an existing body which is willing to take on the responsibilities. In either case, the membership of the Executive does not need to be large, but it does need to be representative and it does need to include consumer representatives. The integrity of the code will directly benefit from the inclusion of consumer representatives.

The Ministry's experience suggests that, where consumer representatives have been appointed, for example, to the Insurance and Savings Ombudsman and Banking Ombudsman schemes, they have been extremely valuable in highlighting consumer issues and suggesting improvements.

The role, responsibilities, and powers of the Executive

The role of the Executive is largely one of overseeing the code. Their responsibilities and powers will depend on the code of practice but are likely to include

- the implementation of the code and its ongoing operation
- monitoring and reporting on compliance
- obtaining adequate finance from industry members, preparing budgets and financial reports
- appointing a conciliator or complaints body to handle customer complaints and disputes between firms
- arranging publicity for the code including the promotion of the code principles to industry members and consumers
- providing for the training of industry staff who may be handling inquiries from the public
- producing an annual report of activities
- imposing sanctions on code subscribers for breaches of the code
- conducting periodic reviews of the effectiveness of the code and its procedures
- initiating amendments or issuing guidelines to clarify aspects of the code.

CONSUMER REPRESENTATION

Consumer input to a code of practice, and representation on an Executive, is an important ingredient in any self-regulatory scheme if the primary intention is to address problems affecting consumers.

Consumer representation not only provides a public window on the scheme but also serves to remove the perception that a business organisation is acting in its members' interests to the exclusion or detriment of the broader public interest.

Consumer representation can improve the design and effectiveness of the code by providing

- a consumer perspective on the problems, and the nature and appropriateness of solutions
- technical expertise, objectivity, and independence in complaint and disputes resolution.

Consumer representation is most appropriate where a code deals with issues of direct concern to consumers such as

- product information, service information, and quality
- restrictions on entry, advertising, etc which are claimed to be in the public interest
- the rights and obligations of buyers and sellers and the allocation of liability between them in the event of disputes
- dispute and complaint resolution, and the remedies and penalties available.

Consumer and community groups are generally in a position to put forward suitable candidates for positions as consumer representatives. Such appointments can establish a direct line of accountability to the consumers they are chosen to represent and appointees will generally be well versed in consumer issues.

Some government departments are also able to nominate suitable consumer representatives. Both the Ministry of Consumer Affairs (Consumer Appointments File) and the Ministry of Women's Affairs (Women's Nomination Service) maintain files of appropriately qualified persons.

Funding of consumer representation

Business and government representatives on bodies that administer codes or decide on disputes are generally paid by the organisation they represent. Consumer representatives, however, are not. The Ministry recommends that a fee be paid to consumer representatives. This may not fully compensate them for all their time but it may go some way towards it and may ensure their continuing availability for such work.

PUBLICISING THE CODE

The success of a code of practice depends on the energy given to making sure that consumers and community groups are

- well-informed about the code and
- aware of their rights, obligations, and remedies under the code.

The code must be highly visible to consumers. If consumers do not know about the code then it is unlikely to benefit them or the code subscribers. The rules need to require that

- the code is in plain language
- there is a plain language summary

- copies of the code and the plain language summary are on display at every point of contact with customers. It is not sufficient to make the code available on request as this implies customers know of its existence.
- copies of the code and plain language summaries are distributed to consumer and community groups
- code subscribers publicise the code in their direct communications with customers. This does not need to be costly for example, they could enclose a summary leaflet to customers with their invoices or with direct marketing material once a year.

ADMINISTERING THE CODE

Need for staff

The decision whether to employ staff specifically to administer the code is a matter for the Executive who will need to consider the likely workload. The code should probably allow the appointment of staff because it is not always possible to accurately predict workloads. However, in most cases the administration of the code will probably become an extra duty for the industry association or a business.

Staff responsibilities may include

- correspondence
- arranging meetings
- collecting data and providing reports to the Executive
- financial reports
- arranging the publication of the code
- arranging the distribution of training guidelines
- writing an annual report of activities
- providing support for the arbitrator appointed to deal with complaints and disputes
- any other tasks designated by the Executive.

Premises

Think carefully about premises if a secretariat is established. Consider requiring separate premises, away from industry players. In a large industry such as banking, finance, insurance, or utilities, having separate premises demonstrates an Executive's independence.

Meetings

The Executive needs to meet regularly (at least quarterly) to ensure that all administrative requirements under the code are adequately addressed. It is important that these meetings, and the organisation of them, is established clearly in the code. In particular, it needs to be clear who is responsible for setting the date and time, and organising the agenda.

Annual report

The code should include requirements for the Executive to report at least once a year to the industry association, its members, and relevant interest groups (such as regulatory authorities and consumer groups). The report should identify industry-wide problems and recommend appropriate solutions. It should also incorporate a separate report from any consumer representative(s).

The coverage and detail of reporting will vary from industry to industry but normally will cover

- breaches of the code and the sanctions and/or remedies applied
- publicity and staff training
- complaints and disputes, and how they have been resolved
- any monitoring that has to be done
- the cost of code administration
- any other relevant details about the code's administration.

ENSURING INDUSTRY PARTICIPANTS UNDERSTAND THE CODE

The success of a code of practice depends heavily on the emphasis and energy given to making sure that individual businesses, the industry association, consumers, and community groups

- are well-informed about the code and
- are able to use the code effectively.

The code should require businesses to ensure that their staff are trained to be well aware of the code and what it means to them and the business.

What staff need to know

All industry staff must understand the provisions of the code and be able to explain these to customers. A code may fall short, not because its principles and procedures are inadequate, but because the subscribers' employees are either unaware of the code or fail to implement it in day-to-day dealings with customers.

What needs to be in the code

The code must require training and support for industry staff so that they know the code well and understand what they have to do. The code does not need to specify in detail what sort of information, training, and support is required. It simply needs to indicate that training will happen and leave the detail to the discretion of the Executive.

Which staff need training

It is important that staff at all levels – management, sales, technical service, and accounts – know about the code's existence and what it requires. Therefore, the code should include provisions that require its subscribers to train all staff in their obligations under the code. Commitment from management is essential for this.

For larger businesses, the code should contain requirements for

- initial training of existing staff (at all levels)
- initial training of new staff
- ongoing training to remind all staff of their obligations under the code.

For smaller businesses, these requirements may not be practicable. Instead, the Executive may need to provide seminars backed up by newsletter information. The code needs to specify if the Executive is to undertake such activities.

Training and support material

It is crucial that the training provisions of the code are backed up with support material. The code could require or suggest any of the following

- a plain language leaflet that outlines the key provisions of the code and provides guidelines on how these should be put into practice
- a summary of the key benefits of the code
- posters for the workplace which outline and reinforce key messages
- articles or advertisements in trade and company publications
- publication of any recent complaints or enforcement action.

Plain language guidelines

Where the code is long or complex, it may be necessary to require plain language guidelines to support staff in dealing with specific issues covered in the code. For example, where a code requires a uniform procedure for handling complaints, a specific guideline may be useful.

RESOLVING COMPLAINTS AND DISPUTES

One of the main public benefits of a code is that it provides focussed complaints and disputes processes. Good processes will enhance the reputation of the industry. They will also help the industry collect solid data about its operation and help reduce future complaints by providing information about problem areas.

The code needs to provide for two levels of complaint resolution

- 1 internal procedures for handling complaints within an individual business
- 2 industry tribunals to handle disputes between consumers and firms, as well as complaints from firms themselves that the code has been breached.

1 Internal procedures for handling complaints

When customer complaints first occur, it is best to handle them through internal complaints procedures. This is the most cost-effective way of dealing with complaints.

The code should require businesses to deal with complaints quickly and effectively. If the complaints are dealt with quickly and well at this level, consumers are less likely to criticise the business and often remain loyal.

Remedies

The code should specify remedies for consumers where performance standards under the code are not met. Remedies should be specified for breaches of rules in each activity area of the code. The purpose of remedies is to compensate consumers for losses resulting from a trader's breach. Therefore, they should be applied only when there is a loss suffered (by the consumer) as well as a breach of the rule. Examples of remedies include refunds of money paid, money compensation for losses suffered, the return of property (for example, trade-in goods), the performance of work, and the setting aside of contract terms in appropriate cases.

Principles of an internal complaints and disputes process

The code needs to require businesses to ensure that their complaints processes are

- **Accessible**
The point of entry is immediate and does not require complaints to be in writing. The procedure is free to the consumer. It progresses through clear and simple stages with plain language information about the process available at the point of purchase.
- **Fair**
Both parties perceive that they have been treated equally. The scheme adheres to the principles of natural justice. The consumer has the right to present their case orally and/or in writing and is given time and, in appropriate cases, assistance to do so.
- **Efficient**
The procedure is as speedy as practicable (a timeframe for first response, and settlement is essential), involves a minimum of paperwork, and results in decisions and outcomes that are consistent and enforceable.
- **Accountable**
A complaints log is kept and includes information on every complaint and dispute (what it was about, how it was resolved, what the outcome was).

Note The code should cover the process in detail and include points at which the complaint can be transferred to the industry complaints and disputes process.

2 An industry complaints and disputes process

The code should specify when complaints should come to the industry complaints and disputes body. Perhaps complaints which have not been resolved within a particular timeframe, or which prove intractable, should come to the body. Perhaps all serious complaints should come to the body. Certainly all disputes between subscribers to the code will have to come to the industry complaints and disputes body.

Purpose of an industry complaints and disputes process

A complaints and disputes process needs to be set up by the Executive to handle allegations that the code has been breached, and, where this is proven, to determine the appropriate sanction. The complaints and disputes process must

- identify breaches
- hear the case (and provide an opportunity for the code subscriber to respond)
- decide on the appropriate remedy and sanction
- take appropriate action on *serious* breaches (where the breach of the code involves actions that are illegal)
- give the subscriber to the code the right to appeal to an independent body.

Who hears industry complaints and disputes

A separate body (of one or more people) should be set up to hear complaints and disputes. That body should not include any member of the Executive or any member of the industry involved in the operation of the code. It should consist of either one independent person or an independent group with a majority of non-industry people. Hearings carried out by a body within the industry will create a perception that the industry is acting only in its members' interests. The industry's role in the process is as an expert witness.

Principles of an industry complaints and disputes process

To provide for fair and efficient redress, a process for resolving disputes/handling complaints should be

- **Accessible to consumers**
The process must be visible, easy to use, and have no significant cost barriers.
- **Fair**
Decisions must be seen as fair by both parties. The principles of natural justice must be observed and decisions must be made using objective criteria.
- **Efficient**
Disputes and complaints must be dealt with in a timely, expeditious, and transparent manner.
- **Accountable**
There must be public accountability through the publication of decisions and other information about disputes and industry-wide complaints.
- **Effective**
Decisions must be binding.
- **Independent**
The process must be independent of the industry.

Choosing a model

There are a number of useful models of industry disputes resolution bodies which meet the criteria. Different options incur different costs for example, an ombudsman (see Appendix 4) will have higher fixed costs than arbitration.

The most cost-effective option will depend on the

- number of complaints and disputes that cannot be resolved by individual firms
- complexity of the complaints and disputes
- amounts of money involved in typical cases
- ease of access to alternative sources of redress (such as Disputes Tribunals or the Courts).

When the number of complaints is moderate and the cases are not complex, it is usually more cost-effective to use an **independent arbitrator** who deals with disputes on an *ad hoc* basis.

When there is a greater number of disputes, or when these vary in their complexity (and so may involve expert knowledge), a permanent full-time ombudsman (or similar) may be more appropriate.

Information from industry and community agencies about past complaints and disputes in the industry can provide useful insights into consumer expectations of the industry and the likely level and complexity of consumer complaints under the proposed code.

Code rules for an industry complaints and disputes process

Whatever the type of industry disputes resolution body chosen, the code must define how it will operate. This means

- **selection** – how the person/body who will hear the disputes is selected, and the length of their term of office
- **role** – their specific responsibilities and jurisdiction
- **procedures** – for making and receiving complaints and disputes (including the stages and timeframes for resolution of the complaint/dispute)
- **powers** – to conduct hearings, receive evidence, make rulings and decisions (including the principles on which these powers are based)
- **sanctions** – need to differentiate between the routine and serious complaints and breaches, and their penalties

- **reporting** – whether reasons for decisions must be in writing, and whether there will be an annual report
- **appeals** – rights of appeal are particularly important where sanctions include suspension or expulsion. Any right of appeal should be to an appropriately qualified independent (not industry) individual or body. The code must clearly define the jurisdiction of an appeals body or individual
- **monitoring** – the intention of and procedures for monitoring
- **review** – the intention of any review and the procedures for reviewing the complaints/disputes process.

Sanctions

Sanctions are an important part of the code. They give it credibility with both the industry and consumers. The code should specify the sanctions (or the range of sanctions) that can be imposed on code subscribers who

- do not comply with disputes resolution orders to remedy customer complaints
- breach the code.

Note Sanctions need to be commercially significant so that industry members are encouraged to comply. This will generate consumer confidence and industry credibility.

Sanctions should be flexible enough to reflect the nature and seriousness of the breach and the loss or damage suffered by the complainant. Examples of sanctions include censures, warnings, corrective letters, publicity, restitution, repair, corrective advertising, withdrawal of advertisements, fines, suspension, or expulsion.

Remedies

The code should specify remedies for consumers where performance standards under the code are not met. Remedies should be specified for breaches of rules in each activity area of the code. The purpose of remedies is to compensate consumers for losses resulting from a trader's breach. Therefore, they should be applied only when there is a loss suffered (by the consumer) as well as a breach of the rule. Examples of remedies include refunds of money paid, money compensation for losses suffered, the return of property (for example, trade-in goods), the performance of work, and the setting aside of contract terms in appropriate cases.

MONITORING THE OPERATION OF THE CODE

If a code is to set standards, it is essential that it continues to be relevant to marketplace conditions. It should therefore specify

1 The purpose of monitoring the code

Basically the purpose is to see whether the code is working effectively.

2 The frequency of monitoring

For example, annually.

3 Who will monitor the code

In most cases, monitoring is likely to be done by the Executive. However it may be desirable to use an independent body and include non-industry representatives when

- there are technical matters involved or
- the Executive is responsible for complaints/disputes procedures.

4 How monitoring will be funded

The costs will generally be met within the usual operational budget.

5 What the timeframe will be

The code needs to ensure that there is adequate time for the exercise.

6 What data will be collected

Monitoring is built on regular and systematic data collection. The code should specify the methods of collecting and collating data, and the sort of data to be collected and collated.

The data could include

- the number of complaints and disputes lodged, who lodged them, and whom they were lodged against
- the subject matter of complaints and disputes (and their proportion of the total)
- the number and proportion found to be in breach of the code (and the reasons why)
- the number and proportion found *not* to be in breach of the code (and why not)
- the time taken to deal with complaints and disputes measured against what the code requires
- whether any complaints and disputes were followed up to see whether they were acted on (and whether any further breaches of the code were found as a result of this)

- the number and type of remedies and sanctions
- the number of complaints and disputes about matters not covered by the code, why they were not covered by the code, and how they were dealt with
- the number of decisions appealed, and the outcome of appeals.

How detailed this data should be will depend on the size of the industry, the number and complexity of complaints, and the seriousness of any breaches.

7 How the data will be analysed

The data should be classified (analysed) at an appropriate level of detail and in a manner that allows the assessment of trends. The code should require that the data analysis address issues such as whether

- participants are complying with the code
- the code is anti-competitive (see Appendix 1)
- the procedures for disputes resolution and the handling of complaints are working effectively.

8 How the monitoring will be reported

For example, separate from, or as part of, the Annual Report.

Information gained from monitoring is an important input into the review process. It is also a valuable source of industry information about the origins and causes of complaints. It can be used to alter practices that cause complaints, and can provide useful input into staff training programmes.

REVIEWING THE CODE

The operation of the code needs to be reviewed so that the code remains robust and credible. The code should specify the process for review. This makes it transparent and gives it public credibility.

The code should specify

1 Purpose of the review

To establish what is currently happening in the industry and whether the code meets its objectives, not just whether the code's rules are working well. The focus of the review process should be on ensuring that the code remains relevant to issues affecting the industry and consumers. It should indicate whether and where the code needs amending. And it should identify newly-emerging issues along with the lessons learned from recent experience so that they can be incorporated into the code.

2 The frequency of review

For example, every three years.

3 The timeframe for the review

Time frames should be set for each stage of the review process. A reasonable amount of time should be allowed for consultation.

4 Who will be involved in the review

Different types of inputs are necessary for a review process to be effective. These are the

- **Executive** – must identify key issues and disputes that have arisen over the period
- **consumer and community groups** – provide a consumer perspective as well as constructive criticism, and ideas for improving the code
- **code subscribers** – provide a day-to-day industry perspective.

Note Funds may need to be set aside for consultation with community and consumer groups.

5 Questions to be asked

The code needs to specify the range of matters to be covered. Some possibilities are

Is the code effective?

- Do the objectives deal with accurately identified and real problems?
- Are the code's principles and rules adequate for these problems?
- Have pre-existing problems been corrected?
- Do the benefits of having the code at least offset the costs?
- Has the code affected competition beneficially or adversely?

Are the procedures for handling complaints and disputes working?

- Does each firm have a complaints system that meets the criteria laid down in the code?
- Has there been a change in the number and type of complaints?
- Are consumers satisfied with the handling of complaints and disputes resolution?
- Are the range and level of remedies in businesses adequate to deal with consumers' problems?
- Is an industry body required for resolving disputes?

Is the code being complied with?

- Is the code being implemented and observed by subscribers?
- Has the industry been called upon to impose sanctions? Have they worked?

Is the code visible?

- Are the relevant groups (consumers, and the staff of subscribers) familiar with the code and its requirements?

Is the code administered effectively?

- Is the Executive adequately resourced to achieve the desired outcomes?
- What are the costs of administering the code? What costs are imposed on subscribers? Are lower-cost options available?

Is there adequate consultation and external representation?

- How much consultation has there been with subscribers and consumers?
- Are outside representatives (such as consumers and government agencies) satisfied that they can contribute adequately?
- How will the outcome of the review be reported and actioned?

UPDATING THE CODE

The operation of the code needs to be updated regularly so that the code continues to be relevant and credible.

The code should specify

1 When amendments can be initiated

Amendments will usually result from a review. However, it may be useful to consider making it possible for the code to be amended between reviews. This would allow newly-emerging issues to be dealt with quickly. The code should also specify whether

- amendments can be initiated at any stage and by any interested party, or only as a result of monitoring work
- there are any limits on the powers to amend the code. For example, are there occasions when an issue must be dealt with only after a review process?

2 Who can initiate amendments

The Executive is the obvious body to initiate amendments. It meets regularly and receives the reports on code activity.

3 The process for amending the code

This section needs to be done in considerable detail and include

- who must be consulted
- what information they must be given
- how their input will be gathered and
- the timeframe for any consultation.

4 Who will enact the amendments

Amendments should be formally enacted by the industry association (or by the sub-committee that originally developed the code) and should be made only after consultation with subscribers, government agencies, and consumers. This will ensure that amendments are workable, acceptable, and will not give rise to new difficulties.

5 How the amendments will be publicised

Amendments should be publicised at least through the same channels used to promote the code initially.

APPENDIX 1: COMPETITION ISSUES

The code of practice must not weaken competition in the industry. A code that “substantially lessens” competition in a particular market for goods and services risks court action under the Commerce Act.

Any person may apply for an injunction under the Act, and it is not necessary for that person to show they have suffered, or are likely to suffer, damage or loss.

From a competition perspective, the primary concern with codes of practice is their potential to restrain commercial behaviour for example, by placing restrictions on advertising, or creating entry barriers for firms. Even voluntary guidelines can be a threat to competition, especially in highly concentrated markets, because the participants can easily develop consensus on methods of restricting competition even if the association or sector does not formally adopt a code.

However, the Commerce Commission may authorise a code of practice in certain circumstances even though it lessens competition. An authorisation allows the code to take effect without risk of either Commission or private action under the Commerce Act.

Authorisations must be applied for before any agreement is entered into or before any code is implemented. If the Commission is satisfied that the code will result (or will be likely to result) in benefits to the public which will outweigh the lessening in competition, it can authorise a code.

The Commission has not granted any authorisation of codes of practice in recent years. In assessing public benefit, the Commission may look to see if a code aims to correct market problems such as a significant failure in the competitive market process (for example, substantial “information asymmetries” or “transaction costs”). Correcting these problems can enhance the competitive process.

Information asymmetries occur when there are large imbalances in information between buyers and sellers. Typically, these asymmetries occur in situations where there is

- insufficient information on products or prices
- false or misleading product or price information.

Typical transaction costs may include

- costs incurred in negotiating and executing a contract
- costs associated with monitoring the performance of the contract
- costs of enforcing the contract or obtaining a remedy if post-sale disputes occur
- costs incurred by customers in finding out about prices, quality, and durability of products before purchase
- costs associated with finding out about suppliers and how the relevant market operates.

Provisions in codes that improve the handling of complaints, transparency, and accountability may also add to public benefit.

Note Codes that include expulsion or suspension as a sanction for non-compliance may have anti-competitive consequences in cases where membership of an association or compliance with the code is necessary for a firm to operate or compete in a market. In the latter case, an independent appeal mechanism is desirable.

The sensible course to follow when seeking to develop a code of practice would be to seek legal advice and, if the code gives rise to competition concerns, to make an application for authorisation to the Commerce Commission.

Commerce Commission contact details

Wellington

Landcorp House
101 Lambton Quay
PO Box 2351
Wellington
Tel (04) 471 0180 • Fax (04) 471 0771

Auckland

Gosling Chapman Building
63 Albert St
PO Box 105-222
Auckland Central
Tel (09) 377 3094 • Fax (09) 377 3561

Christchurch

Riverlands House
31 Victoria St
PO Box 25-193
Christchurch 1
Tel (03) 379 3284 • Fax (03) 366 1311

APPENDIX 2: THE PRIVACY ACT 1993

The Privacy Act 1993 affects all public and private sector agencies (including private individuals) who collect, hold, use, or disclose personal information. The Act imposes legal requirements in matters such as providing access for individuals to their own personal information and disclosure of personal information to third parties.

The Act sets out twelve Information Privacy Principles which apply to all agencies dealing with personal information. The Privacy Commissioner can issue privacy codes of practice that can modify the application of the principles and prescribe how the principles are to be applied, or complied with.

The Privacy Commissioner has issued draft guidelines for privacy provisions in codes of practice.

These are designed to assist representative groups that are proposing to seek the issue of a code of practice for their sector under the Privacy Act. It would be sensible for any organisation which is either specifically developing a code with the objective of submitting it to the Commissioner, or which is addressing some privacy issues within a code of practice, to obtain a copy of the Privacy Act and the Privacy Commissioner's draft guidelines.

Privacy Commissioner contact details

Enquiries (09) 302 8655

Hotline 0800 803 909

Postal address PO Box 466, Auckland

APPENDIX 3: RESTRICTIONS ON THE USE OF THE TITLE OMBUDSMAN

A 1991 amendment to the Ombudsmen Act 1975 restricts the use of the title “ombudsman”.

The permission of the Chief Ombudsman is required before any person or association may employ the term in a self-regulation scheme.

The Chief Ombudsman has published criteria against which any application for the use of the title will be considered. The criteria are

- Unless authorised by statute, no scheme entitled ombudsman should be established in an area where the Ombudsman has, or may be given, jurisdiction under either the Ombudsmen Act 1975, or the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987. Such a scheme would confuse the public and undermine the constitutional role of the statutory Ombudsmen.
- The holder of the title ombudsman must be appointed and funded in a manner which enables them to operate effectively and independently of the organisation which will be subject to the role. The position should also have a publicly notified charter in plain language that is constantly before the consuming public. The appointed ombudsman should have the right to recommend changes to certain aspects of their charter.
- The role of the proposed ombudsman must be to receive complaints directly from a complainant free of charge, to impartially investigate the facts, to conclude with a decision to sustain or not to

sustain, and (if appropriate) to achieve a remedy. The title ombudsman would not be agreed to if the role was seen as one of a counsel or advocate for special-interest groups. The position will need to be seen as one of independence and impartiality from the perspectives of both the organisation and the consumer.

- Permission will not normally be granted for use in roles that are essentially local or regional in nature.
- The title ombudsman should not be used alone but in conjunction with a description which makes the role clear - for example banking ombudsman. This full title should be employed in the public charter and in correspondence and publicity.
- An ombudsman scheme is required to produce an annual public report of activities. It is also desirable for the scheme to make provision for periodic public reviews, to allow consumers to indicate the degree of credibility that they accord the complaints system.

Note Contact the Office of the Chief Ombudsmen to clarify current criteria at the time the code is being developed.

Office of the Chief Ombudsmen contact details

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