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Review of industry dispute resolution schemes

Under Part 7 of the Telecommunications Act 2001

Framework paper

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Purpose

1. This framework document sets out our approach to conducting reviews of industry dispute resolution schemes under Part 7 of the Telecommunications Act 2001 (**Act**)[1].

2. It is intended to help interested parties understand how we will conduct these reviews.

3. Interested parties should read this document to find information on the following:

   3.1 the background to our Part 7 review powers;

   3.2 the matters we may consider as part of a review;

   3.3 how we intend to conduct a review, including how we intend to engage with interested parties;

   3.4 possible outcomes of a review;

   3.5 how frequently we intend to conduct reviews; and

   3.6 how we will deal with information gathered.

Scope of this framework document

4. This framework document relates to the exercise of our function to review industry dispute resolution schemes under Part 7.[2] It does not relate to the s 234 power to issue guidelines to the telecommunications industry on any matters relating to retail service quality (**RSQ**), and does not directly address RSQ codes.[3,4] It does not provide guidance in respect of any other statutory provisions enacted after this framework document is issued.

5. The guidance set out in this framework document is general and not exhaustive. It is not a statement of the law and is not intended to have legal effect.

6. Because the guidance in this framework document is general in nature, the Commerce Commission (**Commission**) will apply it flexibly according to the circumstances of each review. Our approach may evolve over time. We may therefore revise this framework document from time to time.

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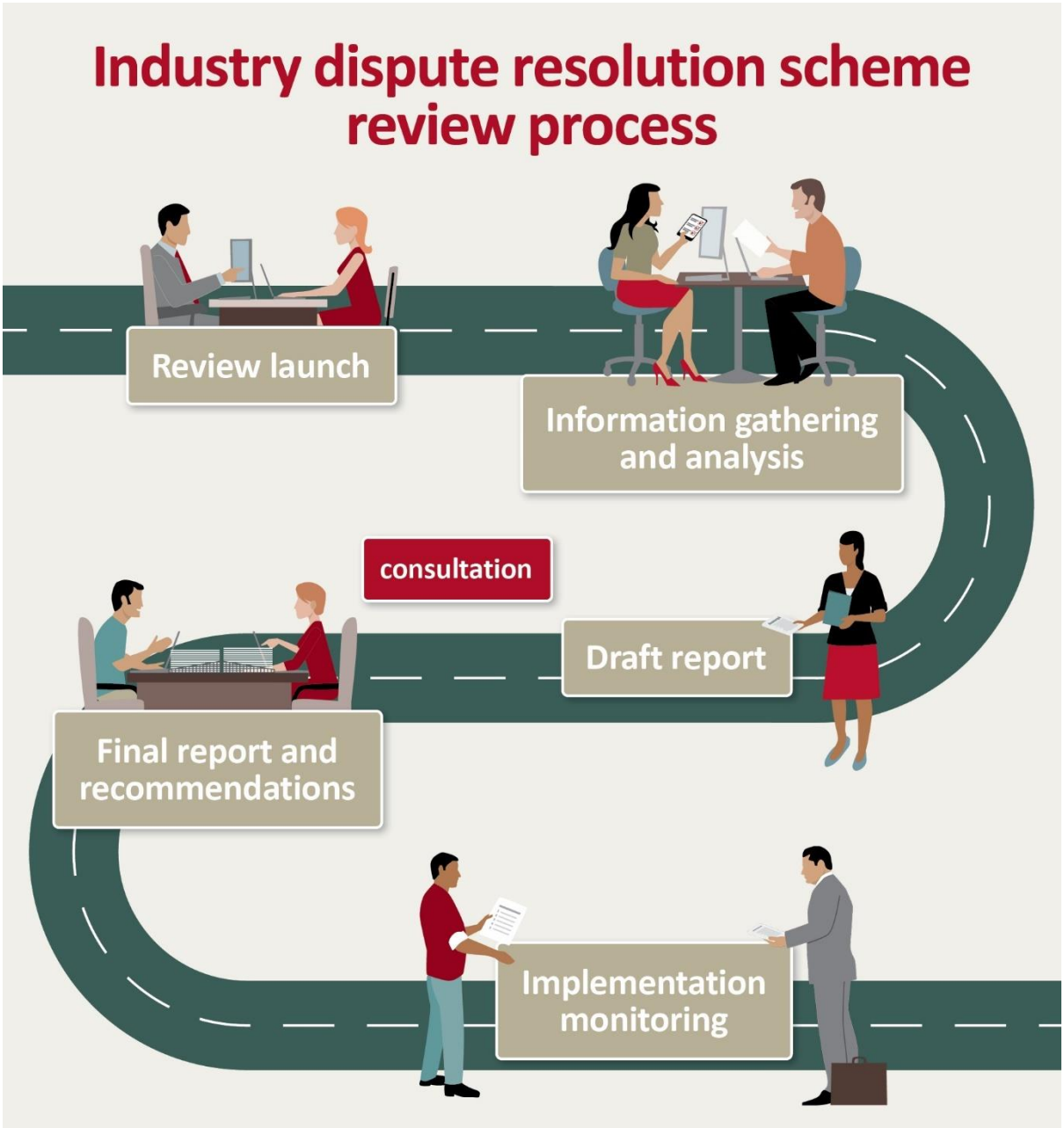
1 All references in this paper are to the Telecommunications Act 2001 unless stated otherwise.

2 Section 232(b) excludes a dispute resolution scheme as scheme defined under clause 2 of Schedule 3C of the Act (i.e., a scheme for resolving disputes within s 155ZI, in relation to an installation).

3 Section 234 provides that the Commission may issue guidelines to the telecommunications industry on any matters relating to retail service quality codes, including advice on what matters are appropriately dealt with by retail service quality codes.

4 See s 235 and s 236.

Overview of the key stages of a review



Background: introduction of Part 7 – Consumer matters

7. Part 7 – Consumer matters was introduced to the Act by the Telecommunications (New Regulatory Framework) Amendment Act 2018. The policy objectives for consumer service quality in the telecommunications sector underpinning these provisions were to ensure that consumers:[5]

   7.1 can make informed choices about retail telecommunications services;

   7.2 can expect service quality at competitive levels; and

   7.3 have access to efficient and responsive complaint and dispute resolution procedures if problems arise.

8. One of the new Part 7 provisions is s 246(1), which requires us to review each industry dispute resolution scheme at least once every three years.

9. There is currently one industry dispute resolution scheme as defined in s 232: the Telecommunications Dispute Resolution Scheme (**TDRS**). The TDRS was set up by the New Zealand Telecommunications Forum (**TCF**) in 2007. The TCF is the scheme provider. The TCF:

   9.1 created the Customer Complaints Code and the Terms of Reference for the TDRS; and

   9.2 appointed FairWay Resolution Limited as the dispute resolution provider for the TDRS.

Matters we may consider when conducting a review

10. The Act sets out a non-exhaustive list of matters we may choose to consider when we conduct a review of an industry dispute resolution scheme. These matters include:[6]

    10.1 the purpose of the industry dispute resolution scheme;

    10.2 the scheme provider;

    10.3 the dispute resolution provider for the scheme;

    10.4 the purpose of the dispute resolution provider for the scheme;

    10.5 the effectiveness of the scheme in resolving complaints by consumers against service providers;

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5 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Telecommunications Act review - consumer matters* (30 March 2017) accessible at https://www.mbie.govt.nz/assets/512ad8c91a/telco-review-ris-consumer-matters.pdf at paragraph 51.

6 Section 246(2); refer to paragraph 13 below.

10.6 the adequacy of the scheme rules;

10.7 the procedures that are used for receiving, investigating, and resolving complaints;

10.8 how promptly complaints are dealt with;

10.9 whether any recommendations for improving the scheme have been implemented.

11. The industry dispute resolution scheme and dispute resolution provider each have their own distinct statutory purposes (refer to paragraphs 13-15 below).

12. As such, if we choose to consider the industry dispute resolution scheme and/or the dispute resolution provider as part of our review, we will consider each according to its respective purpose. This will enable us to assess whether each is meeting, or could better meet, its respective purpose.

Purpose of industry dispute resolution scheme

13. The purpose of an industry dispute resolution scheme is to:[7]

> ensure that, if a consumer has a dispute with a service provider in relation to a Commission code or an industry retail service quality code, the consumer has access to a dispute resolution scheme for resolving that dispute in accordance with the principles set out in section 246(2)(f).

14. The principles set out in s 246(2)(f) are:[8]

14.1 accessibility;

14.2 independence;

14.3 fairness;

14.4 accountability;

14.5 efficiency;

14.6 effectiveness.

7 Section 247.

8 Section 246(2)(f).

Purpose of dispute resolution provider

15. Section 248 provides that the purpose of a dispute resolution provider in relation to a dispute resolution scheme for a Commission code or an industry RSQ code, is—

(a) to operate the scheme; and

(b) to administer the relevant code; and

(c) to manage consumer complaints relating to the code; and

(d) to investigate disputes relating to the code; and

(e) to promote awareness of the scheme and the code; and

(f) to monitor compliance with the scheme and the code; and

(g) to enforce the provisions of the scheme and the code.

How we intend to conduct our reviews

16. We are committed to providing transparency of our processes so that all interested parties can contribute effectively to our reviews.

17. We recognise that each review might differ regarding the matters set out in s 246(2) on which we choose to focus. Nonetheless, we intend to run each review using a broadly consistent approach, while applying flexibility relevant to the needs of the particular review.

18. We will allow interested parties a fair and reasonable time to participate in our processes and to respond to any requests for information and to make submissions, if applicable.

Notifying interested parties when we have launched a review

19. For each review, we will ensure that we inform interested parties and provide them with sufficient notice of when we will be launching a review. We will consider how best to inform interested parties of our decision to launch a review. This may include:

19.1 publishing an open letter on our website;[9]

19.2 publishing a gazette notice;

19.3 publishing a media release;

19.4 informing interested parties via email; or

[9] For example, refer to our open letter published on 29 October 2020 in which the first review was launched: https://comcom.govt.nz/__data/assets/pdf_file/0023/227354/Improving-retail-service-quality-for-consumers-Open-letter-29-October-2020.pdf

19.5 a combination of the above.

20. As soon as reasonably practicable after launching the review, we will publish a short process paper outlining:

20.1 key steps for the review; and

20.2 indicative timeframes for the review, including how interested parties can remain informed and contribute to the review.

Publishing an issues paper setting out focus areas for a review

21. As soon as reasonably practicable after launching a review, we will publish an issues paper setting out our focus areas for the review. The issues paper may be published either at the same time as, or some time after, the process paper.

22. If the issues paper is not published at the same time as the process paper, the process paper will set out a timetable for when we expect it to be published.

23. Our focus areas may be informed by:

23.1 views received through engagement with interested parties;

23.2 complaints data;

23.3 information the Commission obtains through its monitoring function under s 9A; and

23.4 once we have carried out the first review:

23.4.1 recommendations made at the end of previous reviews; and

23.4.2 matters raised in (but which were out of scope of) previous reviews.

24. The focus areas that we set out in our issues paper do not necessarily restrict interested parties from raising other issues related to the industry dispute resolution scheme that they consider relevant to the review.

25. We may exercise our discretion in relation to any such matter. For example, we may decide to extend our focus areas to include any new matter raised with us. We will inform interested parties of any decision to modify our focus areas for a review in a timely manner.

Requesting and gathering information

26. We will typically request information from a range of parties. This can be done at any stage of a review. We may use this information to inform our focus areas for the review. We may also use this information to assess whether the industry dispute

resolution scheme or the dispute resolution provider for the industry dispute resolution scheme is meeting, or could better meet, their respective purposes.[10]

27. We may look to request information from a range of parties, including:

    27.1 the dispute resolution provider for the scheme;

    27.2 the scheme provider;

    27.3 members of the industry dispute resolution scheme;

    27.4 telecommunications providers who are not members of the industry dispute resolution scheme;

    27.5 consumer groups and individual consumers;

    27.6 other dispute resolution schemes; and

    27.7 other government agencies.

28. We will generally look to obtain information through voluntary information requests. We may discuss with parties the information we require and the most practical way to gather that information, before requests are issued. We may also look to collect information in other ways, including through questionnaires, surveys, holding meetings with an interested party or parties and through consultation, workshops, focus groups, conferences or hearings. Where we require information from a person, we can do so using our compulsory information gathering powers.[11]

29. We may make multiple requests for information during a review. We intend to be fair and reasonable with our requests for information and the deadlines we set for parties to respond to our requests.

Duty to provide truthful, accurate and complete information

30. Regardless of how interested parties provide information to us – whether under compulsion or voluntarily in response to an information request or at a meeting – there is a legal duty to ensure that the information provided is complete, truthful, and accurate.

31. It is a criminal offence to attempt to knowingly mislead or deceive the Commission, for example by supplying information to us knowing it to be false or misleading, or by colluding with other people to provide misleading or false answers to our requests or questions.[12]

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10 Refer to paragraphs 11-15 above.

11 Section 246(3) provides that we may require the following persons to provide the Commission with any information relevant to the matters set out in s 246(2): the dispute resolution provider for the scheme; the scheme provider; a scheme member.

12 Commerce Act 1986, s 103(2), incorporated into the Telecommunications Act 2001 by s 15(1)(l).

32. Parties should use their best efforts to ensure that the information provided to us is accurate, truthful and complete.

Testing and analysis of findings

33. We intend to analyse information we collect in order to conduct our review to assess how an industry dispute resolution scheme or a dispute resolution provider for the scheme is meeting or could better meet its respective purposes under the Act.[13]

34. For example, when reviewing an industry dispute resolution scheme and assessing whether it is meeting or could better meet its purpose under s 247 of the Act (refer to paragraphs 13-14 above), we may consider similar dispute resolution schemes and guidance, for example:

    34.1 MBIE's best practice guidance for dispute resolution;[14]

    34.2 Australia's key practices for industry-based customer dispute resolution;[15] and

    34.3 any other relevant benchmark.

35. We may also look to other dispute resolution schemes, such as the Australian Telecommunications Industry Ombudsman, or the energy complaints scheme operated by Utilities Disputes Limited to guide our approach.[16,17]

Possible outcomes of a review

Report and recommendations to the scheme provider

36. As the final step of each review, we must provide a report to the scheme provider on any recommendations for improving the industry dispute resolution scheme. Our report must specify timeframes for the scheme provider to implement our recommendations.[18]

37. We will generally issue a draft report setting out our recommendations.

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13 Refer to paragraphs 11-15 above.

14 Ministry of Business, Innovation and Employment "Best practice guidance on dispute resolution" accessible at https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/best-practice-guidance-on-dispute-resolution/.

15 The Australian Government: The Treasury "Key Practices for Industry-based Customer Dispute Resolution"(2015) accessible at https://treasury.gov.au/sites/default/files/2019-03/key_pract_ind_cust_dispute_resol.pdf.

16 Telecommunications Industry Ombudsman's complaint guides can be found here: https://www.tio.com.au/.

17 Utilities Disputes "General and Scheme Rules for the Energy Complaints Scheme" (1 April 2019) accessible at http://media.utilitiesdisputes.org.nz/media/Scheme%20Documents/ECS%20rules%20Utilities%20Disputes%201%20April%202019.pdf.

18 Section 246(4).

38. We will generally seek submissions from interested parties on our draft report and our draft recommendations to the scheme provider.

39. When making recommendations to the scheme provider, we will consider the approach that is most likely to achieve the desired outcome. For example, in some cases, our recommendations may be principles-based. In other instances, a more prescriptive approach may be more appropriate and we may recommend the implementation of specific measures.

40. Principles-based recommendations may for example:

    40.1 recommend the dispute resolution provider for the scheme takes steps to raise awareness of the scheme;

    40.2 recommend the scheme makes itself more accessible to consumers of telecommunications services.

41. Specific recommendations may for example:

    41.1 recommend the rules for the industry dispute resolution scheme are updated to include or remove a particular provision;

    41.2 recommend the dispute resolution provider for the scheme publishes compliance reports regarding compliance with the scheme.

42. We intend to be fair and reasonable in our recommendations and in the period of time we allow for the scheme provider to implement our recommendations.

Implementation of our recommendations

43. How we intend to monitor implementation of our recommendations will depend on the recommendations we make after each review.

44. We may for example:

    44.1 set fixed deadlines for each recommendation;

    44.2 set one deadline to implement all recommendations;

    44.3 ask the scheme provider for progress reports;

    44.4 conduct a review for the purpose of assessing implementation of our recommendations; and/or

    44.5 assess implementation of all recommendations at the next three-yearly review, or at any earlier time that we consider appropriate.

45. We may include how we intend to monitor implementation of our recommendations in our final report to the scheme provider, or we may publish a separate paper shortly after our review is complete.

Report to the Minister if recommendations not implemented satisfactorily

46. If we consider that any of our recommendations are not implemented satisfactorily, we must provide a report to the Minister. Our report must outline:

    46.1 our recommendations for improving the industry dispute resolution scheme;

    46.2 whether in our opinion those recommendations have been implemented; and

    46.3 whether we consider that either:

        46.3.1 the industry dispute resolution scheme fails to achieve its purpose under s 247; or

        46.3.2 the dispute resolution provider for the industry dispute resolution scheme fails to achieve its purpose under s 248.[19]

47. If we propose to provide such a report to the Minister, we must allow the scheme provider, the dispute resolution provider for the scheme, and members of the industry dispute resolution scheme 20 working days to make submissions on our draft report.[20]

48. Following this report, the Minister may bring in a statutory consumer complaints system under Part 4B. The statutory consumer complaints system under Part 4B would become the dispute resolution scheme responsible for Commission-led RSQ matters (for example, Commission RSQ codes and 111 Contact Code).[21]

How frequently we intend to conduct reviews

49. We must review each industry dispute resolution scheme at least once every three years.[22] We may however conduct reviews on a more frequent basis, for example to:

    49.1 assess whether recommendations made under previous reviews have been implemented satisfactorily;

    49.2 consider whether additional issues have arisen or additional recommendations are required to address issues that have been identified;

    49.3 focus our attention on selected issues that are of particular concern (for example, because of their impact on consumers); and/or

    49.4 conduct an overall sense-check of the operation of the regime.

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19 Section 246(5).
20 Section 246(6).
21 Section 240(1)(b). Refer to s 54 and Part 4B of the Telecommunications Amendment Act (No 2) 2006.
22 Section 246.

How we deal with information

50. We are committed to dealing with all information responsibly. This means that we will:

    50.1 use information only as allowed by law; and

    50.2 take steps to ensure that we appropriately protect private or confidential or commercially sensitive information against disclosure.

51. In doing so, we are required to balance your rights and expectations as to the confidentiality of information you supply us against:

    51.1 the need for us to effectively and efficiently complete a review according to our functions under the Act; and

    51.2 our legal obligations under the Official Information Act 1982 (**OIA**) (in particular, the principle of availability of information).[23]

52. We use the information we collect for the purposes of completing the review for which it was obtained.

53. However, where information disclosed to us gives rise to concerns that one of the other laws we enforce has been breached, we can use information sought by us or given to us for a review in carrying out our other statutory functions, including opening an investigation, taking enforcement action and court proceedings.

54. In such a situation, we can share the information within the Commission, on the same terms as it was collected in the review.

How we protect confidential information

55. We recognise the need to ensure that parties can have confidence in our use and retention of information, including our commitment to respecting as far as possible any privacy, confidentiality, or commercial sensitivity attaching to the information.

56. Some of the information that we receive in the course of carrying out a review (whether provided voluntarily or under compulsion) may be information that is not otherwise in the public domain. Common kinds of confidential or sensitive information include:

    56.1 information that if released would prejudice the commercial or privacy interests of the supplier or the subject of the information;

    56.2 source-sensitive information, such as insider or whistle-blower information where it may be important that the source's identity is protected; or

[23] Official Information Act 1982, s 5.

56.3 information which, if released, would prejudice the supply of information to the Commission.

57. Where personal information is concerned, we will take care to meet our obligations under the Privacy Act 2020.

58. As far as confidential information is concerned, there are a number of ways that we may respond to a request that information is treated as confidential:

58.1 we may consult with the provider of the information before we reach a decision. We may ask that they reconsider part, or all, of the confidentiality claimed;

58.2 we may request that 'public' copies of documents or information are provided, with sensitive material redacted for Commission use only;

58.3 we may request, or prepare, a summary of the documents or information that enables testing of it to occur without releasing sensitive material;

58.4 where you provide us with information that you consider is confidential or commercially sensitive, you should clearly assert that qualification when (or before) you provide the information to us;

58.5 we will not always accept at face value your assertion that information is confidential or commercially sensitive, and we may test this with the provider of the information.

59. We are unlikely to accept 'blanket' claims of confidentiality over a suite of information. We may ask parties to provide further reasons about why information requires protection against release.

60. Where we want to test one party's information with another person, we will consider any assertions of confidentiality before we make a decision about disclosing the information. We will also consider whether we can satisfactorily test the information during the review by asking questions based on the confidential information, but without disclosing the information itself.

61. We will not disclose any information we consider to be confidential or commercially sensitive in a media statement, public report, or in response to a request, unless there is a countervailing public interest in doing so. Such cases are likely to be rare.

How we respond to Official Information Act requests

62. The OIA provides the framework for disclosure of the information that we hold. Under the OIA all information is to be made available unless good reasons exist to withhold it. This is known as the principle of availability.[24]

[24] Official Information Act 1982, s 5.

63. We do not need to receive an OIA request for information in order for the principle of availability to apply. We can release information that in our assessment should be made publicly available.

64. There are a number of reasons that we may withhold information from disclosure in response to an OIA request. These include, most relevantly, where:

    64.1 release would prejudice the maintenance of the law;[25] and

    64.2 release would be in contempt of court.[26]

65. In other cases, we must undertake a balancing exercise. This includes, most relevantly, where withholding the information is necessary to protect the privacy of natural persons, or where release would unreasonably prejudice the commercial position of the supplier or subject of the information.[27]

66. If we consider that any of these potential reasons for withholding the information apply, we must still undertake a balancing exercise and consider the public interest in release.[28] As the principle of availability applies, the information may only be withheld if the potential harm from releasing it is greater than the public interest in disclosure. This 'balancing exercise' means that in some cases information can be released where nonetheless there is some possible harmful effect that might appear to justify withholding it.

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25 Official Information Act 1982, s 6(c).
26 Official Information Act 1982, s 100.
27 Official Information Act 1982, s 9(2)(a).
28 Official Information Act 1982, s 9(1).