

22 July 2019

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## **Utilities Disputes Board Submission to the Civil Aviation Bill Exposure Draft**

The Utilities Disputes Board welcomes the opportunity to comment on the Review of the Civil Aviation Act. We believe, where appropriate, we have a responsibility to promote best practice alternative dispute resolution (ADR) and the benefits to consumers to having access to redress when something goes wrong. We have made submissions to this effect during the development of other ADR schemes.

### **Background**

Utilities Disputes provides independent resolution for complaints and disputes companies have not been able to resolve with complainants. Utilities Disputes currently operates three dispute resolution schemes: The Government approved Energy Complaints Scheme and Broadband Shared Property Access Disputes Scheme, and the voluntary Water Complaints Scheme.

Utilities Disputes was formerly the Office of the Electricity and Gas Complaints Commissioner but incorporated as a limited liability not-for-profit company and rebranded as Utilities Disputes on 1 November 2016. The purpose of the change was to allow Utilities Disputes to provide multiple dispute resolution schemes under an umbrella structure.

Utilities Disputes is governed by an independent Board. The Board has also set up Advisory Committees for each scheme, made up of equal numbers of consumer and industry representatives. This maintains consumer and industry feedback to the Board.

### **Submission**

The Utilities Disputes Board supports the intention of the Bill making it clear effective dispute resolution is important in claims for compensation.

We believe the claims for compensation likely to be brought up will be better dealt with by an ADR scheme.

The Government Centre for Disputes Resolution (GCDR) is part of The Ministry of Business, Innovation and Employment. As other ADR schemes are developed against legislation the GCDR has been used as an advisor.

## ADR model in claims for compensation internationally

The ADR model has been successfully implemented in the aviation sector internationally and is seen as a fair, accessible and independent best practice framework internationally. An example of this is in the UK. In the implementation of the ADR scheme, the UK government noted there was an unmet need regarding complaints from consumers that stemmed from aviation contracts. As the UK's specialist aviation regulator, the Civil Aviation Authority (CAA) was appointed by the government to be the UK's competent authority to approve ADR providers as fit to offer ADR services to consumers of aviation services. Currently the CAA has approved two providers of the aviation scheme.

The CAA's policy is to follow the directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution. The standards set out in their policies are in line with the Benchmarks for Industry-based Customer Dispute Resolution which we adhere to for the best practice New Zealand ADR framework.

The ADR model is also used in dealing in claims for compensation in Canada through the Canadian Transportation Agency. This ADR model includes facilitation, mediation, and a decision maker.

## ADR benchmarks

Best practice ADR schemes operate in accordance with the Benchmarks for Industry-based Customer Dispute Resolution. These are<sup>1</sup>:

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

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

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

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

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

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

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<sup>1</sup> Source: Benchmarks for Industry-based Consumer Dispute Resolution, The Australian Government the Treasury [https://treasury.gov.au/sites/default/files/2019-03/benchmarks\\_ind\\_cust\\_dispute\\_reso.pdf](https://treasury.gov.au/sites/default/files/2019-03/benchmarks_ind_cust_dispute_reso.pdf)

## Examples of ADR provisions in legislation

The Government approved Energy Complaints Scheme and Broadband Shared Property Access Disputes Scheme are set up under Part 4, Subpart 1 and Schedule 4 of the Electricity Industry Act 2010; and sections 155ZG to 155ZN, and Schedule 3C of the Telecommunications Act 2001. Both pieces of legislation explicitly list compliance with the ADR benchmarks as a requirement for approval.

## Benefits of ADR

A best practice ADR scheme offers benefits over the Disputes Tribunal:

**Accessibility** - The Ministry of Transport notes claims for compensation are likely to be for small amounts, which it believes would not justify the expense of taking the dispute to court. Claims for compensation under the Montreal Convention are limited<sup>2</sup>, depending on the nature of the claim. We submit the process of attending a Disputes Tribunal hearing is a barrier the consumers and airlines gaining access to resolution of claims. We believe this because:

- Attending a formal hearing is a barrier for consumers and airlines, taking a significant amount of time and energy for both parties and possibly leading to perverse outcomes if one party is not willing to take part in the hearing. Taking or contesting the intended low claim amounts might simply not be worthwhile for either party. Nation J's 2016 judgment<sup>3</sup> made a declaration the Disputes Tribunal does have jurisdiction to determine claims under the Montreal Convention and ss 91C and 91G of the Civil Aviation Act. We believe the low number of cases heard by the Disputes Tribunal since its jurisdiction was made clear shows the mechanism is not utilised as intended
- There is a cost associated with Disputes Tribunal hearings that must be paid by the consumer, this presents a particular barrier to low value claims where the fee (\$45 for claims up to the value of \$2000) is likely to be a large portion of the potential compensation

We believe an ADR scheme offers a best practice solution to accessibility because:

- An ADR scheme does not rely of physical hearings to award compensation, instead offering a range of resolution methods tailored to best suit the type of claims received. A typical best practice process offered by an ADR scheme for claims for compensation would involve conciliation, investigation, and a decision made by a centralised decision maker. Over 90% of complaints that come to Utilities Disputes are resolved between the parties with assistance from our office and do not require a decision to be made. Throughout this process neither the claimant nor the airline would be required to physically attend a hearing

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<sup>2</sup> Montreal Convention for the Unification of Certain Rules for International Carriage by Air 2242 UNTS 309 (signed 28 May 1999, entered into force 11 April 2003)

<sup>3</sup> *Air New Zealand Ltd v Disputes Tribunal* [2016] NZHC 393, [2016] 2 NZLR 713

- There is no cost to a complainant involved with taking a complaint to a best practice ADR scheme, this removes the barrier to claims for low compensation that are noted to occur. A best practice ADR scheme is funded by its member companies through a membership levy and/or case-based fees. Levies can be structured to incentivise early resolution of claims. Best practice ADR schemes do not require Government funding

**Centralised decision maker** - Best practice ADR schemes are structured around a centralised decision maker. This allows for greater consistency of outcomes for claimants and companies. The Disputes Tribunal uses a range of referees in its cases, leading to potential inconsistency in outcomes.

**Specialist knowledge** - ADR schemes have limited jurisdiction to deal with complaints stemming from specific industries, meaning a wealth of industry specific knowledge and subject matter experts. The Disputes Tribunal has a broader ambit making the development of industry specific knowledge and subject matter experts more difficult.

**Systemic issue analysis** - Best practice ADR schemes collect and analyse information and provide feedback on trends and areas of concern to industry and regulators. This allows industry to respond to any issues before they impact a large number of consumers.

**Continued relationships** – ADR schemes maintain positive rather than adversarial relationships between consumers and companies, encouraging both parties to work together to solve common issues.

**Training** - ADR schemes typically offer training to their members in areas of complaint management.

We intend to make further submissions as this Bill progresses. If we can be of any further assistance please contact our Commissioner Nanette Moreau directly at

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Yours sincerely



**Hon Heather Roy**  
Chair  
Utilities Disputes Ltd Board