

Ministry of Business, Innovation and Employment
By email: FinancialConduct@mbie.govt.nz.

31 May 2019

Dear Sir/Madam

Submission on conduct of financial institutions

Thank you for the opportunity to comment on the Options Paper: Conduct of Financial Institutions.

The Banking Ombudsman Scheme is an approved dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Our participants are registered banks and their subsidiaries and related companies, and non-bank deposit takers that meet certain criteria.

Our aim is to improve the banking experience for customers and banks, as well as to help resolve disputes between banks and their customers. At a broader level, we are interested in any policy developments that potentially impact New Zealand banking customers.

We commend the Ministry of Business, Innovation and Employment for leading this discussion about banks, insurers and other financial institutions focusing on good customer outcomes and appropriately managing the risk of misconduct within their organisations.

General comments

We support a legislative and regulatory framework that promotes high standards of conduct and provides optimal consumer protection. In the banking sector, the current standard of conduct is set through the New Zealand Bankers' Association's Code of Banking Practice (the Code). We consider the overarching duties proposed in the options paper are aligned with the Code. We support a consistent set of principles-based duties being applied across the wider financial services sector.

We support retaining a principles-based approach to the duties so they strike the right balance between flexibility and certainty. The duties can then supported with scalable advice from industry groups, or regulations, to set expectations on how the duties apply in practice.



Our comments are made on the basis of the learnings we have accumulated over the 27 years that the Banking Ombudsman Scheme has been in operation. As part of our work, we also monitor professional standards in comparable jurisdictions. We have therefore also considered the conduct principles that are enforced by the Financial Conduct Authority (FCA) in the [United Kingdom](#).

Our overall view is that all of the proposed duties in the options paper should be included, with some additional wording as outlined in our attached submission form.

In terms of enforcement, we have set out our suggestions for how the duties could be applied to individual cases by dispute resolution schemes and at a regulatory and supervisory level by the Financial Markets Authority (FMA). Again, this follows the UK model where conduct principles are relevant to the roles of both the Financial Ombudsmen Service and the FCA in different respects.

Finally, we invite MBIE to follow the work FCA is planning [later in 2019](#) where it will be considering whether the UK conduct principles provide adequate protection to vulnerable consumers, or whether a separate duty of care to vulnerable consumers is required.

Complaints dashboard

We are currently developing a dashboard that will collect and analyse complaints data from across the banking sector. The detail of this initiative is outlined in our submission form. We consider that this initiative will enable us to share deeper insights with banks, regulators and the public. It directly supports many of the proposals outlined in the options paper.

We would welcome the opportunity to discuss any aspect of our submission or the dashboard further.

Yours sincerely



Nicola Sladden
Banking Ombudsman

MBIE submission form

Question 1

**Which overarching duties should and should not be included in the regime?
Are there other duties that should be considered?**

Option 1 - a duty to consider and prioritise the customer's interest, and act fairly, reasonably and in good faith, to the extent reasonably practicable

We agree that this duty should be included, but suggest that it is strengthened by including a specific reference to fairness. In our view, this requires a more holistic and inclusive approach. For example, an expectation of fair dealing might require a wider and more inclusive consideration of the customer's personal situation in offering services, not just the financial interest that is being served.

We note that:

- The Code of Banking Practice set by the New Zealand Bankers' Association requires banks to "*act fairly, reasonably, and in good faith, in a consistent and ethical way*" and promises that banks will "*do our best to meet the needs of all our customers*".
- The equivalent principle in the UK states: *A firm must pay due regard to the interests of its customers and treat them fairly.*
- In Australia, a financial services licensee must '*do all things necessary to ensure that the financial services ... are provided efficiently, honestly and fairly*' (Sections 912A(1)(a) and (aa) of the Corporations Act 2001 (Cth)).

Option 2: A duty to act with due care, skill and diligence

We support the inclusion of this duty which will implement a consistent standard of care across all financial organisations. Further guidance on the professional standard and how it can be met could be provided through industry guidance or standards.

We agree that this duty places an obligation on organisations to identify and address any capability gaps among their staff. In our view, financial organisations cannot reasonably assure the public of their conduct and culture standards if the duty did not extend to ensuring staff compliance.

Option 3: A duty to pay due regard to the information needs of customers and communicate in a way which is clear and timely

One of the fundamental principles of a code of conduct should be accessibility. Every consumer, regardless of knowledge or expertise, should be communicated with in a way that he or she can understand. We support the inclusion of this duty and agree that it should include taking the circumstances of the particular customer into account.

A significant proportion of the cases we receive at the Banking Ombudsman Scheme are based on communication issues – either because the provider did not gather enough information about the customer, or the customer did not fully understand the terms of the agreement or the benefits and risks associated with the financial product or service.

Communication should occur in a form, language and manner that enables the customer to understand the information provided. This should be a scalable concept. For example, for existing customers, the organisation may be able to establish information needs relatively quickly. But that standard may be different for new or inexperienced customers, or for customers who are not clear about their objectives. The duty to communicate effectively will also need to cater for our multi-cultural society, and providers may need to offer an interpreter where necessary and reasonably practicable.

We consider organisations should also provide an environment where the customer and the organisation can communicate openly and effectively.

Option 4: A requirement to have the systems and controls in place that support good conduct and address poor conduct

We agree that financial institutions should have systems in place to proactively identify and remediate outcomes that result from poor conduct, and to track trends over time.

As we have noted in our cover letter, we are particularly interested in the ways complaints data can be collected and reported to support a focus on good customer outcomes. We are currently developing a complaints data dashboard that will show trends across the banking industry. Over time, we are aiming to use this data to provide lead indicators on emerging issues.

Other benefits of the dashboard include:

- The complaints dashboard will give bank earlier and more insights into problem areas and trends.
- Over time the aim is to move to forecasting and predictive insights, and to sharing more information between banks and regulators.
- It will allow banks to compare their complaints-handling performance with that of competitors.
- It will enable the scheme to give banks more tailored feedback on their trends vis-à-vis those of their peers.

Option 5: A duty to manage conflicts of interest fairly and transparently

We agree with the inclusion of this duty and note that it would include all financial and non-financial conflicts of interest.

Option 6 – A duty to ensure complaints handling is fair, timely ~~and transparent~~ and simple

We strongly support the inclusion of this duty which supports a customer's right to complain. We suggest that the duty also include a requirement for the process to be simple for customers to navigate. This is because processes that are overly bureaucratic or complex can cause complaint fatigue and disengagement, and inhibit accessibility.

We agree that both internal and external complaints services should be visible to customers, with details of both channels included in key communications.

In addition to the notes in paragraph 144, we suggest that good complaints handling practice would include:

- A focus on timeliness, with the majority of complaints being resolved within minimum timeframes
- A requirement to record outcomes so that these can also be analysed for insights
- A feedback connection from complaints data back to product and service design teams.

The *AS/NZS 10004:2014 standard - Guidelines for complaint management in organizations* provides valuable guidance on professional standards for handling complaints. Regulatory Guide 165 from the Australian Securities and Investment Commission is also a valuable guide.

We support this duty because customers should be able to expect a consistent approach to complaints, regardless of the financial service being used. We envisage the work we have underway on the complaints dashboard is already supporting a more consistent approach to complaints by banks.

Other duties

We also suggest that MBIE consider making some reference to 'a focus on good customer outcomes' in the duties as that is the underlying theme of the response to the issues identified.

Question 2

Do you think the overarching duty for managing conflicts of interest should be general (as it is currently worded) or focus on conflicts of interest that arise through remuneration?

Please refer to our suggestion above. We consider that the overarching duty should focus on ethics generally, rather than just conflicts of interest.

Question 3

Is a code of practice required to provide greater certainty about what each overarching duty means in practice?

Yes, we support the development of codes of practice to provide guidance about how the duties apply in practice.

Options to improve product design

Question 4

Which options for improving product design do you prefer and why?

We agree that there have been instances of poor value products being sold across the financial services sector in the past. We therefore support the proposal to give the regulator the power to ban or stop the distribution of specific products in clear cases.

Question 5

If a design and distribution requirement like option 3 were chosen, are there particular products for which this is more necessary than others? If so, please explain what and why.

N/A

Options to improve product distribution

Question 6

Which options to improve product distribution do you prefer and why?

We do not have any specific comments to make on product distribution, other than to support MBIE's work in reviewing the impact remuneration structures have on consumer outcomes.

Question 7

To assist us in comparing the pros and cons of various options, please provide information about remuneration and commission structures currently in use.

N/A

Options relating specifically to insurance claims

Question 8

What is your feedback on imposing a duty to ensure claims handling is fair, timely and transparent?

We consider that a duty to ensure claims handling by insurance companies is fair, timely and transparent would be covered by the overarching duties outlined in options 1 and 2 above. As noted above, we consider the overarching duty should also include the requirement for complaint processes to be simple. On that basis, we do not consider that a separate duty is necessary.

Question 9

If a duty to ensure claims handling is fair, timely and transparent were to be adopted, should an attempt be made to clarify what fair, timely and transparent mean?

N/A

Question 10

What is your feedback on requiring the settlement of claims within a set time?

We consider that a duty of fairness, due care and skill includes an expectation of timely resolution. Timely claims settlement is therefore covered by the overarching duties proposed in options 1 and 2 above. As customer expectations of timeliness vary over time, particularly with increases in technology, any specific guidance could be set out in industry codes. We support this approach which means specific standards can be more easily updated to keep pace with the community's expectations.

Options for tools to ensure compliance

Section 3.6 of the options paper contains options to contribute to the effectiveness of new conduct obligations.

Question 11

Do you agree with the option to empower and resource the FMA to monitor and enforce compliance?

We agree that the FMA should have enhanced powers and primary responsibility for monitoring and enforcing compliance with the new conduct obligations as regulator. The jurisdiction of the Banking Ombudsman Scheme would then complement the FMA's role by providing access to justice for individuals who consider the duties have been breached.

Our terms of reference state:

In making any decision, the scheme must be fair in all the circumstances, having regard to the law, any relevant code of practice, and principles of good banking practice. (The scheme must consult the banking industry in determining these principles.)

In considering what is fair in all of the circumstances, we have regard to the law, but also to industry codes and practices (that may go beyond the law). The duties proposed in the options paper would be relevant legal duties for the scheme to consider in resolving individual cases.

Our understanding is that this is the model for enforcing conduct duties in the United Kingdom between the FCA and the Financial Ombudsman Service.

<https://www.fca.org.uk/publication/mou/mou-fos.pdf>

FMA could be supported in its role through regular information sharing between the dispute resolution schemes and FMA through memoranda of understanding. Our current MOU with FMA is on our website [here](#).

Question 12

What is your feedback on the option to require banks and insurers to obtain a conduct licence?

We support the proposal for conduct to be considered as part of entity licensing. This provides regular opportunities for FMA to proactively monitor compliance, conduct management, systems and staff capacity.

We agree this enables the FMA to set clear expectations for compliance upfront, which will have a positive impact on lifting standards and preventing consumer harm.

Questions 13 and 14

What is your feedback on the option which discusses a broad range of regulatory tools?

We support the range of regulatory tools outlined in options 3 and 4, in addition to licensing.

Question 15

What is your feedback on the option of executive accountability?

Our jurisdiction is based at an organisational level so we do not have any particular comment on executive accountability.

Question 16

What is your feedback on the whistleblowing option?

We support the introduction of whistleblowing as a regulatory mechanism.

Paragraph 205 sets out the merits of offering an external body where complaints could be taken if individuals felt that issues raised through internal procedures had not been properly considered. We are open to providing this service to our participants' employees.

The Banking Ombudsman Scheme was established over 25 years ago as a free and independent service for consumers to use to resolve problems with their bank. Since then we have helped over 80,000 consumers and facilitated the compensation of nearly \$40 million. We are the second-most well-known dispute resolution service, after the Disputes Tribunal.

Bank employees already know about the Banking Ombudsman Scheme and its reputation for independence and fairness. There is therefore some synergy in offering staff a free and independent option for whistleblowing concerns, in the same way that staff refer their customers to the scheme.

We recognise that effective dispute resolution goes beyond resolving issues for individuals. We identify and share lessons from our cases in a variety of ways so that those issues are prevented. We share our insights with banks so they can improve their systems and services for others.

Other financial dispute resolution schemes may also be considering expanding their services to include concerns from the staff of financial services organisations.

Question 17

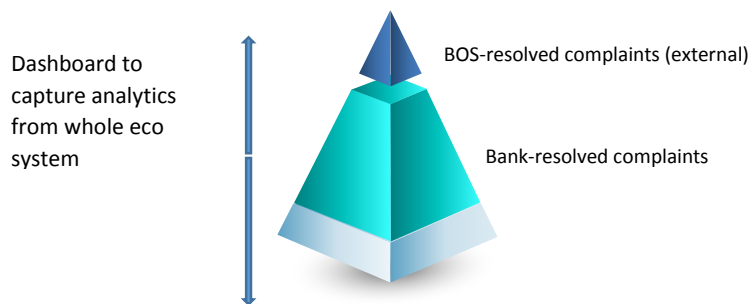
What is your feedback on the option of regular reporting on the industry?

Complaints data dashboard

We are particularly interested in the ways complaints data can be collected, analysed and reported to support a focus on good customer outcomes and to manage the risk of misconduct.

The banking complaints eco system currently works with banks resolving the majority of issues in house, and a small number of complaints are escalated to the Banking Ombudsman Scheme. This system has many benefits for the consumer as issues are resolved quickly and directly with their bank, which means the banking relationship can be restored as quickly as possible.

However, the downside of this decentralised complaints eco system is that there is no central oversight of complaints trends. BOS can, and does, report on the top themes coming through its service, but that only represents the most escalated complaints (5-10% of all complaints).



In late 2018 we started work to develop a complaints dashboard which will pull together data from across the banking industry into one central source. This will enable us to analyse and share insights about types of complaint, numbers of complaints and outcomes across the sector.

The dashboard will have four broad aims: to highlight trends, lift industry standards, prevent banking problems and strengthen customer trust in banks. Data will highlight the nature and extent of any problems in the sector, give banks a broader perspective of industry trends, and encourage early corrective action in the design of bank-specific products and services. Our aim is to 'go-live' by mid-2020. Over time the aim is to move to forecasting and predictive insights.

We see the dashboard as an information sharing tool that will directly support the conduct regime envisaged in the Options Paper. It also fits with a central finding of the review of bank culture and conduct by the Reserve Bank of New Zealand and Financial Markets Authority – that banks must show more initiative in identifying emerging trends and putting problems right. It will enable banks to extract proactive insights about their own complaints, and complaints trends across the sector, so that complaints data can move from being a 'lag' indicator to a 'lead' indicator.

Question 18

What is your feedback on the role of industry bodies?

We agree with the comments in paragraph 211 – the downsides may outweigh the positives in relation to expanding the role of industry bodies. In our view, this increases the risk of inconsistent approaches and consumer confusion.

Who should the conduct regulation apply to?

Part 4 of the options paper discusses who the proposed options might apply to.

Question 19

What is your feedback on the options regarding who the conduct regime should apply to?

We do not have a strong view on whether the conduct regime should apply beyond banks and insurers, other than to say we consider any consumer of financial services should be entitled to receive the same standard of care regardless of who is providing the service.

Your details

Your name

Your organisation

Your email address

In what capacity are you making this submission?

- Individual
- Consumer group/advocate
- Business
- Industry group
- Researcher/academic
- Other

Use and release of information

The *Privacy Act 1993* applies to submissions. You may choose how your personal information is used.

Unless otherwise requested, we may also share submissions received with relevant government agencies such as the Financial Markets Authority.

Can we include your name or other personal information in any information about submissions that we may publish?

- Yes, you can include my name or other personal information
- No, don't include my name or other personal information

We intend to upload submissions to our website. Can we include your submission on the website?

- Yes, you can publish my submission on the website
- No, don't publish my submission on the website

You may ask us to keep your submission, or parts of your submission, confidential. If so, you'll need to attach reasons and grounds under the Official Information Act 1982 for consideration.

- Yes, I would like my submission (or parts of it) to be kept confidential.
- No, I do not wish for my submission to be kept confidential