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Growing and protecting the wealth of New Zealanders

Thursday 6 May 2021

Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 2526
Wellington 6140
New Zealand

By email: DRSReview@mbie.govt.nz

Review of the Approved Financial Dispute Resolution Scheme Rules

This submission on the Ministry of Business, Innovation and Employment (MBIE) Discussion Paper: Review of the Approved Financial Dispute Resolution Scheme Rules, April 2021 (the Paper), is from the Financial Services Council of New Zealand Incorporated (FSC).

The FSC is a non-profit member organisation with a vision to develop and grow the financial wellbeing of New Zealand. FSC members commit to delivering strong consumer outcomes from a professional and sustainable financial services sector. Our 92 members manage funds of more than $88bn and pay out claims of $2.8bn per year (life and health insurance). Members include the major insurers in life, health, disability and income insurance, fund managers, KiwiSaver and workplace savings schemes (including restricted schemes), professional service providers, and technology providers to the financial services sector.

Our submission has been developed through consultation with FSC members and represents the views of our members and our industry. We acknowledge the time and input of our members in contributing to this submission.

The FSC's guiding vision is to Grow the financial confidence and wellbeing of New Zealanders and we strongly support initiatives that are designed to deliver:
- strong and sustainable customer outcomes
- sustainability of the financial services sector
- increasing professionalism and trust of the industry.

We welcome the opportunity to provide feedback on the Paper and our members support the intention to achieve consistent jurisdictional rules across the financial dispute resolution schemes (the Schemes). For clarity, the FSC's members are participants in the following Schemes:

- Insurance and Financial Services Ombudsman (IFSO)
- Banking Ombudsman Scheme (BOS)
- Financial Services Complaints Limited (FSCL)

We welcome continued discussions.

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I can be contacted on 021 0233 5414 or richard.klipin@fsc.org.nz to discuss any element of our submission.

Yours sincerely

Richard Klipin
Chief Executive Officer

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Your name and organisation

Name	Richard Klipin, Chief Executive Officer
Email	richard.klipin@fsc.org.nz
Organisation/Iwi	Financial Services Council of New Zealand

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

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☐ MBIE intends to upload submissions received to MBIE's website at ***www.mbie.govt.nz***. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

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1	What is your feedback on the proposed objective and criteria for the review? What is your feedback on the proposed weighting of the criteria?
	We welcome this review to align the Scheme rules to promote accessibility, fairness, efficiency and effectiveness for consumers. We agree with the criteria and weightings contained in the Paper, although we note the focus is solely on the consumer, however, fairness and good faith are concepts involving both parties.
	Financial cap
2	Are you aware of any instances of consumer harm due to the issues outlined?
	Our members are not aware of any instances of consumer harm due to the issues outlined.
3	Do you have any feedback on the problems outlined?
	Our members have encountered circumstances where jurisdictional limits have been breached. Anecdotally we understand that our members often agree to extend the Scheme's jurisdiction in these cases. To ensure consistency across members of all Schemes, we agree that it would be appropriate to raise the financial cap. Overall, we are supportive of the review and the aim to standardise some Scheme rules through regulation. However, we also note that there is also some danger removing a large amount of a Scheme's discretion, as it may render aspects of a Schemes' terms of references obsolete.
	Option one: set the primary jurisdictional and redress cap at $350,000
4	Do you have any feedback on this option?

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We consider a jurisdictional limit of $350,000 appropriate as it is aligned to the District Court threshold. However, there should be clarity as to whether this threshold amount relates to the value of a claimants' claim, namely the redress amount, or the maximum amount claimable by a claimant. This issue may arise in certain situations, such as for complaints concerning a policy where a partial benefit is payable. For example, a complainant may choose to limit their claim to $250,000 but they actually have reasonable grounds to claim the full policy benefit of $500,000.

We therefore suggest that the jurisdictional limit follow BOS' terms of reference, which make it clear that BOS cannot consider a complaint where "The complainant could reasonably claim, more than $350,000 for direct loss and direct incidental expenses". This means that the threshold amount relates to the maximum amount potentially claimable not the amount the claimant is seeking in redress.

We encourage setting the cap through regulation, with MBIE to review in future as appropriate as the District Court cap is reviewed rarely. This will give MBIE the flexibility to decide whether or not to align with the Court limit as it considers appropriate from time to time.

Whilst effectiveness and efficiency of the Schemes may be impacted by increasing the cap (as more complex claims may be heard by the Schemes) this may be balanced by the fact that increased accessibility for consumers promotes efficiency and effectiveness for consumers, as the Schemes are designed to be a faster and less formal alternative to the courts, and free for consumers to use. A consistent cap therefore promotes fairness to consumers.

However, we note that setting the financial cap at $350,000 represents a significant increase for most of the Schemes, and so it is important to ensure that there are appropriate measures in place to ensure that the Schemes are well placed to handle the consequences of such an increase.

For example, increasing the financial cap will require Schemes to be appropriately resourced to handle an increase in the number of complaints received (which may also be more complex), in order to avoid unfairness towards both consumers and Scheme participants should the increased workload cause delays in resolving complaints. It is important that Schemes have the resources to deal with an increase in complaints prior to an increase in the financial cap coming into effect.

If the schemes do not have enough staff with the appropriate level of expertise, there is a risk of poor outcomes for both the consumer and the financial institution. This is particularly important when bearing in mind that Scheme decisions are only binding if accepted by the consumer. In practice this means the consumer has a right of recourse to the courts, but financial institutions do not. Poor quality decisions can have far reaching implications, for example, decisions may impact an insurer's risk appetite for which products are offered to consumers. We submit that Schemes should be consulted on the amount of time required to prepare for an expanded remit.

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5	Are there any other costs or benefits of this option?
	Option two: introduce a weekly alternative to a lump sum cap
6	Do you have any feedback on this option?
	In principle, we agree that a weekly payment should be available as an alternative but only to the extent that it is appropriate given the nature of the product, namely that the product does not have a total value (such as insurance products that do not have a lump sum component) in which case a weekly payment alternative may be appropriate. However, care, refinement and further discussion between MBIE and the industry would be needed when drafting the valuation criteria for the weekly alternative to clarify how and when the weekly payment alternative will be used. Subject to the above, we support all Schemes having the same weekly alternative cap limit, namely in alignment with the IFSO and look forward to further discussions.
7	Do you agree that a weekly payment alternative should be introduced for all schemes? Why/why not?
	We agree it is appropriate to introduce a weekly payment alternative to the extent that it is appropriate given the nature of the product as set out in question 6 above.
8	Is $1,500 an appropriate weekly payment alternative? Why/why not?
	We agree that it makes sense to align with the IFSO and this amount is likely to ensure accessibility to Schemes for the majority of consumers. In addition, the $1,500 cap is appropriate as products with a weekly payment amount often tie that payment value to a proportion of the customer's pre-claim income.
9	Are there any other costs or benefits of this option?
	Other potential issues with inconsistent awards
10	Do you have any feedback on the problems outlined?
	We agree that the interest payment award provisions should be consistent across all Schemes. However, any type of compensation or award beyond direct financial loss should be given careful consideration.

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11	If a consistent special inconvenience award was to be introduced, in what circumstances should it be awarded? Should this be discretionary, or strictly prescribed?
	We consider Schemes should have the discretion to grant a special inconvenience award only where there has been egregious and unreasonable behaviour (including but not limited to delay) by a financial institution. Whilst discretionary, we encourage consideration of the stress and mental health impact of the complaint on the complainant as a result of the action. If interest awards are also introduced, special inconvenience awards should take into account what considerations are more appropriate to be accounted for in an interest award, such as undue or unreasonable delays by a financial institution.
12	If an interest award was to be introduced how should it be calculated?
	The interest payment award mechanism adopted by IFSO is sensible as interest is awarded at the 90 day bank bill rate where there have been undue or unreasonable delays by the financial institution. This rate is publicly available and can be consistently applied across the Schemes. The commencement date for the calculation of the interest should also take into account when the complaint is able to be heard, as there may be delays caused by the Scheme in hearing a complaint. Further, interest awards should not be awarded by Schemes where there is already an obligation, such as a contractual or a legislative requirement to pay interest. For example, as set out in section 41A of the Life Insurance Act 1908.
13	What are the benefits and costs of the options?
	Aligning to the 90 day bank rate allows for an automatic adjustment to current day rates, with clear, fair and transparent parameters for all parties.
	Timing of membership & jurisdiction
14	Are you aware of any specific situations where providers have switched between schemes resulting in the situation described above? If so, what happened?
	We are not aware of any such situations, however we are comfortable with the rules being amended so members have clear access to a Scheme. It is considered sensible for the current Scheme to be the one to have jurisdiction on the basis that the financial institution has agreed to pay their costs to consider a complaint.
15	Do you agree with the potential problems that may occur as a result of inconsistent scheme rules about the timing of membership/jurisdiction?
	Whilst we are not aware of any specific situations, we agree that it is untenable for consumers to be left without access to a Scheme due to inconsistencies in Scheme rules.

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	Option one: require all schemes to consider claims about current claims about current members, even if the issue arose prior to membership
16	Do you have any feedback on this option?
	Where financial institutions have changed Schemes, to alleviate jurisdictional issues, we consider that consumer complaints should be escalated to the financial institution's current Scheme, regardless of which Scheme they belonged to when the issue complained of occurred. We agree with the benefits as described in the Paper.
17	Are there any other costs or benefits of this option?
	If financial caps are standardised across the Schemes, then consumers are unlikely to be prejudiced by a complaint being considered by a different Scheme to the one which the participant belonged to when the events arose.
	Option two: require schemes to consider complaints where the issue occurred when the provider was a member of the scheme, even if they are no longer a current member
18	Do you have any feedback on this option?
	We agree Option One is preferable for the reasons stated in the Paper. Under Option Two, a financial institution could be bound by the decision of a Scheme that it is no longer a member of, in circumstances where they have likely chosen to change Schemes for a particular reason. Additionally, Schemes would be required to consider complaints against a member that is not currently paying membership fees.
19	Are there any other costs or benefits of this option?
	Applicable time periods (limits) for bringing a claim
20	Do you any feedback on the problems outlined?

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In respect of time periods for complainants to be able to escalate a complaint to a Scheme where there is no decision or deadlock, BOS has indicated it may move from 90 days to a 60-day time frame for complaints to be escalated to BOS for consideration.

When assessing the appropriate time periods (limits) for all Schemes, consideration should be given to the following:

(a) A shorter time frame could make it difficult to properly assess and respond to a customer complaint received around the Christmas and New Year holiday period as most businesses, including financial institutions and their advisers, are largely closed during this time. We suggest that a solution would be to adopt the definition of working days used in legislation governing the New Zealand Courts which excludes the period from 25 December to 15 January (for example, see section 1.4 of the District Court Rules).

(b) If the dispute resolution process is going to be effective, there needs to be adequate time to consider the dispute. Some complaints involve complex legal or technical issues that may require liaison with independent or external experts (and this may increase if the financial cap of Schemes increases). For example, the timeframe for credit card chargebacks is 90 days and in the insurance context, independent underwriters' advice may be required.

(c) In many cases, if a financial institution is properly following its complaints process and considering the complaint in a comprehensive manner, they will struggle to produce a decision or letter of deadlock any earlier than two months after the complaint has been made. In addition, reaching a deadlock is also dependant on customer engagement which may be sporadic and delayed.

(d) To reach a meaningful decision, a financial institution may be required to gather and obtain further information in response to new information provided by the consumer when lodging the complaint. For example, new or further expert opinion, responding to additional information or explanations from the customer, external or independent experts and obtaining legal advice. The timeframe must allow financial institutions to fully explore the complaint to prevent cases from unnecessarily progressing to a Scheme.

(e) Some financial institutions are large corporations and require time to investigate a complaint involving different parts of the business and to ensure staff with the appropriate level of authority are involved, particularly for more complex complaints.

(f) Less time to properly investigate a complaint may lead to rushed decision making and consequently lead to poor consumer outcomes. This could undermine the relationship between the consumer and the financial institution, particularly as the relationship is one of good faith.

(g) Any unnecessary or unreasonable delays by a financial institution can be addressed by way of special inconvenience and or interest awards.

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	(h) For BOS scheme members there is already a 60 day timeframe for customers who are experiencing financial difficulty which financial institutions may have found difficult to manage historically. There are a number of external factors to be considered We support all Schemes having the same timeframe and reiterate that financial institutions can provide consumers a letter of deadlock in a shorter timeframe where appropriate.
21	Are you aware of instances of consumer harm from the problems outlined?
	Option one: limit time period I to a maximum of two months
22	Do you have any feedback on the option?
	Please refer to our response to question 20 for feedback on time periods. We consider that discretion should be applied to reduce the risk of complainants not engaging in a financial institution's complaints process and just waiting out the time period so they can go direct to the relevant scheme. We also recommend that a Scheme exercise discretion to allow financial institutions to provide submissions before a Scheme determines that it has jurisdiction to hear a complaint without deadlock notified by a financial institution. There may be reasons beyond the control of the financial institution that means the time period has lapsed. For example, customer engagement may be limited, and the financial institution participant may be waiting on information to be provided or believed the complaint had been resolved. We note that under clause 8.2 of IFSO's Terms of Reference, discretion has been applied so that the Scheme has discretion to refer customers back to the financial institution if they do not consider deadlock has yet been reached despite two months having passed (as summarised in table four of the discussion paper as "Two months have passed without notification of deadlock (and scheme considers deadlock reached)".
23	Are there any other costs or benefits of this option?
	Option two: create a consistent time period II of three months after deadlock
24	Do you have any feedback on this option?
	We support this Option Two as believe three months is sufficient time for a consumer to escalate their complaint to a Scheme after deadlock is reached and it is appropriate for this to be consistent across the Schemes.

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25	Are there any other costs or benefits of this option?
	Option three: introduce discretion to hear a complaint after time period II
26	Do you have any feedback on the option?
	We support a discretion for hearing a complaint after time period II in exceptional circumstances outside of the consumer's control. However, there should be a definitive end date. An additional three months is appropriate given the accessibility of Schemes. What is to be considered when assessing if there are exceptional circumstances outside of a consumer's control should be consistent across the Schemes. Consumers and financial institutions should be allowed to make submissions on whether there are exceptional circumstances. Considerations could include customer vulnerabilities and unreasonable delays on the part of either the consumer or the participant.
27	Are there any other costs or benefits of this option?
	Option four: consistent limit for time period III
28	Of the four schemes, which way of outlining time period III is preferable? Why/why not?
	Our members submit that the timing of the date from which the six year time frame from the date of knowledge or deemed knowledge of the action (as set out in the BOS terms of reference) to bring a complaint to a Scheme commences should be standardised across all the Schemes. This ensures fairness and consistency across the Schemes and provides financial institutions with business certainty.

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29	Are there any other costs or benefits of this option?

Other Comments

We have observed a further issue, which appears appropriate to raise while MBIE is considering jurisdictional issues between the Schemes.

In some cases, for example financial products manufactured by once financial institution but distributed by another financial institution, consumers may have access to more than one Scheme in respect of the same or similar complaint. For example, a consumer may first approach Scheme A, receive an outcome, and then approach Scheme B with an overlapping or similar complaint. This may result in the same complaint being considered by different Schemes, potentially with different outcomes or the risk that the complainant may be compensated twice. This may impact fairness for both consumers (where some consumers can approach multiple Schemes and others cannot) and financial institutions (where different Schemes come to different outcomes), efficiency (Scheme resources taken up by considering the same complaint twice) and effectiveness. If more than one financial institution is involved with the complaint, there may also be potential issues between those institutions if required to apportion liability.

We submit that consideration, including further discussion with industry, should be given to this issue and what steps can be taken to create better efficiencies and fair outcomes where a complaint potentially involves more than one financial institution who are members of different Scheme. For example, Schemes could be directed to determine between themselves which Scheme will have sole jurisdiction over a particular complaint or area of a complaint on a case by case basis, or Schemes could be prevented from considering aspects of complaints which have already been subject to another Scheme.