

## Submission template

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### Review of the Approved Financial Dispute Resolution Scheme Rules

#### Instructions

*This is the template for those wanting to submit their response to the Review of the Approved Financial Dispute Resolution Scheme Rules discussion document.*

*The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised by 5pm on Thursday, 6 May 2021. Please make your submission as follows:*

- 1. Fill out your name, organisation and contact details in the table, "Your name and organisation".*
- 2. Fill out your responses to the discussion document questions in the table, "Responses to discussion document questions". Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.*
- 3. If you would like to make any other comments that are not covered by any of the questions, please provide these in the "Other comments" section.*
- 4. When sending your submission, please:*
  - a. Delete this first page of instructions.*
  - b. If your submission contains any confidential information:*
    - i. Please state this in the cover page or in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.*
    - ii. Indicate this on the front of your submission (eg the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).*

*Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 2020 also applies.*

- 5. Send your submission as a Microsoft Word document to [DRSreview@mbie.govt.nz](mailto:DRSreview@mbie.govt.nz)*

*Please direct any questions that you have in relation to the submissions process to [DRSreview@mbie.govt.nz](mailto:DRSreview@mbie.govt.nz).*

## Submission template

### Review of the Approved Financial Dispute Resolution Scheme Rules

#### Your name and organisation

|                         |                                                 |
|-------------------------|-------------------------------------------------|
| <b>Name</b>             | Privacy of natural persons                      |
| <b>Email</b>            | Privacy of natural persons                      |
| <b>Organisation/Iwi</b> | Insurance & Financial Services Ombudsman Scheme |

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

The Privacy Act 2020 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

MBIE intends to upload submissions received to MBIE's website at [www.mbie.govt.nz](http://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.

I do not want my submission placed on MBIE's website because... [Insert text]

#### 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.

I would like my submission (or identified parts of my submission) to be kept confidential because... [Insert text]

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 strongly support improving consumer access to redress and the criteria set out in the FSP Act. Having an emphasis on accessibility for the purpose of this review is sensible.*

***Financial cap***

2

*Are you aware of any instances of consumer harm due to the issues outlined?*

*Yes, there are many situations where consumers have restricted access to justice because their claim is for more than the financial cap (we understand this to mean the same as the jurisdictional limit in this review). In particular, life insurance is commonly for amounts over \$200,000, as is house insurance in a total loss situation e.g. in circumstances like the Canterbury Earthquakes.*

*Similarly, complaints relating to income cover are commonly outside of the cap for weekly payments.*

3

*Do you have any feedback on the problems outlined?*

*There are also situations where the amount in issue in a complaint cannot accurately be quantified before the complaint is fully investigated e.g. financial advice claims. This can make it difficult to determine whether a complaint is under the financial cap at the time the DRS is determining whether it has jurisdiction to consider it.*

**Option one: set the primary jurisdictional and redress cap at \$350,000**

4 Do you have any feedback on this option?

*We agree that the increase is warranted and overdue. Consideration ought be given to implementing a mechanism for regular consultation and a review of the jurisdiction limit for across all dispute resolution schemes e.g. in the same way as the District Court's jurisdiction is increased from time to time.*

*The 5-yearly Review of the IFSO Scheme carried out by Prof. John McMillan AO in 2018 recommended as follows:*

*"It is sensible that the Monetary Limit should be reviewed regularly and increased from time to time. This would be in line with inflationary pressures, commercial and social realities, and the role of the IFSO Scheme as an accessible alternative dispute resolution mechanism for consumers. I understand that the Applicable Monetary Limit for lump sum payments under the New Zealand Banking Ombudsman Scheme is to be increased from \$200,000 to \$350,000. This is in line with an increase in the jurisdictional limit that applies to claims in the District Court of New Zealand. I note too that much higher monetary caps apply to complaints to the Australian Financial Complaints Authority – for example, the total cap for general financial claims is \$500,000 and for income stream insurance is \$13,400 per month. 20 There is necessarily a degree of arbitrariness in selecting a monetary cap limit. However, two weighty factors should be maintaining parity with comparable limits for other dispute resolution options, and ensuring that in the current environment the IFSO Scheme remains a viable, accessible, cost-free and non-adversarial dispute resolution option for consumers. On that basis I favour an increase in the lump sum amount to \$350,000".*

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

*We agree the financial cap should be consistent across the DRSs and it should relate directly to the District Court limit to avoid a gap in consumer access to dispute resolution.*

**Option two: introduce a weekly alternative to a lump sum cap**

6 Do you have any feedback on this option?

*For consistency, each of the DRSs should have a weekly alternative to a lump sum.*

7

*Do you agree that a weekly payment alternative should be introduced for all schemes? Why/why not?*

*Yes, as noted above, while the weekly amount is specific to some products, a lump sum option may not apply in a broader range of products now available outside insurance, including the provision of financial advice about insurance products.*

8

*Is \$1,500 an appropriate weekly payment alternative? Why/why not?*

*As most complaints we receive with weekly payments are for Income Protection (IP) cover, the weekly amount also needs to be set at a realistic level to allow consumers to use a DRS and it needs to keep pace with inflation over time.*

*The IFSO Scheme's weekly cap has not been changed since 2015 and it currently reflects an annual salary of less than \$80,000. That is close to the average salary of about \$55,000 and we do not believe many people earning an average salary could afford to, or do, insure their income.*

*The 5-yearly Review of the IFSO Scheme carried out by Prof. John McMillan AO in 2018 recommended as follows:*

*"A weekly payment limit of \$1,500 also seems inappropriately low. It equates to an annual income of \$78,000, which may be less than that received by many potential claimants. It is particularly important that consumers who have disputes over disability payments have adequate access to a cost-free dispute resolution option. I understand that the current weekly limit has posed difficulties for the IFSO Scheme in accepting some complaints of that nature".*

*He recommended increasing the weekly monetary limit to \$3,000, to ensure that consumers who have disputes over disability payments have access to justice. However, we note that the Review was undertaken in 2018; 3 years later, costs have continued to increase.*

*For that reason, we suggest the weekly cap be raised to at least \$4,000 a week so it equates to an annual salary of \$200,000. MBIE may wish to obtain indicative figures from insurers offering this cover to establish an average weekly sum covered and use that as a basis for establishing the weekly amount.*

*In terms of the weekly amount staying relevant, we suggest a mechanism is used that ties it to an amount proportionally greater than the average salary, increasing on an annual basis on a specific date. For example, 1.5 x the current average salary determined annually as at 1 July. Alternatively, the addition of an annual CPI adjustment.*

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

*There is a clear benefit of providing access to justice for consumers who have IP cover, cannot work and have no means to dispute an insurer's decision to decline a claim except expensive litigation.*

***Other potential issues with inconsistent awards***

10 Do you have any feedback on the problems outlined?

*The amount that can be awarded for special inconvenience should also be consistent across the DRSs. The amount the IFSO Scheme can currently award does not always cover expenses a consumer may have had in pursuing a complaint.*

*We believe the "special inconvenience" provision provides adequate compensation. We do not support extending this generally to include stress and humiliation.*

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?

*The provision should be discretionary. We suggest guidelines be included, but that it not be strictly proscribed, allowing the DRS to consider the specific circumstances of each complaint on a case-by-case basis.*

12 If an interest award was to be introduced how should it be calculated?

*We agree interest should be able to be awarded where appropriate. We suggest the DRSs apply s.10 of the Interest on Money Claims Act 2016 (the Act provides a calculator).*

13 What are the benefits and costs of the options?

*Benefits – more consistent approach across the DRSs and the courts.*

***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?

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|    |                                                                                                                                                                                                                                      |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 15 | <i>Do you agree with the potential problems that may occur as a result of inconsistent scheme rules about the timing of membership/jurisdiction?</i>                                                                                 |
|    | Yes                                                                                                                                                                                                                                  |
|    | <b><i>Option one: require all schemes to consider claims about current claims about current members, even if the issue arose prior to membership</i></b>                                                                             |
| 16 | <i>Do you have any feedback on this option?</i>                                                                                                                                                                                      |
|    | <i>We agree – where a person or entity is currently a member of a DRS, that DRS is more likely to have influence over the member and the member is more likely to abide by the DRS’s decision.</i>                                   |
| 17 | <i>Are there any other costs or benefits of this option?</i>                                                                                                                                                                         |
|    | -                                                                                                                                                                                                                                    |
|    | <b><i>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</i></b>                                                  |
| 18 | <i>Do you have any feedback on this option?</i>                                                                                                                                                                                      |
|    | <i>Where there is no current relationship with a DRS, it would be very difficult to obtain information and then impose/enforce a decision.</i>                                                                                       |
| 19 | <i>Are there any other costs or benefits of this option?</i>                                                                                                                                                                         |
|    | -                                                                                                                                                                                                                                    |
|    | <b><i>Applicable time periods (limits) for bringing a claim</i></b>                                                                                                                                                                  |
| 20 | <i>Do you have any feedback on the problems outlined?</i>                                                                                                                                                                            |
|    | <i>It would be easier if all DRSs are in line in respect of the time limits.</i>                                                                                                                                                     |
| 21 | <i>Are you aware of instances of consumer harm from the problems outlined?</i>                                                                                                                                                       |
|    | -                                                                                                                                                                                                                                    |
|    | <b><i>Option one: limit time period 1 to a maximum of two months</i></b>                                                                                                                                                             |
| 22 | <i>Do you have any feedback on the option?</i>                                                                                                                                                                                       |
|    | <i>We agree. However, sometimes complaints genuinely take longer than 2 months to consider e.g. where expert reports are required, so it is important that this provision provides the DRSs with some flexibility around timing.</i> |

23 *Are there any other costs or benefits of this option?*

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***Option two: create a consistent time period II of three months after deadlock***

24 *Do you have any feedback on this option?*

*We do not believe this is necessary.*

25 *Are there any other costs or benefits of this option?*

*However, the benefit of this is consistency between the DRSs.*

***Option three: introduce discretion to hear a complaint after time period II***

26 *Do you have any feedback on the option?*

*Having a discretion to consider a complaint outside of the specified timeframes is important for providing access to consumers whose circumstances may preclude them from making a complaint to the DRS immediately after deadlock is reached. This is especially so for people who have health related claims, and their health makes it difficult to proceed with complaint.*

27 *Are there any other costs or benefits of this option?*

*This option creates some uncertainty for members in terms of knowing when a complaint is completed. However, it can be addressed by providing a limit within which the discretion must be exercised.*

***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?*

*We do not agree with the time period proposed. The IFSO Scheme mechanism is logical, because it requires a Participant to have considered a complaint and the period of time to have passed without the consumer taking further action for them to be time-barred.*

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

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## Other Comments

### ***The adviser liability gap***

*A similar but slightly different, and more serious, problem has been caused by the move to the financial advice licensing regime. This is because individual financial advisers no longer need to be registered with a dispute resolution scheme – as long as they are covered by a Financial Advice Provider's (FAP) licence (whether because they are engaged directly by a FAP or indirectly engaged through an Authorised Body).*

*Because there has been significant movement from an individually based dispute resolution scheme membership regime, to an entity level membership regime, we now have a situation where many financial advisers are members of a dispute resolution scheme in a completely different capacity.*

*To use a hypothetical example: an adviser was an IFSO Scheme member until 14 March 2021 but, from 15 March 2021, ceased that membership because they were now engaged by XYZ Limited which holds a transitional licence. XYZ Limited is an IFSO Scheme member (although for the purposes of this example, it would not matter whether XYZ Limited was another scheme's member). If a complaint arose about the advice the financial adviser provided in December 2020, the IFSO Scheme would not have formal jurisdiction to investigate a complaint made about the adviser after 15 March 2021, because they were no longer an IFSO Scheme member. XYZ Limited may also say it has no liability for the complaint because, although the adviser is now covered by XYZ Limited's transitional licence, when engaging the adviser, XYZ Limited never agreed to take on liability for any complaints made about the adviser's advice provided before 15 March 2021. Moreover, section 63(1)(ba) of the FSP Act does not apply, because it is not XYZ Limited failing to take the remedial action directed by a scheme; rather, it is the adviser failing to take the action.*

*The problem is that no scheme has the ability to terminate the adviser's membership, which leads to a termination on the FSPR (this is the only enforcement tool the schemes have to ensure compensation awards are paid). This is because the adviser is no longer a member of **any** scheme in their own right, post 15 March 2021. A similar problem arises when an adviser leaves the industry.*

*The adviser liability gap represents a **significant access to justice issue** that should urgently be addressed by MBIE. Many financial advisers have ceased their scheme memberships in their own right post 15 March 2021. This potentially puts many consumers at risk of having no access to a scheme, should they have a complaint about advice an adviser provided to them, prior to 15 March 2021.*