



## COVERSHEET

<b>Minister</b>	Hon Dr David Clarke	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of briefing</b>	Setting Consistent Rules for Approved Financial Dispute Resolution Schemes: Policy Approvals	<b>Date to be published</b>	5 December 2022

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
October 2022	Setting Consistent Rules for Approved Financial Dispute Resolution Schemes: Policy Approvals	Office of the Minister of Commerce and Consumer Affairs
19 October 2022	Setting Consistent Rules for Approved Financial Dispute Resolution Schemes: Policy Approvals: DEV-22-MIN-0238 Minute	Cabinet Office

### Information redacted

**NO**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

## **Setting consistent rules for approved financial dispute resolution schemes: policy approvals**

### **Proposal**

- 1 This paper seeks policy approval to make regulations under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the Act) to set consistent rules for approved financial dispute resolution schemes.

### **Executive summary**

- 2 There are four approved financial dispute resolution schemes (the schemes) which resolve complaints between consumers and financial service providers (providers). Each scheme is required to issue rules that govern how it resolves disputes and what disputes it may consider, subject to the requirements of the Act and any regulations.
- 3 With each scheme setting its own rules, inconsistencies have arisen over time that mean some consumers receive different outcomes or levels of access throughout the complaints process, depending on which scheme their provider is registered with. In some instances, this may lead to worse consumer outcomes through lost or limited access to redress.
- 4 I propose changes to make the schemes' rules more consistent in order to improve fairness of redress for consumers throughout the complaints process. The proposed changes relate to the financial limits for complaints a scheme can consider and award, limits on specific types of compensation that can be awarded, rules on which scheme can consider a complaint where the provider has changed schemes, and time limits for bringing a claim.

### **Background**

- 5 The Act requires all providers to be registered and, if they provide services to retail clients (e.g., consumers), belong to an approved scheme. The schemes are independent entities and deal with customer complaints about their provider. They are designed to be a faster and less formal alternative to the courts, are free for consumers to use, and scheme decisions are only binding if accepted by the consumer.
- 6 There are currently four approved schemes:
  - 6.1 Banking Ombudsman Scheme (BOS)

- 6.2 Insurance & Financial Services Ombudsman (IFSO)
  - 6.3 Financial Dispute Resolution Service (FDRS)
  - 6.4 Financial Services Complaints Limited (FSCL).
- 7 Scheme rules are issued by the schemes, and changes must be approved by me as the Minister of Commerce and Consumer Affairs to ensure they comply with the principles of dispute resolution listed in Section 52(2) of the Act. These principles are accessibility, independence, fairness, accountability, efficiency, and effectiveness.

*Inconsistent scheme rules are affecting consumer access to redress*

- 8 The Ministry of Business, Innovation & Employment (MBIE) completed a statutory review of the Act in 2016. The review found that with each scheme setting its own rules, situations can arise where consumers' access to redress is limited. The review also noted a potential for consumers to lose access to redress if providers switch between the schemes. MBIE recommended that further work should be undertaken with the schemes to identify changes that could be made to improve and promote access to fair and effective redress by standardising some scheme rules.
- 9 Consequently, MBIE began work in 2020 to identify possible improvements to scheme rules. This review's focus was on jurisdictional rules (i.e., the operational rules which define the issues or scenarios that consumers can bring forward complaints about, and the types of redress that schemes can award). The following broad issues were considered as part of the review:
- 9.1 the maximum value for the complaints a scheme can consider and award;
  - 9.2 limits on specific types of compensation that can be awarded;
  - 9.3 rules for which scheme can consider a complaint where the provider has changed schemes;
  - 9.4 time limits on bringing a claim.
- 10 The review included public consultation on a discussion document, as well as discussion with the schemes and other key stakeholders from the financial services sector.

*Regulatory changes are required to achieve fairer and equitable outcomes for consumers*

- 11 Without regulatory intervention, the schemes' rules are likely to remain inconsistent or further diverge, and consumers will continue to experience issues through the complaints process.
- 12 While absolute uniformity in scheme rules would likely undermine schemes' abilities to respond to different types of complaints in their respective parts of the sector, there is a need for fundamental aspects of the system-level

framework to be consistent. This is to ensure that all consumers can access equivalent levels of redress regardless of which scheme their provider is registered with.

### *Objectives*

- 13 My primary objective in proposing these changes is to improve consistency across the schemes' rules to increase consumer access to redress through the schemes. This objective aligns with the specific purpose of the dispute resolution schemes as set out in section 47 of the Act, which is "to promote confidence in financial service providers by improving consumers' access to redress from providers through schemes to resolve disputes".
- 14 Establishing consistent scheme rules in key areas may also contribute to the main purposes of the Act which are "to promote the confident and informed participation of businesses, investors, and consumers in the financial markets, and to promote and facilitate the development of fair, efficient, and transparent financial markets".

### **The maximum value for the complaints a scheme can consider and award**

*I propose to set a consistent and higher primary financial cap of \$500,000 for the schemes*

- 15 The Act states that scheme rules must "set out the remedial action that the scheme can impose on a participant in order to resolve a complaint". The scheme rules for each of the approved schemes set out a maximum value for complaints that it can consider and award, also referred to as a 'primary financial cap'. BOS and FSCL have a primary financial cap of \$350,000, while IFSO and FDRS have a primary cap of \$200,000.
- 16 I am concerned that the above inconsistencies can affect consumers' access to, and outcomes of, redress depending on whether their provider is registered with a scheme that has a \$200,000 or \$350,000 cap. This issue is mitigated somewhat by the fact that all bank complaints are heard by BOS, and most insurance complaints are heard by IFSO. However, other complaints, such as those outside of the banking and insurance sector, may result in differing amounts of redress being awarded by different schemes for similar complaints.
- 17 I am also concerned that the caps do not reflect the current value of many financial products today. For example, data from March 2022 shows that the average mortgage for all borrower types in New Zealand is \$401,000 and the average for first home buyers is \$586,000<sup>1</sup>. The value of life insurance products is also typically of higher value than the schemes' current primary caps, averaging \$566,000<sup>2</sup>.

---

<sup>1</sup> Canstar, 2022

<sup>2</sup> Life Direct, 2022

- 18 Limited quantitative evidence is available on the claims process, and it is difficult to quantify the exact number of consumers impacted by inconsistencies between the scheme's financial caps. However, most stakeholders consulted with agree that a financial cap of \$200,000 is now most likely insufficient.
- 19 FSCL reported that before increasing its cap to \$350,000 from \$200,000, it declined over 35 claims across a six-year period due to the claims being outside of its jurisdictional cap (more may have not been pursued by consumers at all due to being outside of the cap). Similarly, IFSO has reported instances where consumer redress is limited due to a claim being higher than the primary financial cap. This is most commonly seen for life insurance claims over \$200,000, and home insurance in a total loss situation such as the Canterbury earthquakes. No data is available on consumers who choose not to pursue a complaint because of the understanding that their claim would not be accepted under current rules.
- 20 I propose to set a consistent primary financial cap of \$500,000 for all the schemes. This would enable more consumers to access the schemes with complaints that were previously excluded or not pursued due to lower financial caps. A consistent cap will create a fairer system for consumers who will be able to access similar compensation for claims of similar value, regardless of the scheme their provider is registered with.
- 21 An alternative option I considered was to tether the schemes' primary financial cap to the District Court's monetary limit which is currently set at \$350,000. However, if the District Court's monetary limit is not regularly reviewed (historically the limit has been reviewed only infrequently) the cap may continue to lose pace with the cost and value of financial products. I also believe it is important that schemes remain as a cost-effective and fast-paced forum for consumers to resolve claims outside of the courts.
- 22 I intend to keep the rules stated in regulations in relation to the financial cap subject to a five yearly review. This would be undertaken by MBIE in consultation with the schemes to assess whether it is still fit for purpose as the value of financial products change over time.

*I propose to set an alternative weekly payment cap for regular payment products of up to \$1,500 for all schemes*

- 23 There are inconsistencies between the schemes in the availability of a weekly alternative to the primary cap, whereby a financial product or service is valued as a regular payment rather than a lump sum (such as some income protection insurance products). IFSO and FDRS consider complaints if they would otherwise exceed the primary financial cap but relate to a product that provides regular weekly payments up to the value of \$1,500. BOS and FSCL only consider these complaints if the total payments are under the primary financial cap, or the provider and consumer otherwise agree.
- 24 I propose to set a consistent alternative weekly cap of \$1,500. This will likely improve accessibility to the schemes as consumers whose provider is a

member of BOS or FSCL would be able to access redress for claims regarding payment products with values above the primary financial cap. It also creates a fairer system for consumers who will be able to access compensation for similar claims, regardless of the scheme their provider is registered with.

- 25 A \$1,500 cap may become insufficient over time as the value of financial products continue to rise. I therefore intend to keep the value of the weekly alternative cap under review as part of reviewing the primary financial cap.

### **Limits on specific types of compensation that can be awarded**

*I propose to set a consistent special inconvenience award of up to \$10,000 for all schemes*

- 26 All the schemes offer 'inconvenience awards' to consumers on top of the primary financial cap for any non-financial harm or inconvenience suffered as a result of a provider's action or inaction throughout the complaints process (e.g., stress or humiliation). These award caps range from \$2,000 to \$9,000.
- 27 The circumstances under which inconvenience awards are paid also differ. IFSO can only order an inconvenience award in limited circumstances, such as a special inconvenience in making the complaint or for incidental expenses incurred in settling a claim. The other schemes can require an inconvenience award in a wider range of situations for any inconvenience suffered by consumers due to a provider's action or inaction.
- 28 I propose to set a consistent inconvenience award of up to \$10,000 across schemes. This will improve fairness for consumers who experience difficulties during dispute resolution processes. It may also strengthen the incentive for providers to treat consumers fairly during the complaints process.

*I propose to set a consistent interest award for all schemes using the same method as the District Court*

- 29 Three of the schemes (excluding BOS) include an award for interest with the final payment to compensate consumers for delays in addressing complaints, but the three schemes have different methods for calculating interest.
- 30 I propose that all schemes should award interest on top of a claim where there was a delay. I propose that interest should be calculated from the date the claim arose with the provider using the same method as the District Court, which is set out in Section 12 of the Interest on Money Claims Act 2016.
- 31 In addition to promoting fairness, a consistent interest award may also act as a stronger incentive for providers to ensure the timely resolution of complaints.

## **Rules for which scheme can consider a complaint where the provider has changed schemes**

*I propose that all schemes should be required to consider complaints about current members only, regardless of when the alleged misconduct occurred*

- 32 Providers are generally free to switch schemes. All scheme rules therefore set out whether they can consider complaints about the conduct of members that occurred prior to the member joining the scheme.
- 33 FSCL and IFSO rules specify that claims can only be brought about current members. BOS and FDRS rules specify that claims can be brought about current or former members who were a member when the action subject to complaint took place. There is a potential for some consumers to be left without access to redress if, for example, a provider was a member of FSCL at the time the alleged misconduct occurred but has since switched to FDRS.
- 34 The schemes have advised that informal arrangements are typically made to decide which scheme is best placed to deal with a complaint in these types of situations. These processes can take time to resolve. I consider that these lengthy processes undermine the efficiency of the dispute resolution process.
- 35 I propose to set consistent rules so that all the schemes only consider complaints about current members (regardless of whether they were a member when the alleged misconduct place or not). This is the most straightforward way for consumers and schemes to understand which scheme is required to manage a complaint. It will also help to improve efficiency as the process for handling historic claims would not require ad-hoc negotiation between schemes.
- 36 This proposal would also enable schemes to enforce decisions more effectively against providers. The primary enforcement mechanism of the schemes is the power to revoke a provider's membership which results in de-registration from the Financial Service Providers Register and no longer being able to operate as a financial service provider. As both BOS and FDRS only consider claims about providers that were members when the issue occurred, they may have problems enforcing a decision where a former member brings a complaint under current settings.

## **Proposed changes to time periods for bringing a claim**

- 37 All schemes require consumers to attempt to resolve the complaint with their provider first. The schemes have a range of different rules regarding when a consumer may bring a complaint after the consumer has attempted to go through the provider's internal dispute resolution process. The relevant time-period rules can be broken down into three types, which I have termed time period I, time period II and time period III.

*I propose to set time period I to a maximum of two months for all schemes*

- 38 Time period I refers to when a scheme becomes available after a complaint is taken to internal dispute resolution with the provider but without internal resolution or any deadlock<sup>3</sup> having been reached. The differences in scheme rules regarding time period I vary from 20 days to three months.
- 39 While providers do require sufficient time to work through internal complaints resolution processes, particularly complex cases, the differing rules are likely resulting in unfair outcomes for some consumers. For example, a consumer can take their complaint to FSCL within one calendar month without deadlock but would have to wait three months with BOS.
- 40 To correct for this inconsistency, I propose to set a maximum time period of two months after a complaint is taken to a provider for a scheme to become available.
- 41 A slight inconsistency will remain with this proposal due to not setting a minimum time period, allowing FSCL to retain its 20-day rule. I consider there is not enough evidence to warrant a change to FSCL's rules and that my proposal to set a consistent maximum time period will improve consumer outcomes compared to the status quo.

*I propose to set time period II to three months for all schemes*

- 42 Time period II refers to when a scheme becomes unavailable after deadlock is reached (i.e., a consumer must bring their complaint to the scheme before this time period expires).
- 43 IFSO limits the timeframe for bringing a complaint after deadlock to two months, while the other three schemes limit the time period to three months. This puts consumers whose provider is a member of IFSO at a disadvantage due to having less time to bring a complaint forward post-deadlock.
- 44 I propose to set a consistent three-month time period for consumers to approach a scheme post-deadlock. This will bring IFSO in line with the other schemes, ensuring that all consumers have the same amount of time to access dispute resolution.

*In relation to time period II, I propose to set an additional time period of up to nine months for all schemes to consider complaints in exceptional circumstances*

- 45 All the schemes have an additional discretionary timeframe in which to consider a complaint beyond the initial post-deadlock timeframe in the case of exceptional circumstances (e.g., the consumer having experienced family or health issues). BOS and FSCL may consider cases up to six months post-deadlock in exceptional circumstances and IFSO up to 12 months. FDRS does not specify a time limit for this discretionary period.

---

<sup>3</sup> Deadlock refers to when a provider has fully considered a complaint through its internal complaints procedure and has decided that the complaint cannot be resolved by that procedure.



- 46 I propose to set an additional time period of up to nine months for schemes to consider complaints in exceptional circumstances. I believe this proposal would allow vulnerable consumers a reasonable amount of time to approach a scheme with a complaint. It would also provide consistency and finality for when all exceptional cases must be resolved, regardless of which scheme.

*For time period III, I propose to set a consistent six-year deadline for all the schemes to consider a complaint*

- 47 Time period III refers to the total deadline after which the scheme cannot consider a complaint. All of the schemes have a total time period of six years for a consumer to bring forward a complaint. However, the commencement date for this time period differs across schemes. For instance, some schemes commence time period III from the date the alleged misconduct occurred while others commence it from the date the alleged misconduct was first subject to formal complaint.
- 48 I propose to set a consistent six-year deadline that would apply over time period I and II and begin on the date a consumer becomes aware of an issue. I believe this will help to increase clarity and consistency in the rules for the total time a consumer has to bring forward a complaint to a scheme. I expect this to mean consumers with long-term financial products will have greater access to schemes as they often only become aware of an issue years after purchasing a product.

## **Implementation**

- 49 After regulations are made, the schemes will be responsible for incorporating the new required rules into their terms of reference and updating any informational material, including their website. The schemes will restate their rules by:
- 49.1 incorporating all the rules into their scheme rules that are implied by regulations
  - 49.2 identifying where their existing rules are inconsistent with the rules implied by regulations and removing or amending them as necessary.
- 50 The rules set out in regulations will become part of the scheme rules at the time the regulations come into force.
- 51 A transitional arrangement will likely be required for schemes so that it is clear what rules should be applied for claims that occurred before and after the date the regulations are set.

## **Consultation**

- 52 The following government agencies have been consulted on this paper: the Financial Markets Authority, the Government Centre for Dispute Resolution, the Ministry of Justice, the Treasury, and the Department of the Prime Minister and Cabinet.

- 53 MBIE undertook public consultation as part of developing the proposals set out in this paper. In April 2021 MBIE released a discussion document that sought feedback on proposals to set consistent scheme rules. 21 submissions were received from the schemes, consumer advocacy groups, and financial service providers. Submissions were broadly in favour of the proposals and the feedback received has been used to inform the final proposals contained in this paper.
- 54 Most submitters were in favour of setting a consistent primary financial cap. It was noted that the cap should not be too high as this would mean the schemes could become weighed down by administration, undermining their purpose. It was also noted that fees to providers could increase if scheme resourcing is affected by an increased cap. However, I consider the benefits to consumers of greater redress and compensation outweigh these costs.
- 55 My proposal to set a consistent primary financial cap of \$500,000 was not consulted on during initial public consultation. However, MBIE consulted the schemes on the proposal separately in July 2022. BOS is supportive of this option as a means of increasing possible access for consumers to schemes. FSCL and FDRS noted possible resourcing implications for schemes if more complex cases are assessed due to a higher cap. However, FSCL noted that case fees should make up for extra case numbers and the overall financial cost to schemes is likely to be insignificant.
- 56 MBIE will continue to engage and communicate with key stakeholders, including the schemes, consumer advocacy groups and financial service providers, to ensure all regulatory changes are understood.

### **Financial Implications**

- 57 There are no financial implications for the proposals in this paper.

### **Legislative Implications**

- 58 The proposals in this paper will require the making of regulations under section 79(1)(cb) of the Act.

### **Impact Analysis**

- 59 A Regulatory Impact Statement has been prepared and is attached to this paper.

### *Quality of the Impact Summary*

- 60 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

## Human Rights

- 61 The proposals outlined in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. There are no gender or disability perspective implications from the proposals.

## Communications

- 62 Subject to Cabinet's agreement to the recommendations in this paper, MBIE will inform key affected stakeholders. I may also make a Ministerial press release.

## Proactive Release

- 63 I intend to release this paper proactively, subject to redactions, within 30 days. MBIE will publish a copy of this paper on its website.

## Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that in 2020 the Ministry of Business, Innovation & Employment released a discussion document seeking feedback on proposed changes to approved financial dispute resolution scheme rules and that the proposals in this paper take into account feedback from that consultation [DEV-21-MIN-0046 refers];
- 2 **note** that this paper seeks policy approval to make regulations to align approved dispute resolution scheme rules to improve and promote consumer access to redress through the schemes;

### *Proposed changes to the financial limits for complaints a scheme can consider and award*

- 3 **agree** that a primary financial cap of \$500,000 should be set for all schemes;
- 4 **agree** that a weekly alternative payment cap of \$1,500 for regular payment products should be set for all schemes;

### *Proposed changes to the limits on compensation that can be awarded*

- 5 **agree** that a special inconvenience award of up to \$10,000 should be set for all schemes;
- 6 **agree** that a consistent interest award should be set for all schemes using the same method as the District Court, as set out in Section 12 of the Interest on Money Claims Act 2016;

### *Proposed changes to rules for which scheme can consider a complaint where the provider has changed schemes*

- 7 **agree** that all schemes should consider complaints about current members only, regardless of when the alleged misconduct occurred;

*Proposed changes to time periods for bringing a claim*

- 8 **agree** that a maximum time period of two months should apply for when a scheme becomes available after a complaint goes through internal dispute resolution but without internal resolution or deadlock;
- 9 **agree** that a maximum time period of three months should apply for when a scheme becomes available for a complaint after deadlock;
- 10 **agree** that an additional time period of up to nine months should apply for schemes to consider complaints after deadlock in exceptional circumstances;
- 11 **agree** that a consistent six-year deadline should apply for all the schemes to consider a complaint, beginning on the date that a consumer becomes aware of an issue;
- 12 **authorise** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the proposals in this paper;
- 13 **authorise** the Minister of Commerce and Consumer Affairs to make decisions consistent with the policy proposals in this paper on minor issues that arise during the drafting process.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs