



Banking Ombudsman Scheme

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Our ref: 4.1.1

31 March 2017

Financial Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment

faareview@mbie.govt.nz

Dear Sir/Madam

Submission on draft financial services legislation

Thank you for the opportunity to comment on the draft Financial Services Legislation Amendment Bill.

As we have indicated in submissions on the review of the financial advice regulatory regime, we support the review's aims of reducing complexity and increasing consumer understanding and confidence in the regime. Broadly speaking, we consider the Bill would help achieve these aims. This view is, of course, subject to examination of detailed disclosure requirements.

Set out below are responses to three of the questions raised in the consultation document. We provide this comment as an approved dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Participants of our scheme are – with the exception of a few non-bank deposit-takers – registered banks, their subsidiaries and related companies. These banks and others employ about 400 authorised financial advisors.

Offers in the course of unsolicited meetings

1. If an offer is through a financial advice provider, should it be allowed to be made in the course of, or because of, an unsolicited meeting with a potential client? Why or why not?

We understand that one of the purposes of the restrictions on making offers in the course of unsolicited meetings is to protect consumers from being pressured into buying a product before they have had sufficient opportunity to make an informed decision.

Banks commonly cross-sell financial products. For example, a customer may apply for a loan, and the officer may give advice and information about insurance or KiwiSaver.

In years gone by, we have received complaints about the sale of a product during an unsolicited approach to a customer. This might have happened, for example, when a customer's term deposit was about to roll over or when a large deposit was made into a customer's account (typically from a house sale or redundancy payment), prompting an offer to invest the money in a managed fund.¹ Some customers complained they felt pressured into buying a product without having been given sufficient time to understand the nature of the product or whether they needed it.

However, such complaints have been very few in number in recent years. Banks nowadays have – and implement – policies and processes governing the sale of managed funds and other complex financial products that require staff to give customers detailed advice and information about the product, as well as sufficient opportunity to consider the information before making a decision. Complainants typically allege they received inadequate advice, rather than that they were pressured into making a decision. Indeed, we have received complaints that banks have not offered other suitable products to customers.

There may be some benefit to consumers in allowing offers in these circumstances: if, for example, where a lending officer providing advice or information about a credit facility identifies a potential need for a customer, such as loan protection or life insurance. In this situation, it appears appropriate to draw the customer's attention to such products at the time.

We note that the general duties on individuals who give regulated financial advice appear to provide protection against pressure selling.

Conduct of financial advisers

5. Do you agree that the duty to put the client's interest first should apply both in giving the advice and doing anything in relation to the giving of advice? Does this make it clear that the duty does not only apply in the moment of giving advice?

We agree that the duty to put the client's interest first should apply both in giving the advice and doing anything in relation to the giving of advice. We also consider that the wording makes it clear the duty does not apply only during the giving of advice.

Information in relation to consumer disputes

20. Do you support clarifying that schemes must provide information to the FMA if they believe that a provider may be involved in conduct that constitutes a breach of relevant financial markets legislation?

We consider that the proposed wording of the change would have the effect of broadening, rather than merely clarifying, this obligation.

Currently, section 67 of the Financial Services Providers (Registration and Dispute Resolution) Act 2008 requires us to advise the relevant regulators of any series of material complaints about a bank. Such notification may involve the disclosure of confidential and identifying information to regulators. This helps them enforce compliance with financial services legislation. We also give the Financial Markets Authority anonymized trend information, in accordance with a memorandum of understanding (copy attached).

¹ See case 48 in 2001-02 Annual Report and case 45 in the 2006-07 Case Note Compendium.

We consider the current information-sharing regime strikes the appropriate balance between our role in resolving individual customer complaints and financial market regulators' role in promoting and facilitating the development of fair, efficient, and transparent financial markets, which includes enforcement of relevant legislation.

As an independent dispute resolution scheme, we have no regulatory function. Our purpose is to resolve disputes. We do this in a prompt, informal and outcome-focused manner. We treat the information we receive from both sides as confidential (unless specific and limited circumstances apply). Some of this information is about a bank's commercial decision-making.

We have concerns about amending section 67 as proposed. The scope of the duty, as worded, appears very broad, and may require schemes to disclose many matters that regulators are unlikely to consider require a regulatory response.

The success of our scheme depends in large measure on the co-operation of those involved. The dispute resolution process is inquisitorial, not adversarial. The main ways we resolve disputes are by facilitation (a dispute is resolved by agreed settlement or withdrawal) or, failing that, by issuing a decision. Facilitation is preferable because it is faster and generally results in more satisfactory outcome for both sides. The amendment under consideration may result in a more adversarial process. At a minimum, this is likely to lead to delays. Quite possibly, it could lead to the withholding of information. This would seriously impede our work.

We consider the threshold for sharing confidential and identifying information should remain relatively high. We consider the current arrangement strikes the right balance between the roles and responsibilities of schemes and regulators. We are happy, however, to discuss this further.

Conclusion

We support the Financial Services Legislation Amendment Bill. We look forward to seeing the disclosure requirements once they are finalised. If you would like clarification about any aspect of this submission, please feel free to contact me at

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Banking Ombudsman

Memorandum of Understanding

between

Financial Markets Authority

and

Banking Ombudsman Scheme Limited

Memorandum of Understanding dated 10 December 2014

Between

Financial Markets Authority (FMA);

And

Banking Ombudsman Scheme Limited (BOS).

1. Roles and responsibilities of FMA and BOS

- 1.1 FMA is an independent Crown entity established under the Financial Markets Authority Act 2011 (FMA Act), with statutory functions under that Act and the Acts listed in Schedule 1 of that Act. FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets. It monitors, investigates, and enforces compliance with securities, financial reporting, and company law as they apply to financial markets participants and financial markets. FMA regulates securities exchanges, financial advisers and brokers, futures dealers, trustees and statutory supervisors, KiwiSaver schemes and other superannuation schemes.
- 1.2 BOS is an approved dispute resolution scheme under section 50 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPR Act). Its purpose is to investigate and resolve disputes between customers and their banking service providers. Under the FSPR Act the approved dispute resolution schemes are intended to be accessible, independent, fair, accountable, efficient, and effective.
- 1.3 The parties have agreed to enter into this Memorandum to record the basis upon which they will endeavour to assist each other in the performance of their respective functions.

2. Principles

- 2.1 This Memorandum is a statement of the intent of FMA and BOS to consult, cooperate and exchange information in relation to financial services providers (as defined in the FSPR Act) that are members (as also defined in the FSPR Act) of BOS. The consultation, cooperation and exchange of information will assist both FMA and BOS to achieve their complementary objectives and facilitate fair, efficient and transparent financial markets and investor confidence in financial service providers.
- 2.2 FMA and the BOS anticipate that cooperation will be primarily achieved through on going information sharing, supplemented when necessary by more in-depth cooperation.
- 2.3 FMA's ability to share information it holds in relation to the exercise and its powers or the performance of its functions and duties under the Financial Advisers Act 2008 (FA Act) is

governed by section 151 of the FA Act. BOS acknowledges that FMA's ability to share other information with BOS is limited by section 59(3) of the FMA Act which prohibits FMA from publishing or disclosing information or documents that are supplied or disclosed to, or obtained by, FMA under the FMA Act or any financial markets legislation (as defined in the FMA Act) unless the publication or disclosure of the information or document is to certain persons (as set out in section 59(3) of the FMA Act). Such persons include a person who FMA is satisfied has a proper interest in receiving the information or document. FMA will therefore only disclose or supply other information to BOS under this Memorandum where the disclosure is permitted under section 59 of the FMA Act. Furthermore, FMA may, by written notice, impose any conditions on BOS in relation to the publication, disclosure, or use of information or documents provided to it by FMA in accordance with section 60 of the FMA Act or section 151 of the FA Act.

- 2.4 FMA acknowledges that BOS's ability to share information with FMA is limited by BOS's Terms of Reference (TOR). The TOR provide that BOS is not able to disclose personal information to FMA about a complaint BOS has received:
- (a) that may identify the complainant or the financial service provider named in the complaint (refer to paragraph 33 of the TOR); or
 - (b) where the person who provided the information to BOS has asked for that information to be kept confidential to BOS, unless BOS has the consent from the person that provided that information to disclose it to FMA (refer to paragraphs 9 and 33 of the TOR).

However, BOS must disclose information to FMA about a complaint BOS has received if it is required by law to do so (refer to paragraph 33 of the TOR).

BOS may also disclose information to FMA if it needs to consult with FMA to decide whether BOS or FMA should consider a complaint BOS has received provided BOS has the complainant's consent to disclose any information that may identify the complainant (refer to paragraphs 25.4 and 33 of the TOR).

- 2.5 BOS must disclose information to FMA if there is a series of material complaints about a financial service provider if it is the relevant licensing authority for the financial service provider (refer to paragraph 39 of the TOR and section 67 of FSPR Act).
- 2.6 FMA acknowledges that BOS's ability to share information with FMA is also limited by the Privacy Act 1993.
- 2.7 BOS will only disclose or supply information to FMA under this Memorandum where the disclosure is permitted under the TOR and is not in breach of the Privacy Act 1993.
- 2.8 Subject to relevant legislation and the TOR, FMA and BOS agree that in their dealings with each other as contemplated under this Memorandum they will:
- (a) act in good faith, and approach issues in a timely, collaborative, open, and transparent manner;

- (b) cooperate in the performance of their respective functions;
- (c) seek to achieve a complementary and consistent approach, so far as it is appropriate given their independent roles and respective objectives;
- (d) endeavour to keep each other informed, and to exchange information and views, in areas relevant to each other's responsibilities, where appropriate, including through regular meetings;
- (e) identify opportunities to coordinate activities in order to enhance efficiency, promote consistency, and avoid unnecessary duplication in the regulation of financial service providers (as defined in the FSPR Act); and
- (f) maintain an appropriate degree of transparency on principles and practices relating to the performance of their respective functions.

2.9 In accordance with the principles of consultation, cooperation and exchange of information, but without limiting their general application, both parties agree to make relevant information available to the other as set out in clause 3, and subject to any legislative requirements and the TOR.

3. Information Sharing

- 3.1 Subject to clause 2, FMA and BOS agree, to confer and report any trends arising out of their work relating to specific financial services and financial products which are relevant to the purpose of the other.
- 3.2 BOS will provide quarterly reports to FMA relating to complaints, enquiries, and disputes it receives in relation to financial service providers. The initial form of the report is set out in Appendix A. The parties acknowledge that the form of the report may change quarterly as new trends emerge. The parties may amend the form of quarterly report by agreement from time to time.
- 3.3 FMA will provide quarterly reports to BOS relating to complaints it receives in relation to financial service providers. The form of the report is set out in Appendix B. The parties may amend the form of quarterly report by agreement from time to time.

4. Referrals

In some instances FMA receives complaints which may be suitable for referral to BOS. To support the efficient and effective resolution of complaints, FMA will develop an internal process to ensure complainants are aware of the services BOS offers for appropriate complaints.

5. Meetings

- 5.1 FMA and BOS will meet at least quarterly at such times and places as the parties agree from time to time. The meetings will facilitate regular contact between the parties on routine operational matters, trends, financial service providers operating on the perimeter of financial markets legislation and risks relating to specific financial services or products.
- 5.2 Senior representatives of the parties will meet at least annually to review and discuss the operation of this Memorandum and cooperation and coordination between the parties.

6. Contact Persons

All communications between FMA and BOS should be between the principal points of contact as communicated by the parties to each other from time to time.

7. Confidentiality

- 7.1 For the purposes of this Memorandum "Confidential Information" includes all information, whether written or oral or by any other means, relating to any engagement between the parties pursuant to this Memorandum and all information provided by a party in accordance with this Memorandum, other than information that:
 - (a) is in or comes into the public domain through no fault of the relevant party or any of its officers, employees, agents or contractors;
 - (b) was and can be demonstrated to have been, lawfully in the relevant party's possession or known to the relevant party before its disclosure; or
 - (c) is disclosed to the relevant party by a third party having no obligation of confidence in relation to that information.
- 7.2 Each party agrees:
 - (a) to keep confidential all Confidential Information; and
 - (b) to use the Confidential Information solely for the purposes of performing its functions.
- 7.3 The parties will abide by all relevant privacy obligations and legislation and not disclose any personal information which it is not permitted to disclose to the other party, or which the disclosure of, would amount to a breach of any privacy obligations or legislation or governing rules that apply to that party.
- 7.4 Nothing in this Memorandum will prevent the disclosure of information that is required or permitted to be disclosed by law. Where either party is required by law to disclose information obtained under this Memorandum or intends to disclose information obtained under this

Memorandum which it is expressly permitted by statute to disclose in the particular circumstances, the disclosing party will notify the other party in writing as soon as practicable.

8. Legal Nature of Memorandum

- 8.1 This Memorandum is intended to be facilitative only and to assist FMA and BOS in the performance of their respective functions, and is not intended to create legally enforceable rights or obligations.
- 8.2 Without limiting clause 3.1:
- (a) nothing in this Memorandum limits the exercise by FMA of any of its powers or the performance by FMA of any of its functions under the FMA Act or any other legislation, or requires FMA to act in a particular manner in the exercise of its powers or the performance of its functions;
 - (b) nothing in this Memorandum limits the exercise by BOS of any of its powers or the performance by BOS of any of its functions under the FSPR Act or other legislation, or requires BOS to act in a particular manner in the exercise of its powers or the performance of its functions;
 - (c) requires or obliges either party to provide any information to the other except as regulated by law under financial markets legislation or other relevant legislation.
- 8.3 This Memorandum does not affect any right of FMA or BOS to communicate with or obtain information or documents from any person (as defined in the FSPR Act).

9. Disputes

Where there is a disagreement over any matter related to issues in this Memorandum, the parties will seek to resolve the issue by negotiation at an operational level. If these negotiations fail, the matters will be referred to the FMA Chief Executive Officer and the Banking Ombudsman for discussion and resolution.

10. Term and Review

- 10.1 This Memorandum will continue in full force and effect unless and until terminated in the following manner:
- (a) by agreement of both parties; or
 - (b) by either party on not less than 3 months written notice to the other party.
- 10.2 Upon termination of this Memorandum, the parties must meet, as soon as practicable, to discuss and agree the process by which any joint initiatives or protocols developed under this

Memorandum will be terminated. This includes ensuring, to the maximum extent possible, that their respective interests and objectives and on-going performance of their respective functions are not prejudiced by such termination beyond the extent of any prejudice necessarily caused by virtue of the termination.

11. Execution

Signed for and on behalf of
Financial Markets Authority

Chief Executive

Date: 10-12-14

Signed for and on behalf of
Banking Ombudsman Scheme Limited

Banking Ombudsman

Date: 4/12/14

Appendix A

Quarterly Statistical Report: XXX to XXX

Key emerging issues

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-
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Cases received and completed

Type of case	20XX-XX	20XX-XX
Enquiry		
Received to XXX		
Completed to XXX		
Complaint		
Received to XXX		
Completed to XXX		
Dispute		
Received to XXX		
Completed to XXX		

Key products and concerns

Banking products	Enquiry	Complaint	Dispute	Total	Share of total
Lending					%
Bank Accounts					%
Payment Systems					%
Cards					%
Investment					%
Other					%
Insurance					%
Not Applicable					%
Total					%

Banking concerns	Enquiry	Complaint	Dispute	Total	Share of total
Service Issues					%
Other					%
Participant Decision					%
Fees, Charges & Rates					%
Transaction Errors					%
Advice & Information					%

Privacy & Confidentiality						%
Not Applicable						%
Total						%

Number of cases received by product
Insurance

Categories	Enquiry	Complaint	Dispute	Total
Life insurance				
Failure to act as instructed/promised				
Other				
Declined application/claim				
Withholding information				
Unsuitable product recommended				
Disclosure of confidential information				
Poor or unsuitable advisory process				
Acting without authority/instruction				
Other transaction error				
Loan protection insurance				
Declined application/claim				
Other				
Non-disclosure/explanation of fees/charges				
Failure to provide reasons for a decision				
Poor or unsuitable advisory process				
Inappropriate staff behaviour				
Home and contents insurance				
Other				
Acting without authority/instruction				
Withholding information				
Failure to provide reasons for a decision				
Inappropriate staff behaviour				
Income protection insurance				
Other service issue				
Declined application/claim				
Health insurance				
Delay				
Failure to act as instructed/promised				
Vehicle insurance				
Failure to act as instructed/promised				
Other insurance				
Acting without authority/instruction				
Total				

Investment

Categories	Enquiry	Complaint	Dispute	Total
KiwiSaver				
Declined application/claim				
Failure to act as instructed/promised				
Other service issue				
Non-disclosure of contractual terms				
Delay				
Cancelled/withdrawn/declined product/service				
Other				
Denied access to funds in account				
Delay in receipt of funds				
Fee excessive/unfair				
Misleading information or promotional material				
Acting without authority/instruction				
Term deposit				
Error with interest rate levied				
Failure to provide reasons for a decision				
Incorrect/inaccurate information provided				
Other service issue				
Other				
Denied access to funds in account				
Failure to act as instructed/promised				
Acting without authority/instruction				
Miscalculated arrears/rebate/payout				
Discriminatory product features				
Interest rate excessive/unfair				
Non-disclosure of contractual terms				
Declined as customer				
Destroyed/lost records				
Failure to draw attention to material terms and conditions				
Product/service incomplete				
Failure to respond to correspondence				
Other investment				
Other service issue				
Delay				
Failure to provide reasons for a decision				
Bonus bonds				
Technical or system malfunction				
Other				

Destroyed/lost records				
Funds lost during transaction				
Superannuation				
Failure to respond to correspondence				
Declined application/claim				
Other				
Financial advice				
Failure to follow mandate				
Other service issue				
Other				
Managed fund				
Inappropriate staff behaviour				
Delay				
Other service issue				
Total				

Lending

Categories	Enquiry	Complaint	Dispute	Total
Property lending				
Inappropriate collection activity				
Failure to act as instructed/promised				
Other				
Incorrect/inaccurate information provided				
Other service issue				
Fee excessive/unfair				
Failure to provide reasons for a decision				
Declined application/claim				
Cancelled/withdrawn/declined product/service				
Irresponsible lending				
Non-disclosure/explanation of fees/charges				
Declined repayment proposal				
Inappropriate staff behaviour				
Interest rate excessive/unfair				
Error with interest rate levied				
Acting without authority/instruction				
Error with fee/charge levied				
Non-disclosure of contractual terms				
Discriminatory action by bank staff				
Failure to respond to correspondence				
Breach of privacy				
Delay				
Failure to follow mandate				
Disclosure of confidential information				
Poor or unsuitable advisory process				
Declined to compensate for fraud/theft				
Other transaction error				
Denied access to funds in account				
Unauthorised transaction				
Incorrect payout				

Non-property lending				
Inappropriate collection activity				
Other				
Declined repayment proposal				
Failure to respond to correspondence				
Failure to provide reasons for a decision				
Inappropriate staff behaviour				
Cancelled/withdrawn/declined product/service				
Fee excessive/unfair				
Failure to follow mandate				

Breach of privacy				
Declined application/claim				
Declined as customer				
Failure to draw attention to material terms and conditions				
Withholding information				
Failure to act as instructed/promised				
Poor or unsuitable advisory process				
Non-disclosure of contractual terms				
Other service issue				
Interest rate excessive/unfair				
Irresponsible lending				

Credit card lending				
Inappropriate collection activity				
Declined to compensate for fraud/theft				
Interest rate excessive/unfair				
Other				
Failure to respond to correspondence				
Error with fee/charge levied				
Failure to act as instructed/promised				
Declined repayment proposal				
Misleading information or promotional material				
Declined application/claim				
Withholding information				
Acting without authority/instruction				

Overdraft				
Inappropriate collection activity				
Failure to act as instructed/promised				
Other				
Other service issue				
Incorrect/inaccurate information provided				
Breach of privacy				
Interest rate excessive/unfair				
Denied access to funds in account				
Irresponsible lending				
Failure to provide reasons for a decision				
Acting without authority/instruction				
Fee excessive/unfair				

Guarantee				
Other service issue				
Failure to provide reasons for a decision				
Inappropriate staff behaviour				
Acting without authority/instruction				

Other					
Total					

Appendix B

Quarterly Report

Report Period Q[•] / [20[•] – 20[•]]

Number of Complaints

[•]

Total increase/decrease from last quarter

Example

Trend in complaints for last 4 quarters

Example

Distribution of Complaints

Financial Service Provider	Number of complaints	% of total complaints
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- Financial Advisor
- Other Financial Service Provider

Financial Advisors	% of total complaints
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- AFA
- RFA
- QFE
- QFE advisor

Other Financial Services Provider	% of total complaints
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- Registered Bank
- Insurer

Financial Market Products

Financial Market Products	% of total complaints
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Key financial adviser complaint issues

Key financial adviser complaint issues	% of total complaints
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- Advice
- Conduct
- Advertising

