Draft guidelines to assist schemes applying to become an approved dispute resolution scheme: summary of submissions

In September 2008, three pieces of legislation were enacted to improve the regulation of financial institutions, financial products and financial service providers: the Reserve Bank Amendment Act 2008, the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

The Ministry of Consumer Affairs is implementing the dispute resolution regime as established by Part 3 of the Financial Service Providers (Registration and Dispute Resolution) Act. In brief, the Act requires financial service providers (FSPs) to be registered. In order to be registered, financial service providers who provide financial services to the public must be members of a dispute resolution scheme. The dispute resolution scheme may be either an approved (dispute resolution) scheme or the reserve dispute resolution scheme.

As the provisions in the Act that provide for the approval of dispute resolution schemes are a new regulatory approach, it is desirable to prepare some guidance for those who are interested or affected. A discussion paper was released in June 2009 which outlined the proposed guidelines on dispute resolution schemes meeting the requirements to become approved. The paper suggests a number of approaches schemes could take in order to achieve the robustness envisioned by the Act.

There were 18 submitters (all submitters are listed at the end of this document) on the Draft Guidelines consultation paper: 11 from industry members, 1 from a group of consumer organisations, 1 from a marketing law specialist, 2 from the existing Ombudsman schemes and 2 from the two governing bodies of the Insurance & Savings Ombudsman (ISO). In addition, Spicers Portfolio Management Ltd sent a letter of general support for the new framework. Several submissions on the Proposed Reserve Scheme rules also had comments of relevance to the Draft Guidelines.

Submitters provided feedback on many aspects of the Draft Guidelines, most notably the scope of a scheme's jurisdiction to consider complaints; membership criteria and requirements; referrals and information sharing between approved schemes, the reserve scheme and appropriate bodies; reviews of determinations; accessibility; naming and shaming; governance; funding and how the Act's requirements apply to specific business models.

Scope of scheme's jurisdiction

Many submissions emphasised the importance of having clear terms of reference about the complaints a scheme may consider. ANZ considered that if a complaint falls outside this jurisdiction, the scheme should have an obligation to refer the complaint on to the more appropriate body.

Some submitters were concerned about the parameters for complaints from consumers who are not customers, such as those who have been refused insurance cover or credit. Submissions were also received about the difficulties with

investigating complaints on the administration of commercial decisions, and about general unfairness being grounds for considering a complaint.

One submitter stated that a minimum level of harm should be caused before a scheme will investigate. The level should be set the same as the Disputes Tribunal limit, in order to avoid duplicating jurisdictions. Lesser claims would go the Disputes Tribunal. Several submitters were concerned with possible overlap with other regulatory authorities.

Sovereign would like to see the exclusion of class action complaints, and the exclusion of consideration of systemic issues.

ANZ National and QBE support a limit of $200k based on the current ISO and Banking Ombudsman (BOm) jurisdiction. The Institute of Financial Advisers argues that the claims limits should be lower for individual advisers than corporate entities. A common theme in submissions was that lower limits for one scheme will create incentives for members to scheme shop, and disadvantage certain consumers.

There was a suggestion that the Guidelines need to provide more requirements for how schemes will deal with issues such as consequential losses, breaches by the complainant, and limitation of liability under the Consumer Guarantees Act 1993.

Submitters thought that an overall time limit for taking complaints of 2 years from when the complaint is first lodged with the member, as suggested for the reserve scheme, is too long. ANZ National submitted that 1 year is more appropriate; QBE prefers 6 months.

Two submitters felt that the limitation periods in the Limitation Bill were impractical, with one submitter preferring ASIC's limitation period of 6 years.

Membership criteria and requirements

Submitters in the insurance and savings industry would like schemes to be able to only accept FSPs who are members of a specified industry association.

ANZ National submitted that while detailed prescription of internal complaints handling is unnecessary, there needs to be minimum standards. They anticipate that MCA will refer to the NZBA Banking Code of Practice's minimum requirements.

ANZ National notes that advisers and QFEs are obliged under the proposed Disclosure Regulations to disclose details of their dispute resolution scheme membership to consumers. Child Action Poverty Group and the current ombudsman schemes' consumer representatives believe that FSPs should be required to inform consumers in writing of their ability to take complaints to the scheme.

Submitters were divided on whether an FSP should be allowed to be a member of more than one scheme. Some thought it would lead to confusion if the scheme did not cover all aspects of the FSP's business. Others would like to avoid an FSP from

“scheme shopping”. One submitter argues that if an FSP is eligible for membership to an approved scheme, they should not be allowed to join the reserve scheme.

Naming and shaming

Many submitters would like to see a range of tools used in addition to the “big stick” of membership termination to enforce member compliance. Naming and shaming was one particular tool mentioned in the paper, however, industry as well as consumer submitters noted that it must be used with caution. In some instances, reputational damage to the member may outweigh the initial harm done to the complainant.

Consumer representatives submitted that membership may be terminated due to a member limiting access to the scheme, or not providing adequate internal complaints processes. However, they would also like to see the rules set out a list of tools available to address member non-compliance, such as financial penalties.

Reviews of determinations

Submitters were divided in their opinions on appeal or review rights. While some thought that appeals and reviews were to be avoided due to the deleterious effect on the finality and expediency of the dispute resolution process, others argued for appeal or review rights.

Sovereign submitted that the schemes should provide for internal appeals by members, but not complainants. Sovereign also argued for the provision of appeal rights to the District Court on both procedural and substantive grounds.

One submitter (QBE) opposed the availability of judicial review.

Referrals and information sharing

Submitters would like to see clearer guidelines on the interaction between the dispute resolution schemes and the Securities Commission. Submitters also argue for clearer requirements for communications between schemes, such as the use of MOUs.

Sovereign would also like to see rules requiring schemes to share precedent and interpretations.

Accessibility

Submitters made a number of suggestions for the accessibility guidelines. In particular, submitters mentioned legal representation. IFA is concerned that lawyers will become involved due to professional indemnity insurers taking an active interest in claims against their policyholders.

Most submitters felt that legal representation would undermine the informal process of a dispute resolution scheme. However, there were some concessions that in certain circumstances legal representation would be necessary.

Sovereign submitted that there should be cost sharing or awarding of costs to members for complaints not upheld.

Governance

Members of the insurance industry, and the ISO Board, would like the guidelines to support alternative governance structures. The ISO currently has a two-tier governance structure, and the guidelines support a single tier. The ISO Commission, however, would like to progress changes to this structure.

Funding

Financial advisers in particular are concerned about the costs of dispute resolution. The Institute of Financial Advisers felt that the high costs would often force financial advisers to settle, which may give consumers an unfair advantage. QBE would like to see levies on members capped at a maximum limit.

One submitter noted that including the dollar value amount of fees in the rules is impractical, as it would fluctuate year to year according to operational requirements.

A few submitters felt that FSPs will wait until the reserve scheme levies are finalised before deciding which scheme to seek membership of.

Different business models

Several submitters, in particular those representing financial advisers, argued for various measures to recognise the special position of small practices and sole traders. The arguments were based around two points. Unlike the situation vis a vis consumers and large corporate entities like banks, there may be less of a power imbalance between consumers and small practices/sole traders. FSPs also argued for special consideration in requirements for promoting the scheme, governance structures, claims limits etc.

Kiwibank's business structure uses agents in NZ Post branches, rather than Kiwibank employees, to carry out its services to the public. Kiwibank is concerned that all of those representatives will have to individually belong to dispute resolution schemes.

List of submitters

ANZ National Financial Group

Cameron Partners

Financial Services Federation

IAG NZ Limited

Institute of Financial Advisers

Insurance Council of NZ, Investment Savings and Insurance Association, Health Funds Association of NZ

Insurance & Savings Ombudsman Board

Insurance & Savings Ombudsman Commission

Kiwibank

Munich Reinsurance Company

Office of the Banking Ombudsman

Office of the Insurance & Savings Ombudsman

Professional Advisers Association

QBE Insurance Limited

Rae Nield Marketing Law (on behalf of Farmers Trading Company Ltd, Taxicharge New Zealand Ltd, New Zealand Taxi Federation)

Sovereign Limited

Wellington Community Law Centre (with input from Problem Gambling Foundation NZ, Catholic Social Services and Pacific Budgeting Family Trust)