

Proposed reserve dispute resolution scheme operating rules and governance arrangements: 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.

The reserve scheme is being established by the Ministry of Consumer Affairs, and in accordance with the Financial Service Providers Act, the Ministry consulted on the proposed rules of the reserve scheme by releasing a discussion paper in June 2009. This paper summarises the submissions to the consultation process.

33 submissions (all submitters are listed at the end of this document) were received and they were grouped into the following categories for analysis:

- Banking and insurance - Banking Ombudsman (BOM), Insurance & Savings Ombudsman (ISO) and their members (13 submissions)
- Other FSPs – other FSPs and their industry associations (9)
- Consumer - consumer organisations/representatives and individuals (7)
- Others - e.g. Dispute Resolution Services Ltd, Retailers Association (4)

Submitters support the aims of the dispute resolution regime and generally agree with the approach and rules of the reserve scheme. However, there were a significant number of submissions that considered the core rules (for example, the compensation cap or claim limit) of the approved and reserve schemes should be consistent. Other areas which submitters particularly focused their feedback on were definition of complaints, when complaints can be taken to the reserve scheme, the compensation cap and governance.

Comparable terms for approved and reserve schemes

There were a significant number of submissions, mainly from the banking and insurance and consumer categories, that felt that approved schemes and the reserve scheme should have comparable terms so that there are consistent standards within the financial sector. This ensures that the standards set by the approved schemes are not undermined and helps prevent “scheme skipping” to a scheme with lower charges or potential liability. Submitters also argued that comparable terms ensure equity for all FSP customers.

Necessary expertise

Several submitters, especially the specialist FSPs, emphasised that the reserve scheme must have the relevant expertise and knowledge to resolve complaints across the wide spectrum of financial services covered. Similar comments were also made in regard to industry representation on the advisory board.

Definition of complaint

Submissions from the banking and insurance and other FSP categories had concerns about the definition being too broad and gave suggestions to tighten the definition. Suggestions to tighten the definition include:

- Adding “financial” so the definition becomes “An expression of dissatisfaction or concern about a *financial* service or *financial* product...”
- Change “and has not received satisfactory resolution” which implies a resolved complaint can be re-litigated, to “and which has not been previously resolved”.
- Listing exclusions as part of the definition (these are already covered under “Limits to Jurisdiction”)

The Bankers’ Association considers that the rule that complaints may be made about “any other matter that the customer considers has affected his or her fair treatment” is too wide and subjective. They consider that such a broad definition could expose the scheme to abuse by vexatious complainants and the scheme could be clogged by frivolous claims.

The Bankers’ Association also pointed out that the clause

“While complaints about commercial decisions are not usually within the jurisdiction of the Reserve Scheme, the Reserve Scheme may consider complaints about commercial judgement which involves an act or omission contrary to or not in accordance with a duty owed at law, in a code of practice, or pursuant to the terms (express or implied) of the contract between the scheme member and the consumer.”

is confusing as the “Limits on Jurisdiction” expressly excludes complaints relating to a member’s commercial practice. They felt the clause should be removed.

In contrast to the financial services industry, a couple of submissions from the consumer sector suggested broadening the definition, for example, amending it to “*Any* expression of dissatisfaction ... for which the complainant *implicitly* or *explicitly* expects redress ...”.

When can complaints be taken to the reserve scheme

An overall time limit of 2 years is proposed for taking complaints to the reserve scheme from the time the complaint was first lodged with the member. This limit applies when a person has not been advised by the FSP (but later

becomes aware through other means) that they can take a complaint to the reserve scheme.

Of those who commented on the 2 year time limit, some felt this period of time was fair, but others felt it was too long and there were suggestions ranging from 6 months to 18 months as a more appropriate period. It was considered that an overall time limit of 2 years was operationally impractical because over time access to accurate information and recall of events may become eroded and the quality of decision-making could be compromised.

Compensation cap

There were divided views on the proposed compensation cap. There were arguments for both a higher limit and a lower limit and for a claim limit rather than a compensation cap.

Many submitters from the banking and insurance category suggested a limit of \$200,000 to be consistent with the Banking and Insurance & Savings Ombudsman schemes, and so that FSPs are not attracted to joining the reserve scheme with a view to limiting their potential liability.

Submissions from the Other FSP category, however, advocate a lower limit because a large number of entities in this group are sole providers or small entities and cannot afford such compensation sums. It was also argued that claims for large amounts tend to be complex legal or contractual matters which should be dealt with in the courts.

A claim limit as opposed to a compensation cap is preferred by some because a compensation cap may encourage complainants to reduce a claim to within the cap in order to have the claim considered free of charge rather than incur costs to take the claim to the judicial system. They felt that the proposal for a compensation cap effectively results in there being no limits on the size of what complaints can be considered.

Membership and procedural requirements

There was no particular focus for comments submitted on membership requirements and procedural requirements. The rules discussed in this section received 2-4 comments.

Enforced termination of membership is a serious matter as a FSP may have to close its business. Therefore it was considered important that rules and processes must be established for fair justice, which includes appropriate penalties for minor breaches (rather than expulsion) and appeals.

Some considered that promotion of the reserve scheme should primarily be the responsibility of members. Access to the reserve scheme is possible only after a complaint has been taken to a member's internal complaints system. Therefore it is considered it is the responsibility of the member to promote the reserve scheme. Moreover not all FSP customers are able to access the

reserve scheme. For this reason it was argued that promotion of the reserve scheme should only be a secondary function of the reserve scheme.

The Bankers' Association pointed out that there is no time restriction for resolving a complaint under the Banking Ombudsman rules and suggested that the proposed 40 day "best efforts" rule be removed from the reserve scheme. The Insurance & Savings Ombudsman submission suggested that, from their experience, 90 days would be more realistic.

Some submitters felt that members should be entitled to appeal determinations or take disputes to the courts in the same way that complainants are. It was felt the proposed rule for members was against the objective of natural justice.

Governance

Most of the comments relating to governance were about the advisory body and member representation or input to the operation of the reserve scheme.

Some submissions commented that the role of the advisory body appears to include both governance and advisory functions, especially to government. Some felt that the body's role should focus on governance. If its role is to provide advice to government, then the advisory body should be funded by government or the functions should come under the responsibility of the Ministry of Consumer Affairs.

Several finance industry submissions pointed out that it was important that reserve scheme members should be informed and consulted about rule changes, contract terms with the service provider and service provider performance; that is, there is accountability to members. In line with this view it was highlighted that the proposed governance arrangements did not have a mechanism for all members to provide input into the operation of the reserve scheme and that 3 industry members on the advisory body is not sufficient to represent the many different types of financial service providers in the financial services sector.

List of submitters

AA Insurance Limited
ANZ National Financial Group
Cameron Partners
Child Poverty action Group
Consumer Representative, Board of the Banking Ombudsman Scheme Ltd - Helen Walch
Consumer Representatives, Insurance & Savings Ombudsman Commission – Claire Dale, Sam Huggard
Dispute Resolution Services Ltd
Finance Sector Union
Financial Services Federation
Fisher & Paykel Finance
GE Capital
GE Money
IAG NZ Limited
Insurance Brokers Association of New Zealand
Insurance & Savings Ombudsman
Insurance & Savings Ombudsman Board
Insurance Council of New Zealand, Investment Savings and Insurance Association and Health Funds Association of New Zealand
Institute of Financial Advisers
Kiwibank
LEADR (Association of Dispute Resolvers)
Munich Reinsurance Company
New Zealand Bankers' Association
New Zealand Federation of Family Budgeting Services (Inc)
New Zealand Institute of Chartered Accountants
New Zealand Retailers Association
Nicholas Marshall
Office of the Banking Ombudsman
QBE Insurance Limited
Rae Nield Marketing Law (on behalf of Farmers Trading Company Ltd, Taxicharge New Zealand Ltd, New Zealand Taxi Federation Inc.)
Sovereign Limited
Spicers Portfolio Management Limited
Trustee Corporation Association of New Zealand
Wellington Law Centre
Westpac New Zealand Limited