Submission template

Review of the Approved Financial Dispute Resolution Scheme Rules

Your name and organisation

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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?
	Financial Advice NZ represents around 1600 financial advice members. We strongly support the objective of the review; "to improve consumer access to redress available through the schemes" Access to Dispute Resolution Schemes, as an alternative to seeking redress through the Disputes Tribunal (which is limited) or the courts, is highly valued by Financial Advice NZ and the adviser community. While independent research[1] we commissioned in 2020 showed 94.9% of financial advice consumers rated the advice they had received as good or very good for their needs and goals, we recognise that sometimes things do go wrong. Dispute Schemes have an important role to play to ensure that in these situations, trust and confidence in in the financial community is maintained. Financial Advice New Zealand believes people who access quality financial advice are better off than those who don't. We also believe that quality financial advice leads to a long-term increase in people's financial health, wealth and wellbeing. For this reason we support the objectives and the four criteria of this review, as anything that supports trust in the financial community supports our goals of promoting the value of financial advice. In particular, accessibility is key as without ease of access to the scheme, consumers don't any of the other benefits.
	Financial cap
2	Are you aware of any instances of consumer harm due to the issues outlined?
	Financial Advisers are just a small portion of the participants in the schemes, and as so few members have been involved in a claim or potential claim, we do not have a lot of direct examples of whether there has been consumer harm caused by the current financial cap levels. However, we are aware of at least one situation where an adviser's client determined they were slightly outside the claim value of the appropriate dispute scheme and did not proceed with action as they felt they did not have the financial means to challenge a claim in the courts.
3	Do you have any feedback on the problems outlined?
	Financial Advice NZ agrees that consumers should have the same ability to seek and gain redress regardless of the scheme their financial provider is a member of. Consistency is fundamentally important to ensure that consumers are not disadvantaged, or advantaged, by their provider's choice of dispute scheme when they themselves have no option to choose the scheme to hear their claim.

[1] "Trust in Advice – Research on the Value of Financial Advice" published by Financial Advice NZ in 2020.

	Option one: set the primary jurisdictional and redress cap at $350,000
4	Do you have any feedback on this option?
	We support the financial cap being the same as the District Court cap, as we recognise this was how the original levels were set. We also support the ongoing tethering of the cap to the District Court limit. This would see the cap moving dynamically and without delay in line with the District Court limit.
5	Are there any other costs or benefits of this option?
	An additional potential cost is the increase in membership costs to scheme members if more consumers are able to bring claims, and if those higher claims increase complexity for the schemes.
	Option two: introduce a weekly alternative to a lump sum cap
6	Do you have any feedback on this option?
	As written, Option 2 allows a dispute scheme to award the maximum weekly redress amount with no cap on the total pay-out. Given the nature of weekly income insurance products, it is possible a payout could be required up to the age of 65. Therefore depending on the age of the claimant the redress allowed by this option could theoretically be; • $1,500 a week for 5 years – potential redress $390,000 • $1,500 a week for 15 years – potential redress $1,170,000 • $1,500 a week for 20 years – potential redress $1,560,000 A weekly cap of $1,500 is in effect an uncapped total redress amount for these type of insurance products, whereas claims about any other product is limited to $350,000.
7	Do you agree that a weekly payment alternative should be introduced for all schemes? Why/why not?

In principle we support the weekly alternative to a lump sum limit for all schemes. However, for the reasons stated below, we don't support the option as written and have suggested an alternative approach.

We believe all claims, regardless of the type of financial product, should be able to be heard through the dispute scheme, and that the redress limit should be the same across all products.

1. Currently, consumers' access to redress for weekly income products can differ depending on their product provider's scheme choice as not all providers allow weekly payments for consideration (based on a financial cap calculation they perform). These calculations are not consistent across the schemes. Including Option 2 would provide a consistent approach across all schemes.
2. However, we don't see any rationale for giving one type of insurance product a different total redress cap from other types of products when consumer harm is equivalent.
3. The proposed option would allow the weekly redress to be awarded with no cap on the total pay-out. We feel this approach inappropriately treats this group of insurance products significantly more favourably than all other products.
4. As an alternative, we believe a total payout cap of $350,000 should be added to this Option 2 to allow parity with all other products.

   Ie – Schemes can hear claims up to the $1,500 a week limit, and schemes can award claims of weekly payments up to the $350,000 total cap.
5. We do recognise that having a weekly limit is of use as the total value of claims of this type cannot necessarily be determined up front. The weekly cap limit could allow a way for schemes to determine which claims they can hear. This recognises that the value of weekly payments until a consumer dies or reaches the age their policy ends is not easily calculatable as the end date is not known upfront, therefore the total value of the claim is unknown upfront.
6. Having just the $350k limit as the only figure available for schemes to determine their ability to hear a claim may unfairly exclude too many consumers - we believe that having a weekly cap limit as well as a total redress cap would address this issue.

This approach is consistent with the Australian Financial Complaints Authority (AFCA) Complaint Resolution Scheme Rules. Those ***rules***, while recognising a monthly claim cap for Income Stream Insurance, also set out the maximum remedy available per consumer for this product at the same level as other insurance and credit products.

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

At $1,500 a week, this amount does limit the number and type of consumers who can access redress for this product as it excludes consumers with higher than average incomes.

In principle we support an increase to the $1,500 cap but only if implemented as a jurisdictional limit in line with our alternative approach as outlined above - with a total cap limit equivalent to all other products. To ensure more consumers can access the scheme, we support an increase of the weekly cap to a level which better reflects the income of those consumers who purchase these weekly payment products.

9	Are there any other costs or benefits of this option?
	With the uncapped total redress value as proposed, we are concerned about the expansion of liability on Financial Advisers and Financial Advice Providers (FAPs). Whilst we understand this option is mostly in use for the insurance product providers, in theory advisers and FAPs could also be liable for this uncapped amount. If implemented as stated, the proposal could cause an increase in Professional Indemnity Insurance (PI) premiums once PI providers understand the potential, although unlikely, risk to Financial Advice Providers of this new uncapped amount for those FAPs giving advice on insurance products that provide weekly income payments. This increased potential liability is significant and could result in some FAPs choosing not to provide advice in this area, a negative consumer outcome. Depending on the date of implementation, and whether this weekly option would apply to new claims arising for advice given prior to the date of implementation, we are also concerned about the financial impact on Financial Advisers. Financial Advisers, who are personally liable for their advice up until 15 March 2021 when the new FAP regime was implemented, may not have enough PI run-off cover as they would not, and could not, have known of this potential uncapped risk for advice given on insurance products with weekly payments.
	Other potential issues with inconsistent awards
10	Do you have any feedback on the problems outlined?
	We support a consistent cap on these awards across the dispute schemes to ensure consumers' claims are treated the same regardless of which scheme their provider has chosen to be a member of.
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?
	For consistency, we support the special inconvenience award being a discretionary award for direct costs only rather than for stress, humiliation and inconvenience. This supports consistency between schemes as it removes the human aspect of evaluating those soft factors, but allows discretion to determine when direct costs should be reimbursed on a case by case basis.
12	If an interest award was to be introduced how should it be calculated?
	We support the interest calculation being consistent between the schemes by being linked to a verifiable source.
13	What are the benefits and costs of the options?
	No comment to add.
	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?
	Our consultation with adviser members highlighted that advisers would prefer a claim to go through a dispute scheme process rather than through the courts, so we don't see that they would switch schemes in order to avoid claims.
15	Do you agree with the potential problems that may occur as a result of inconsistent scheme rules about the timing of membership/jurisdiction?
	Financial Advice NZ agrees with the potential issues around current jurisdiction as highlighted in the discussion paper. We understand informal processes between the schemes have limited the impact of these issues on consumers to date, but we strongly believe all schemes should have the same rules regarding whose claims they can hear and that no consumer should be left out of the dispute process if their claim is within the acceptable limit. Financial Advice NZ also wishes to raise another issue with jurisdiction specifically related to Financial Advisers for advice given up to 15 March 2021. This important issue is detailed later in this submission in the Other Comments section.
	Option one: require all schemes to consider claims about current claims about current members, even if the issue arose prior to membership
16	Do you have any feedback on this option?
	This is the option Financial Advice NZ supports. It is consumer centric in that is easy for the consumer to determine which scheme to contact, and it corresponds to how Professional Indemnity Insurance works for advisers – claims made policies. It also matches the new FAP disclosure requirements which require FAPs to make their dispute resolution scheme membership publicly available[2] to consumers. We also agree with the discussion paper that this option best allows schemes to enforce decisions and to escalate issues through their ability to impact registration on the FSPR.
17	Are there any other costs or benefits of this option?
	This option increases transparency as providers can promote to consumers who they can contact for any issues, regardless of when that issue happened.
	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
18	Do you have any feedback on this option?

[2] Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2020, schedule 21A 4(1)(k)

	Financial Advice NZ does not support this option. This option does not work well with the new FAP disclosure requirements. If this option was implemented, then the public information on dispute scheme on the FAP's website would not necessarily be correct if that FAP has ever been a member of more than one dispute scheme. This would cause additional confusion for consumers. This option is not consumer centric, and can create a negative first experience for the consumer as they bounce around schemes to determine who they are meant to contact. It is also the opposite of how industry Professional Insurance Liability works – claims made.
19	Are there any other costs or benefits of this option?
	Added complexity for FAPs who, to be complaint with their disclosure requirements, would have to publicly list their membership history with dispute schemes with dates included so consumers could determine who they can complain to.
	Applicable time periods (limits) for bringing a claim
20	Do you any feedback on the problems outlined?
	Financial Advice NZ believes all schemes should have the same rules around timings.
21	Are you aware of instances of consumer harm from the problems outlined?
	Option one: limit time period I to a maximum of two months
22	Do you have any feedback on the option?
	We support the proposal of a standard 2-month period from the time a consumer makes an internal complaint.
23	Are there any other costs or benefits of this option?
	Option two: create a consistent time period II of three months after deadlock
24	Do you have any feedback on this option?
	We support the proposal of a standard 3 month window for claims that have not been resolved internally.
25	Are there any other costs or benefits of this option?
	Option three: introduce discretion to hear a complaint after time period II

26	Do you have any feedback on the option?
	We believe all schemes should have the ability and obligation to consider an extension for claims in some circumstances. We note the option as described in point 76 uses two quite different word around these circumstances "Special Circumstances" and "Exceptional Circumstances". We support the "Special Circumstances" wording with additional reference to vulnerable consumers.
27	Are there any other costs or benefits of this option?
	No comment to add.
	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?
	Looking at the four current schemes, and taking into account the nature of the claims the dispute resolution schemes address, we consider 6 years from the time the consumer gained knowledge or ought reasonably to have gained knowledge of the act or omission as appropriate.
29	Are there any other costs or benefits of this option?
	No comment to add.
Other Comments	

Financial Advice NZ is very concerned about a gap we see in these rules regarding lack of jurisdiction of Dispute Resolution Schemes to consider claims regarding financial advisers' advice and actions prior to March 15, 2021.

The situation is not created by the proposed changes to the rules, but it is not addressed by it.

Without this issue being addressed, we believe the accessibility, effectiveness and efficiency goals of the dispute resolution programme and this review are impacted for both consumers and advisers. This impact could be felt for the next six years or longer.

Access to Dispute Resolution Schemes, as an alternative to seeking redress through the Dispute Tribunal or Court, is valued by Financial Advice NZ and the adviser community. We do not want to see a situation where consumers are not able to find a Dispute Resolution Scheme able to hear their claim.

Issue 1: Financial Advisers are no longer members of a Dispute Resolution Scheme
The concern is that from 15 March 2021, financial advisers are generally exempt from the requirement to be members of a Dispute Resolution Schemes – only their FAPs have that requirement[3].

[3] s48a Financial Service Providers (Registration and Dispute Resolution) Act 2008 as amended by Financial Services Legislation Amendment Act 2019)

If going forward dispute schemes can only consider claims about current members (the proposed and our supported option), then as the adviser is no longer a member of any scheme, no scheme has jurisdiction for a claim raised about an adviser's advice or actions prior to March 15, 2021. Similarly, the adviser is now no longer obligated to comply with the rules of the schemes or to comply with a binding order[4].

Without resolution, any new claims about advisers advice or actions relating to the period before 15 March 2021 could fall outside the Dispute Resolution Schemes' jurisdiction leaving a consumer without redress other than through the Dispute Tribunal (limited) or Court.

(We note this will not always be the case as if there is a current policy in place, whomever is now managing that policy has an obligation to ensure the policy/advice is still relevant and to make changes if it is not. Depending on the consumer's claim, the dispute scheme of whomever is managing the policy now may be the correct scheme to hear the claim.)

Our suggestion is that Jurisdiction Option 1 is amended to include the following;

> *If a party to a claim is not a member of any scheme, but is covered by another entity's Dispute Resolution Scheme membership (as noted on the FSPR) then that Dispute Resolution Scheme has jurisdiction to hear the claim against the party.*

This would at least create a clear jurisdiction decision about which dispute scheme the consumer would contact for potential redress. Note: this first step does not make the FAP responsible for the claim, the FAP's only direct involvement is in the determination of scheme jurisdiction.

The second and harder issue to resolve through the scheme rules or elsewhere, is who the dispute scheme can hold liable for the claim.

Issue 2: If jurisdiction is resolved, who can be held liable by the dispute scheme

The issue of who can and should be held liable for the adviser's advice/actions prior to 15 March 2021 does not appear to have an easy solution, yet it is very important someone can have an award made to ensure consumers and advisers aren't forced into expensive court proceedings.

Scheme providers, advisers and consumers need this issue resolved with some urgency.

We recommend MBIE consults directly with advisers, schemes and Professional Indemnity Insurance Providers to ensure a suitable solution is found. Financial Advice NZ is happy to prepare a paper on this issue and lead the discussion.

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[4] s49f of the Financial Service Providers (Registration and Dispute Resolution) Act 2008, "A member of an approved dispute resolution scheme must comply with the rules of the scheme."