

Submission on discussion document: *Effective financial dispute resolution*

Your name and organisation

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Responses to discussion document questions

Context to my submission

I have a dispute resolution background and have worked as a resolution practitioner at the Financial Ombudsman Service Australia (now AFCA), the Insurance & Financial Services Ombudsman Scheme and Fairway Resolution. From 2020 to 2023 I managed the internal complaints process at TSB Bank. This year I'm completing a research Master of Laws focussing on bank dispute resolution design and consumer access to justice.

Issue 1: Consumer awareness of and access to dispute resolution

1

Do you think there is a problem with low consumer awareness and access to dispute resolution?

Yes, I believe there is a problem with low consumer awareness and access to dispute resolution. Issues relating to consumer access to justice extend wider than financial services.¹ However, the intersection of legal capability and financial capability adds further complexity in financial services dispute resolution.

Consumer knowledge is an important factor in access to civil justice. A socio-legal theory of dispute emergence finds that “naming, blaming and claiming” are required for individuals to pursue a dispute.²

For example, for a victim of a romance scam to pursue a complaint against a bank they will need to:

Name	Identify they have been involved in a romance scam and acknowledge they are a victim.
Blame	Identify the bank may have obligations in respect of the scam and form a view that the bank is responsible for their loss.
Claim	Decide they will make a complaint against the bank to reimburse their losses.

Research has identified people have a blind spot when it comes to understanding civil problems and possible resolution options. People think they already understand the problem;³ do not perceive it as having a ‘legal’ basis;⁴ and rely on support and advice from non-legal actors (like family and friends)⁵ to inform their understanding of the situation.

A recent study in Victoria, Australia, explored residents’ understanding of law and the legal problems they experience. The study identified that consumers with debt or money

¹ For example, see Bridgette Toy-Cronin and others *Wayfinding for Civil Justice National Strategy* (Wayfinding for Civil Justice Working Group, December 2023).

² William LF Felstiner, Richard L Abel and Austin Sarat “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming” (1980) 15 L & Soc Rev 631.

³ Rebecca L Sandefur “Access to What?” (2019) 148 Daedalus 49, at 51.

⁴ Emily S Taylor Poppe “Institutional Design for Access to Justice” (2020) 11 UC Irvine L Rev 781, at 786.

⁵ Sandefur, above n 3, at 51.

problems have the highest probability of doing nothing about the problem.⁶ Further, these consumers are more likely to experience ‘clusters’ of other problems alongside those relating to money.⁷ Problems related to debt and money also tended to last longer than other types of civil problems.⁸

Legal capability has been identified as one of the key barriers to consumers pursuing disputes.⁹ Legal capability includes the multi-dimensional awareness; understanding; resilience; skills and resources to resolve justice problems.¹⁰ If consumers lack an aspect of legal capability, this may prevent them from making a complaint or pursuing a claim against an FSP.

Financial capability is also important in consumers’ understanding and ability to identify and pursue complaints. MBIE has already articulated the concerns regarding the financial capability of consumers in its discussion document.

A lack of cultural capability has also been identified within the New Zealand civil justice sector.¹¹ A lack of recognition of collective approaches to conflict can present a barrier for consumers of different cultures to engage in complaint processes.

Based on the available research, consumer knowledge and capability is required for consumers to make complaints to FSPs and escalate these to EDR schemes.

2

Do you think the recent increase in the volume of disputes indicates better awareness and access to the schemes?

No comment.

3

What are the barriers for consumers in accessing financial service providers’ internal complaints processes?

I believe there is an intersection of system, organisational and psychological barriers for consumers to access the internal complaint processes of FSPs.

As part of my research project, I am conducting a desktop review of the website content retail banks present to consumers about their complaint processes (“the online content”). High-level preliminary findings indicate that there could be more information provided to support consumers to access complaint processes. For example:

- Only 2 banks (of 13) let consumers know they could appoint a representative for their complaint (whether that is a family member, friend or professional). The same 2 banks were the only ones that provided details of the complaints process in languages other than English; provided easy read guides and provided details of NZ

⁶ Nigel J Balmer and others “Volume 1: Everyday Problems and Legal Need” (Victoria Law Foundation, Melbourne, August 2023) at 16.

⁷ Ibid, at 15.

⁸ Ibid, at 18.

⁹ Marc Galanter “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change” (1974) 9 L & Soc Rev 95.

¹⁰ Pascoe Pleasence and Nigel J Balmer “Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies” (2019) 16 Journal of Empirical Legal Studies 143 at 144.

¹¹ Bridget Fa'amatuaunu “Self-represented litigation and meaningful access to justice in Aotearoa and Samoa” (2023) 19 AlterNative 13 at 20

Relay and iSign for consumers to make a complaint. Customers of the 11 other banks do not receive this type of information to support accessibility.

- No banks provided details of advocacy organisations that could represent consumers (like community law or financial mentors) within the online content.
- Digital channels to make a complaint were not presented as available to all consumers. Only 2 banks (of 13) said a complaint could be made via social media.
- Seven banks informed consumers they will receive a decision or response about the complaint, but consumers were not made aware of the practical outcomes that are possible through the complaints process.

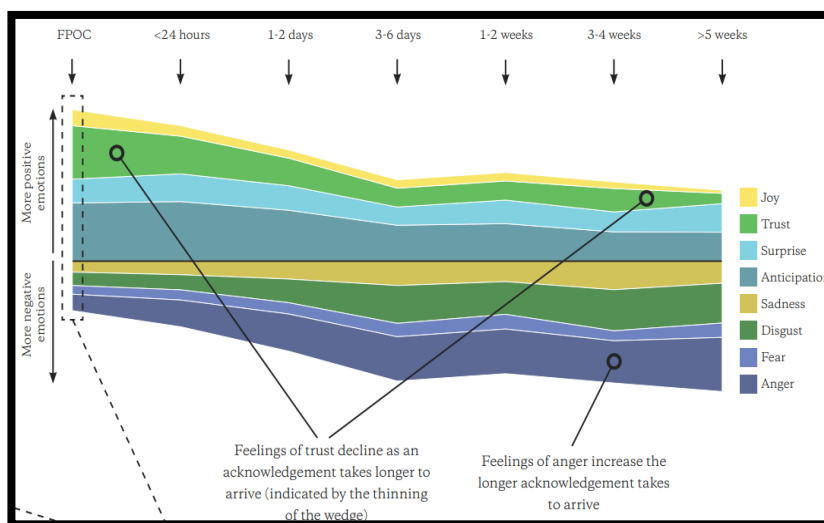
Based on my professional experience engaging with consumers over 12 years, other possible barriers could include:

- The complaints culture within the organisation and the frontline staff members' ability to identify and record dissatisfaction as a complaint.
- Consumers' reluctance to make a complaint because they may see it as a formal and time-consuming process. Frontline teams need to be able to have conversations with consumers to support their understanding of the complaints process and why it can be an effective way to resolve their problems.
- Previous negative experiences that impact consumers' confidence or trust in engaging in complaint processes.
- Consumer feelings of powerlessness and/or futility and thinking their FSP will not do anything to help them.

4 What are the barriers for consumers in accessing dispute resolution schemes?

The design of financial dispute resolution in New Zealand requires consumers to have completed the FSP's internal complaints process before a dispute will be investigated at an EDR Scheme.

Huntswood highlights that the longer a dispute remains unresolved, the more negative emotions the complainant experiences:¹²



¹² Huntswood "Complaints Outlook 2022" <www.huntswood.com>.

In my view, if a consumer has completed the FSP's IDR process and the matter remains unresolved, then in addition to the barriers for internal dispute resolution, further barriers could include:

1. Loss of trust towards the FSP and potential distrust of the EDR scheme.
2. Uncertainty about the EDR scheme process and discomfort at pursuing the matter in an unknown environment.
3. Additional resilience, time and energy required to pursue the matter further in circumstances where they have already received an unfavourable outcome from the FSP and may be dealing with negative emotions.

5

Do you have any specific examples or case studies of situations where consumers have experienced issues accessing a financial dispute resolution scheme?

No comment.

Issue 2: Enhancing scheme effectiveness through improved oversight and accountability

6

Do you think that current oversight and accountability mechanisms are sufficient to ensure schemes' effectiveness? Why/why not?

No comment.

7

Do you think that the schemes are as effective as they could be? Why/why not?

No comment.

8

Do you agree with these criteria for assessing the options? Why/why not?

No comment.

Status quo: Retain existing model and monitor the impact of aligning the schemes' rules

9

Do you think that the new regulations will be sufficient to achieve the objectives set out above?

No comment.

Option to address issue 1: Supporting consumer access and awareness of schemes

10

Which of the options we have described above would be most effective to support consumers to resolve issues with their financial service provider?

I believe a combination of enhancing advice and support and increasing FSP information about complaint processes will be helpful.

Financial mentors can be accessible advocates for consumers (when resourced appropriately). Targeted training to empower mentors to support clients through complaint processes can assist in overcoming some of the knowledge and awareness barriers consumers in difficult circumstances face.

In Australia, there are more consumer financial advocacy services available, including the Financial Rights Legal Centre. While the Banking Ombudsman Scheme provides information and guidance to consumers, it is impartial and its role does not include representing consumers with their complaints. Engaging with community law and other relevant organisations on options to enhance the ability for consumers to receive information, advice and representation for their financial problems can help support consumer access to justice for financial problems.

While I agree it will be good for FSPs to prominently display information about their complaint processes to consumers (in addition to the disclosures that are already required), I think procedural information is not enough. There needs to be careful thought into what type of information will support consumer understanding of complaints and help them overcome some of the psychological barriers to making a complaint. How the information is presented is important, as well as ensuring consistency across the financial services sector. Currently, the information provided to consumers is largely text-based and I think different mediums will help to support consumer understanding.

It could be beneficial for the FMA or industry bodies such as the NZBA and ICNZ to develop industry videos and/or interactive content at a high level about complaint processes that all banks and insurers could use. This means the content will be consistent for consumers. It could explain what a complaint is, the types of outcomes consumers can receive and practical support available to assist them. There could also be high-level information available in different languages that banks and insurers could have available for consumers – this then reduces the cost for small and medium organisations to individually translate their complaint processes into different languages.

11 *What are the likely costs of implementing these options?*

No comment.

12 *Should these options be led by government, or the schemes themselves?*

No comment.

13 *Are there any other approaches that would improve consumer access to and awareness of dispute resolution options?*

Personally, I do not believe that any of the individual options presented in this discussion document will resolve the issues in consumer understanding and participation due to the complexities of this issue.

However, collectively, MBIE, the FMA, FSPs and EDR schemes can take an integrated and holistic approach to improving awareness and accessibility (as part of a broader all-of-government approach to improving access to civil justice), underpinned by research and iterative learnings. This should include engaging with justice and consumer organisations to ensure referrals, support and education are available at a range of entry-points within the consumer services landscape.

Option to address issue 2: Enhancing scheme effectiveness through improved oversight and accountability

14 *Do you think that there is a need for dispute resolution schemes to be more accountable?*

No comment.

15 *Do you think there are issues with the performance or effectiveness of the schemes?*

No comment.

16 *Do you think there should be consistency in how the schemes carry out independent reviews? What would be the best approach for achieving this consistency?*

No comment.

17 *Do you think government should set further scheme rules? If yes, what areas of the scheme rules should be set by government?*

No comment.

18 *Do you think it is necessary for government to make changes to ensure effective and impartial governance of the schemes? If yes, what changes would best meet this aim?*

No comment.

19 *Do you think the schemes should have to report against performance targets or standards? If yes, how should these standards be reported and what metrics should be used?*

No comment.

20 *Are there any risks or unintended consequences associated with the options we are considering?*

No comment.

21 *Will any of these proposals result in significant additional costs for the schemes, scheme participants and/or consumers? If yes, please describe the magnitude of these costs.*

No comment.

22 *Are there any other ways to improve schemes' accountability and effectiveness?*

No comment.

Other options

23 *Do you agree that the impact of regulations to align scheme rules, along with any other improvements proposed in this document, should be assessed before considering changes to the current scheme model? Why/why not?*

It's great to see that MBIE is considering the future design of financial services dispute resolution. My personal opinion is that the Australian "Ramsay Review" final report provides a well-considered and evidence-based rationale for why one consolidated EDR

scheme is more appropriate than separate schemes.¹³ I do not believe there is a compelling reason why the Ramsey Review findings on this issue would not also be relevant to the New Zealand context.

While MBIE may wish to monitor the current arrangements, I encourage MBIE to also commence a review into the overarching institutional design of financial services dispute resolution in New Zealand. This would include engaging broadly across the financial and civil justice sector about the most appropriate design for the New Zealand context.

Consideration should be given to whether an industry scheme/s, Tribunal, or other model is appropriate alongside review of the purpose and design of internal FSP complaint processes.

I note the Disputes Tribunal has jurisdiction across some financial disputes. Reviewing the role of the Disputes Tribunal and how it can support access to justice for consumer financial problems should also be included as part of this review.

In my opinion, simply merging all four EDR schemes into one is not sufficient. Any new design should represent the future of consumer dispute resolution in New Zealand. It should incorporate human-centred design, cultural considerations and best-practice accessibility (including digital innovation), underpinned by contemporary research and robust stakeholder engagement.

24

Are there any other areas and options for change that we should consider that have not been addressed in this discussion document?

The focus of this consultation has been on the EDR schemes and I agree this is important. It is also important to recognise that the FSPs themselves are providing the vast majority of substantive justice outcomes about consumer financial problems.

For example, between 1 April 2023 and 31 March 2024, banks recorded 98,460 consumer complaints.¹⁴ The Banking Ombudsman Scheme formally investigates only around 0.16% of these complaints each year.¹⁵ The formal investigation occurs when a complaint has reached the end of the bank's internal complaints process and is unresolved. BOS then receives the full bank file and an Investigator reviews whether the bank has met its obligations.

I believe the FMA should focus attention on the internal complaint processes and decision-making within FSPs. Some foundational questions as a starting point are:

1. Does the FMA consider FSPs to be the main provider of civil justice outcomes to consumers with financial problems in New Zealand? What implications does this have from a regulatory perspective?
2. Do FSPs consider themselves to be the main provider of civil justice outcomes to consumers with financial problems in New Zealand? What implications does this have from an organisational perspective?
3. How do consumers and the FMA know that the complaint outcomes provided by FSPs are substantively fair and legally correct?

¹³ Ian Ramsay and others *Final Report: Review of the financial system external dispute resolution and complaints framework* (The Treasury, Canberra, 3 April 2017).

¹⁴ Banking Ombudsman Scheme "Complaints at a glance" Complaints Dashboard <bankomb.org.nz>.

¹⁵ A figure of 160 disputes was used for the calculation (160 / 98460), based on the number of formal complaint investigations confirmed in the Banking Ombudsman Scheme *Annual Report 2023* (Banking Ombudsman Scheme, Wellington, 2023).

Other comments

Thank you for your consideration of my submission. I'm happy to be contacted regarding any of my comments.