

22 September 2022

By email: guidancefeedback@comcom.govt.nz

Commerce Commission - Te Komihana Tauhokohoko

Dear Madam/Sir,

ICNZ submission on Consultation on draft consumer remediation guidance for businesses

Thank you for the opportunity to submit on the Commerce Commission's (**Commission's**) Consultation on draft consumer remediation guidance for businesses (**Consultation**).

By way of background, the Insurance Council of New Zealand - Te Kāhui Inihua o Aotearoa (**ICNZ's**) members are general insurers and reinsurers that insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of New Zealand assets and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability, business interruption, professional indemnity, commercial property and directors and officers insurance).

Please contact Jane Brown (jane@icnz.org.nz) if you have any questions on our submission or require further information.

1. Responses to consultation questions

The following section sets out ICNZ's responses to the questions asked in the Consultation.

What do you think of the proposed principles for how businesses may approach remediation and why?

ICNZ is supportive of principles 7 and 8 of the guidance and also of an approach to remediation that is scalable and reflective of the type of breach and harm caused.

In relation to principle 9, we provide the following comments:

- We believe that principle 9.3 would benefit from some explanation as to what 'detriment' would look like in these circumstances. As the principle also refers to 'loss' and 'harm', we assume that 'detriment' must be different again and query whether it is needed.
- Principle 9.6 should be redrafted as, "giving consumers the benefit of the doubt where **it is reasonable to conclude that** there is uncertainty ~~(for example, where the business is missing information)~~". We do not believe that principle 9.6 should apply to every instance of uncertainty, as this is a highly subjective measure, and should instead contain a threshold.

ICNZ agrees that consumer remediation processes should be comprehensive, timely, fair and transparent and note that this principle aligns with the general expectations set out in the industry's Fair Insurance Code.¹ We make the following comments about specific subsections of principle 10:

- We would appreciate greater clarity in principle 10.3.1 as to what customer needs are being referred to.
- It is not clear in principle 10.3.2 what is meant by “invites consumers to participate in the process to properly assess their individual circumstances”. It is also unclear in what circumstances it would be helpful for consumers to be part of the process and how that would be managed in situations where there are numerous impacted consumers. Unless properly managed, there could be a real risk that participation unnecessarily slows down any remediation and leads to consumer confusion and a perception that consumers need to ‘opt in’ to a remediation process. This principle may benefit from some examples of what consumer participation might look like and how it would represent better customer outcomes. We note that in terms of precedent for consumer participation, ASIC’s Regulatory Guide on Client review and remediation conducted by advice licensees states, “inviting clients to participate in the review and remediation should only be necessary in limited circumstances.”²
- While we understand the need for flexibility, we have concerns around the practicality of applying principle 10.3.5 and the uncertainty it creates. For example, we question what would be considered a ‘non-strict’ application of a time-bar. Businesses need the flexibility to determine what is reasonable in the circumstances given every remediation and customer situation is different. We suggest principle 10.3.5 be amended to “Does not take an **unreasonably** legalistic approach...”.
- We believe that principle 10.3.7 should be consistent with paragraph 14.1.4 and refer to an “external dispute resolution process” rather than “an avenue for consumers to seek independent review”.
- The word “all” should be removed from principle 10.4.4 as it is too uncertain. Principle 10.4.4 should be “Takes reasonable steps to trace and contact affected customers”.
- We recommend adding the words “Where appropriate,” at the start of the first sentence in principle 10.4.5. Self-identification may not be possible for all remediations, for example, because only the business involved has the necessary data and information to be able to identify affected customers.
- We do not believe that principle 10.4.6 should be so strict as to expect that every remediation process will take on board feedback received. This principle would be more appropriately rewritten as “consider feedback received, **as appropriate**”.

What do you think of the proposed principles for calculating compensation and why?

Principles 10 and 11 state that records are to be reviewed back to the time where the business reasonably suspects the conduct or omission occurred, and that a legalistic approach will not be condoned. The principles also reference seeking further information from customers to fill gaps, applying beneficial assumptions to counter missing information and blanket remediation approaches. This suggests that remediation look back periods are uncapped. We question whether such an approach to compensation is ‘fair’ to customers as uncapped remediation will increase complexity and timeliness of remediation programmes. An unlimited period for backdating compensation will

¹ https://www.icnz.org.nz/fileadmin/Assets/PDFs/Fair_Insurance_Code_2020_te_reo_logo.pdf.

² RG 256.92, https://asic.gov.au/media/4009895/rg256-published-15-september-2016.pdf?utm_source=asic&utm_medium=pdfpromotions&utm_campaign=rg256.

also potentially create additional administrative burden for businesses due to having to deal with a greater number of deceased estates and consumers for whom the business does not hold, or cannot obtain, contact details.

We believe that a more appropriate approach to compensation is that taken by ASIC in their consumer remediation draft regulatory guide,³ where they propose a starting point for the remediation review period of “when [the business] reasonably suspect the misconduct or other failure first caused loss to a consumer”. They go on to say that a review period should rarely exceed seven years. ICNZ’s view is that this approach would strike a more appropriate balance, particularly in light of challenges with legacy systems and other record keeping limitations.

We also believe that 11.1.5 would benefit from the addition of, or reference to, a standard definition for “use-of-money interest component”.

In terms of calculating compensation, are there any other general issues that businesses may require guidance on that are not currently included in the principles?

ICNZ would appreciate guidance from the Commission as to whether they have a set level of tolerance for what refunds should and should not be paid, i.e. a reasonable threshold if the company does not hold a customer’s bank account. At present, in the equivalent Australian guidance RG 256,⁴ ASIC states, “where the amount of compensation to be paid to a client is below \$20 and the client cannot be compensated without significant effort on your part – for example, because the client no longer holds an account with you – you may instead make a community service payment”. While we note that this particular guidance is subject to review, it is the type of expectation that it would be helpful for the Commission to include in their guidance. However, we stress that any such expectation must be sufficiently flexible to be applicable to different products and services.

What do you think of the proposed principles for engagement with consumers and why?

We consider the word “ample” in principle 12.1.2 should be replaced with “reasonable” so it reads “...allow **reasonable** time for consumer responses”.

Principles 13.1.2 and 13.2 outline the efforts business are expected to take in order to engage with customers but we are concerned that they do not set out realistic methods for communicating. We question how appropriate it is for businesses to use social media to track down customers as this may risk impeding on an individual’s right to privacy. Some insurers have also stopped using SMS to communicate as feedback from customers indicated that they thought text messages were fraudulent which in turn, drove higher volumes of traffic to contact centres with negative customer feedback. We therefore recommend that principles 13.1.2 is amended to “for example, email, post, phone calls, SMS **or** social media **where appropriate**”.

In relation to principle 13.4.4, we believe that further clarification is required about the expectations for maintaining a webpage outlining remediation activity. For example, what would the Commission’s expectations be in terms of accessibility of this information, and what would happen in situations where a product is distributed through an intermediary or partner. It is unclear if both the insurer and the intermediary would be required to have information about remediation on their webpages. Principle 13.4.4 also requires businesses to provide a means of self-identifying. We believe that there would be very few customers that would ‘self-identify’ as most consumers will not understand the nuances of complex remediations. Consistent with the feedback already provided about self-

³ Regulatory guide 000 (attachment to CP 350), <https://download.asic.gov.au/media/rp0l5n0t/attachment-to-cp350-published-17-november-2021.pdf>.

⁴ See above, n 2.

identification in principle 10.4.5, we believe that this principle should also be amended to include the words “Where appropriate,” at the start of the first sentence as self-identification may not be possible for all remediations.

For principle 14.1.2, we would expect that the information provided should be only at a basic level so that there is sufficient information for the customer to see how the remediation has been calculated, while not being so complex as to create confusion or mistrust.

We do not believe that the examples in principle 15.1.1 are helpful. We recommend that these are removed and simply state that remediation should be provided either by credit or refund. This will allow greater flexibility for companies who may have different processes in place.

What do you think of the proposed principles for governance and record keeping and why?

In relation to principles 16.1.4 and 19, we question whether there is any benefit to consumers in public reporting on progress of remediation processes. Clear and direct communication to affected consumers would be the most reliable way to ensure that important information is communicated, and we do not believe that public reporting would add anything to this. There is also the risk that multiple means of communication and messaging may cause confusion for consumers, particularly if a remediation is complex in nature.

We note in principles 17 and 18.1.3 reference to “independent assurance” and “third-party quality assurance” respectively. We consider the reference to both should be changed to “assurance”, for consistency. “Assurance” would also cover a broad range of options as appropriate for different businesses. Assurance reviews do not necessarily have to be undertaken by an external party, for example, and larger organisations may have appropriate internal audit and assurance functions to undertake such reviews themselves. This approach would also allow an organisation to tailor the level of assurance to the materiality of the circumstances.

Do you have any other feedback or comments?

ICNZ would like to understand the proposed application of this guidance in respect of insurance products, noting that:

- There is a Memorandum of Understanding between the Financial Markets Authority (FMA) and the Commission dated 31 March 2014 under which the FMA has primary regulatory and enforcement responsibility for fair dealing in relation to financial products and financial services; and
- The FMA has indicated that they will be issuing remediation principles for the industries they regulate. The FMA has already communicated the nature of such principles to the general insurance industry.

Our concern is that from experience, difficulties can arise when two regulators issue guidance or principles on the same matter. Namely:

- There is the potential for inconsistency between the two regulators which creates confusion and uncertainty as to how a remediation should be managed. This in turn could slow down the remediation process; and
- There is a cost in complying with two sets of requirements. This would seem to be unnecessary duplication and would not add any value for consumers. Instead, it would potentially detract time and resources from managing the remediation process itself.

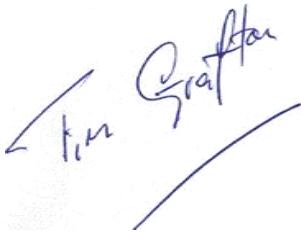
ICNZ therefore recommends that:

- Clarity is provided as to whether the proposed Commission guidance applies to insurance; and
- If both the Commission and FMA are intending for their guidance or principles to apply to insurance that they work together to ensure consistency both in setting the guidance or principles and in their interpretation and application of them. This will mitigate the risks of uncertainty and unnecessary duplication as set out above. We note that this would be consistent with one of the objectives of the Kaunihera Kaiwhakarite Ahumoni – Council of Financial Regulators Insurance Forum to “identify areas where those regulatory initiatives may overlap and where there is scope for cooperation”.

2. Conclusion

Thank you again for the opportunity to submit on the consumer remediation guidance consultation. If you have any questions about our submission, please contact our General Counsel by emailing jane@icnz.org.nz.

Yours sincerely,

A handwritten signature in blue ink that reads "Tim Grafton". The signature is written in a cursive style and is positioned above a horizontal line.

Tim Grafton
Chief Executive

A handwritten signature in blue ink that reads "Jane Brown". The signature is written in a cursive style and is positioned above a horizontal line.

Jane Brown
General Counsel