Review of the Approved Financial Dispute Resolution Scheme Rules

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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?
	ICNZ welcomes the review of the financial dispute resolution (FDR) scheme rules in order to ensure that they best promote accessibility, fairness, efficiency and effectiveness, and, as far as possible, to achieve consistency across the schemes. We believe that the objective and criteria appear appropriate, although we do not believe that accessibility should hold additional weighting. Fairness, efficiency and effectiveness are equally important and are often connected to a scheme's accessibility in other ways. For example, no matter how easy it is to access a scheme, if that scheme is viewed as unfair, inefficient or ineffective in promoting resolution, the effect will likely be that the scheme is not accessed, or options for redress are sought elsewhere. Furthermore, it seems contrary to natural justice to provide accessible dispute resolution schemes if this is at the expense of fair, efficient, and effective schemes. In relation to the 'fairness' criterion, we believe that there should also be reference to the quality of decisions. If the process is not fair to insurers, then it will impact on the insurance pools they manage and on the costs to customers more broadly. We also note that the focus of the review seems to be solely on the consumer, yet fairness and good faith in particular, are concepts involving both parties.
	Financial cap
2	Are you aware of any instances of consumer harm due to the issues outlined?
	There are no instances of consumer harm that we aware of.
3	Do you have any feedback on the problems outlined?
	ICNZ recognises that a cap of $200,000 may be problematic for a small number of consumers whose dispute relates to a financial product over this threshold and who are not in a position to pursue court action. Evidence from our members, however, suggests that in the general insurance space, this is not often an issue, particularly as there is an ability to waive the jurisdictional limit if an insurer believes the complaint remains suitable for adjudication. We agree with the comments in paragraph 33 of the discussion paper that if the cap is too high, the schemes could be forced to become more like courts with more formal and slower processes, which in turn, could impact on accessibility for consumers. ICNZ disagrees with the inflation argument presented in paragraph 32 of the discussion paper. MBIE's analysis shows that goods and services that cost $200,000 in 1992, when the District Court limit was set, would cost approximately $350,204 in late 2020. This point ignores the fact that of the four FDR schemes, the Banking Ombudsman (BOS) was the only one in existence at the time the financial threshold was set to align with the District Court. The Insurance and Savings Ombudsman Scheme was established in 1995 with an original financial cap of $150,000. Their limit increased to $200,000 in 2009, prior to their renaming in 2015 when they became the Insurance and Financial Services Ombudsman (IFSO). To apply the same CPI adjustment to IFSO's 2009 threshold, would suggest a revised limit of around $240,000.
	Option one: set the primary jurisdictional and redress cap at $350,000

4	Do you have any feedback on this option?

MBIE must carefully consider whether the financial cap should be increased across all products or whether there are some that would be more appropriately considered by the courts

ICNZ is supportive in principle of an increase to the schemes' financial cap. We recognise the reasons presented in the discussion paper around providing access to redress for those who cannot afford court proceedings and that the cap may be too low relative to the present-day cost of financial products. However, we do question whether it would be appropriate to raise the cap for all financial products, or whether there are some categories of product which would be more appropriately considered by the courts. For example, if a limit of $350,000 were implemented it would seem sensible for the schemes to be able to hear house, contents, car, and travel insurance claims up to that amount as this would likely mean an increase in claims for the schemes, thereby freeing up some of the courts' resources and enabling them to deal with more complex cases or those with high quantum disputes. It would also mean that more individuals are able to access the dispute schemes free of charge. However, the extent of any increase for these products needs to carefully consider the issues we set out below. We do not believe that the case has been made out for increasing the financial cap for more complex insurance products such as liability cover and business interruption, which are typically taken out by SMEs as opposed to individuals. Our view is that claims for these products, would be more appropriately heard by a court and subject to formal judicial processes.

In light of the above comments, we believe that MBIE must carefully consider and balance the following factors before making any decision regarding the financial cap:

(1) The financial limits need to be kept in proportion with what the FDR schemes are there to achieve. In considering alignment of the schemes, it is important to recognise that the schemes operate in different contexts, with different kinds of members, and that pursuing uniformity risks hindering their ability to tailor their operations to the contexts within which they operate. For example, while the BOS handles a small proportion of insurance-related complaints, its main focus is on banking issues and so the fact that it has increased its limit should not of itself be a driving reason to also increase the financial cap for insurance-focussed schemes.

(2) Consistent with the above, it is important to note that the implications of the financial cap for banking and insurance are quite different. For insurance, the cap applies to the difference between the amount offered by the insurer to settle a claim, and the amount sought by the insured, which could potentially relate to a very large claim, even with the current limit for IFSO's and Financial Services Complaints Limited (FSCL) of $200,000. As an example, if an insurer made an offer of $1.1 million to settle a total loss of a residential property, while the insured sought $1.25 million, that would fall within IFSO and FSCL's jurisdiction as the amount in dispute is only $150,000.

(3) Higher value complaints (particularly where, for example, liability is at issue, quantum of loss needs to be established or the process of settling the claim determined) tend to be more complex and are not capable of adjudication by reference to the papers only. In insurance disputes, witness evidence, cross examination, and competing expert opinions are commonly required to resolve an issue. There can be complex issues of law or policy interpretations which arise, and which are often best tested through the court process with each side being given the opportunity to present and challenge the counter position, particularly when a case might set valuable legal precedent.

(4) If the financial cap were to be increased to $350,000, thereby capturing more complex complaints, the schemes are under no obligation to consider the rules of evidence (such as hearsay), their previous decisions (i.e., they are not bound by precedent), or strict legal issues, and can instead resolve a complaint with a focus on fairness. While ICNZ strongly supports its members behaving fairly, and a duty to act fairly towards insureds is included in our Fair Insurance Code,[1] insurers can be disadvantaged by this approach when they are required to draft policies and make decisions based on the law.

(5) FDR schemes have a large number of participants and can be slow in producing decisions when they are experiencing a particularly heavy workload. Increasing the financial cap will create more work for the schemes and may slow down investigations and decisions if and until the FDR schemes are appropriately resourced – this is unfair to both consumers and participants. Therefore, it is important FDR schemes are appropriately resourced to deal with an increase in complaints prior to an increase in the financial cap coming into effect. It should however be noted that additional resources may lead to higher costs for scheme participants, who would likely then pass those costs onto their customers.

(6) If FDR schemes do not have enough staff with the appropriate level of expertise, there is a risk of poor outcomes for both the consumer and the participant. This is particularly important when bearing in mind that scheme decisions are only binding if accepted by the consumer. In practice this means the consumer has a right of recourse to the courts, but participants do not, even if they believe that the determination is incorrect. Poor quality decisions can have far-reaching implications. For example, decisions may impact an insurer's risk appetite for which products are offered to consumers.

(7) Fraud is a significant issue for the insurance industry, with global estimates placing the extent of the problem at 10% of annual GWP.[2] Where there are indicators of fraud, particularly in relation to a large claim, it is important that decision makers have the opportunity to assess a complainant in person. Increasing the cap to $350,000 would allow more claims where fraud is suspected to be heard by a FDR scheme without there being an opportunity to hold a hearing and cross-examine the complainant about the circumstances giving rise to the claim.

(8) If the financial cap were to increase to $350,000, it is likely that more questions of law would arise before the FDR schemes, which we believe are more appropriately addressed via the courts.

The financial cap should not be tethered to the District Court limit

Consistent with our response to question 3 above, ICNZ does not believe that it is appropriate to tether the financial cap to the District Court limit given the nature of the schemes' design and operation. Unlike the District Court, the processes employed by the schemes are relatively information-based (for example, they do not allow for legal representation, hearings, expert witnesses, or formal discovery), there is no ability to cross-examine witnesses, they do not involve judicial decision-makers and there is no ability for participants to appeal the decisions. The schemes should not be seen as a substitute for the Court. It must be recognised that the schemes sit in a hierarchy of dispute resolution options with a narrower scope, to allow for a free, more fast-paced, lighter touch adjudication process for lower value, lower complexity complaints.

	Participants should retain the ability to waive the financial cap Regardless of the level of the financial cap, ICNZ believes that participants should retain the ability to waive the limit for vulnerable customers, or complaints which they believe would be best considered by the FDR scheme, where there is agreement between the member, the customer and the scheme.
5	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.
	Option two: introduce a weekly alternative to a lump sum cap
6	Do you have any feedback on this option?
	We support all FDR schemes having the same weekly alternative cap limit.
7	Do you agree that a weekly payment alternative should be introduced for all schemes? Why/why not?
	We agree that it would be appropriate to introduce a weekly payment alternative for policies that include weekly payments for the reasons specified in paragraph 35 of the discussion paper. If there is only one scheme which provides a weekly alternative to the financial cap and their financial institution does not belong to that scheme, it is possible that consumers will be left without an avenue to pursue their complaint.
8	Is $1,500 an appropriate weekly payment alternative? Why/why not?
	ICNZ agrees that it would be sensible to align with the IFSO's current weekly payment alternative of $1,500, as this amount is likely to ensure accessibility to FDR schemes for the majority of consumers.
9	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.
	Other potential issues with inconsistent awards
10	Do you have any feedback on the problems outlined?
	We agree that where possible, awards available to consumers should be consistent across all FDR schemes. However, any type of compensation or award outside of the insurance contract should be given careful consideration and be strictly prescribed. Specifically, all schemes should be required to use a similar and objective method for calculating interest. Regarding the special inconvenience award, in our view, the biggest issue is not inconsistency in award limits, but inconsistency in how they are calculated.
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?

[1] ***https://www.icnz.org.nz/fileadmin/Assets/PDFs/Fair_Insurance_Code_2020.pdf***, para 3.
[2] ***https://ifb.org.nz/wp-content/uploads/2019/08/Insurance-Fraud-Bureau_White-Paper.pdf***, pg 8.

	We support a consistent special inconvenience award that is strictly prescribed to instances where a consumer has suffered unnecessary and significant inconvenience as a result of a participant's action or inaction. However, we note that for all schemes, other than the BOS, a $10,000 limit would be a significant increase from their current special inconvenience award limit and could be considered excessive given that the schemes are provided free of charge for consumers. A $10,000 limit could also appear to be excessive when compared with what courts have tended to award in general damages.[3] Given the non-judicial nature of the schemes, we believe that any increase to the current limit for special inconvenience awards should be accompanied by strong criteria and guidance on how and when an award may be made to ensure that awards remain appropriate and are not used as an alternative mechanism for resolving the underlying dispute. As a starting point, the Australian Financial Complaints Authority's (**AFCA**) Rules provide that compensation can only be awarded for non-financial loss in circumstances where there has been "an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Complainant's expectation of enjoyment or peace of mind".[4] AFCA has also issued guidance about their approach to non-financial loss claims, which sets out when an award will be made, how much may be awarded, what AFCA will consider in making their decision, and a number of case studies of instances where awards were made for non-financial loss.[5] While AFCA's guidance is valuable for participants, in order to ensure consistency and certainty, ICNZ would prefer to see similar guidelines in Aotearoa New Zealand implemented via regulations, rather than incorporated into scheme rules or terms of reference.
12	If an interest award was to be introduced how should it be calculated?
	ICNZ believes that where financial compensation is awarded, it would appropriate to align with IFSO's current practice and calculate interest at the 90-day bank rate, where there has been undue or unreasonable delay by a member.
13	What are the benefits and costs of the options?
	Aligning to the 90-day bank rate allows for an automatic adjustment to current day rates, with clear, fair, and transparent parameters for all parties.
	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?
	ICNZ is not aware of any situations where participants have switched between schemes, impacting on accessibility for consumers, efficiency, or effectiveness.
15	Do you agree with the potential problems that may occur as a result of inconsistent scheme rules about the timing of membership/jurisdiction?

[3] For example, in the context of leaky building litigation, Justice Baragwanath in the Court Appeal case of *Byron Ave (O'Hagan v Body Corporate 189855* [2010] BCL 299) set the level of general damages for single owner-occupiers at $25,000 and for single non-resident/investor owners at $15,000. Against this, $10,000 for a FDR scheme seems like a substantial limit.

[4] ***https://www.afca.org.au/media/1111/download***, at D.3.3.

[5] ***https://www.afca.org.au/media/335/download***.

	Despite not having experienced any issues under the current membership rules, ICNZ recognises that there could be situations where inconsistent scheme rules about the timing of membership/jurisdiction could mean that consumers do not have access to redress, or schemes do not have the ability to sanction a former participant.
	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?
	ICNZ agrees that requiring all schemes to consider claims about current members, even if the issue arose prior to membership is the most practical approach and will provide guaranteed access to a scheme for consumers. In addition to the benefits outlined in paragraph 56 of the discussion paper, this Option would also provide the most clarity for both schemes and participants, and means that time will not be spent debating jurisdiction or which rules should apply. However, if adopting this approach, it will be important to prevent gaming of schemes by participants. For instance, it would be undesirable for a claim, once lodged in one scheme, to be transferred to another scheme by virtue of a participant changing membership. It will also be important for schemes to ensure clear disclosure that should a participant transfer to another scheme they will not be responsible for claims that arise thereafter, no matter when the claim arose. This will be important given the six-year timeframe given for hearing a complaint.
17	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.
	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?
	In ICNZ's view, Option two would have a significant impact on efficiency and effectiveness, as participants would be required to understand the processes and rules of more than one scheme. We also agree that there would be disadvantages associated with this Option, including the potential for consumers to become confused about which scheme will hear their complaint, which should be avoided if possible. For this reason, we believe that Option one is the preferable approach.
19	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.
	Applicable time periods (limits) for bringing a claim
20	Do you any feedback on the problems outlined?
	ICNZ agrees that all the issues with the current scheme time periods are valid. Inconsistent timeframes for similar products or complaints puts some consumers at a distinct disadvantage.
21	Are you aware of instances of consumer harm from the problems outlined?

ICNZ is occasionally contacted by members of the public with questions around timeframes for applying to their insurer's dispute resolution scheme, for example, at what point they are able to apply to a scheme without deadlock, but we are not aware of any instances of consumer harm.

Option one: limit time period I to a maximum of two months

22 Do you have any feedback on the option?

We believe that two months should be set as the time period I limit, rather than it being a *maximum* of two months, as anything less could be too short a time for a participant to adequately consider a dispute. The following factors should be taken into consideration when setting the time period for when a scheme becomes available without deadlock or a decision:

(a) Some complaints involve complex legal or technical issues and, in many cases, even if a participant adheres to its internal complaints process and considers the complaint in a comprehensive manner, they may struggle to produce a decision or letter of deadlock any earlier than two months after the complaint was made.

(b) To make a fully informed decision, a participant may be required to gather further documentation following receipt of new information from the consumer when they lodge the complaint. For example, a participant may require a new expert opinion or legal advice, or need to respond to the customer's additional information or explanation. The timeframe must allow participants to fully explore the complaint in order to prevent cases from unnecessarily progressing to an FDR scheme when the complaint would be resolvable within the internal dispute resolution process if time allowed it;

(c) Some participants are large corporations and require time to investigate a complaint involving different parts of the business and to ensure staff with the appropriate level of authority are involved and the appropriate escalation processes are followed;

(d) Having less time to properly investigate a complaint may lead to rushed decision-making and unintentionally, poor consumer outcomes. This could undermine the relationship between the consumer and the participant, which will generally be an ongoing relationship;

(e) Any unnecessary or unreasonable delays by a participant can be addressed by way of special inconvenience and/or interest awards.

23 Are there any other costs or benefits of this option?

There are no other costs or benefits that we are aware of.

Option two: create a consistent time period II of three months after deadlock

24 Do you have any feedback on this option?

ICNZ agrees that three months is a sufficient time for a consumer to escalate to their complaint to an FDR scheme after deadlock is reached and it is appropriate for the time period to be consistent across all schemes.

25	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.
	Option three: introduce discretion to hear a complaint after time period II
26	Do you have any feedback on the option?
	At the time deadlock is issued, participants are required to provide consumers with information on how to access their FDR scheme. Schemes can be accessed in a variety of ways (e.g. by phone, email, completing an on-line form, etc.) and we do not believe that escalating a complaint is a particularly onerous or complex process, although we acknowledge that this may not be accurate for some vulnerable customers. We would therefore support schemes having a discretion to hear a complaint after time period II either in exceptional circumstances, or circumstances outside of the consumer's control. However, to provide certainty for all parties to the dispute resolution process there should be a definitive end date. We believe that under exceptional circumstances up to an additional three months after time period II would be an appropriate timeframe given that for most consumers, the schemes are easily accessible. Schemes should be provided with strict criteria to consider when assessing if there are exceptional circumstances or circumstances outside of a consumer's control to ensure that there is consistency in any extension of the timeframe. For example, the criteria could include an assessment of customer vulnerability and whether there have been unreasonable delays on the part of either the consumer or participant. To make the process fair, consumers and participants should be allowed to make submissions on whether, in their view, there are exceptional circumstances or circumstances outside their control which would warrant an extension of the time period.
27	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.
	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?
	ICNZ believes that of the four schemes, the BOS's and FSCL's approach (six years after the complainant became (or should have become) aware of the action) would be the most appropriate to extend to all schemes. In particular, this would be the most practical option from an insurance perspective, as the time period would only commence when an insured becomes aware of the issues, which, as noted at paragraph 72 of the discussion paper, would likely be at claim time (or renewal time, given that general insurance products are typically renewed annually). For completeness, and in order for the dispute resolution process to work most efficiently and fairly, time period III should not commence at the time the customer purchased an insurance product, unless that was the time they became aware (or ought to have become aware) that there was a need to make a complaint.
29	Are there any other costs or benefits of this option?
	There are no other costs or benefits that we are aware of.

Other Comments
No further comments.