

# Submission

to the

Ministry of Business,  
Innovation and Employment

on the

Review of Approved  
Financial Dispute  
Resolution Scheme Rules

6 May 2021

## About NZBA

1. The New Zealand Bankers' Association (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.
2. The following seventeen registered banks in New Zealand are members of NZBA:
  - ANZ Bank New Zealand Limited
  - ASB Bank Limited
  - Bank of China (NZ) Limited
  - Bank of New Zealand
  - China Construction Bank
  - Citibank N.A.
  - The Co-operative Bank Limited
  - Heartland Bank Limited
  - The Hongkong and Shanghai Banking Corporation Limited
  - Industrial and Commercial Bank of China (New Zealand) Limited
  - JPMorgan Chase Bank N.A.
  - Kiwibank Limited
  - MUFG Bank Ltd
  - Rabobank New Zealand Limited
  - SBS Bank
  - TSB Bank Limited
  - Westpac New Zealand Limited

## Introduction

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on its *Discussion Paper: Review of the Approved Financial Dispute Resolution Scheme Rules (Discussion Paper)*. NZBA commends the work that has gone into developing the Discussion Paper.

## Contact details

4. If you would like to discuss any aspect of this submission, please contact:

Antony Buick-Constable  
Deputy Chief Executive & General Counsel  
[antony.buick-constable@nzba.org.nz](mailto:antony.buick-constable@nzba.org.nz)

Brittany Reddington  
Associate Director - Policy & Legal Counsel  
[brittany.reddington@nzba.org.nz](mailto:brittany.reddington@nzba.org.nz)

## Summary

5. NZBA supports MBIE's review of the rules for Financial Dispute Resolution Schemes (**DRS**), particularly the focus on ensuring accessibility for all consumers by creating a consistent set of jurisdictional rules. NZBA considers:
  - (a) The financial cap for all DRS should be set at \$350,000. This cap should be set through regulation, rather than tethered to the District Court Limit. There should be a weekly alternative to a financial cap that is limited to insurance products, provided that there is further consultation between MBIE and the industry in setting the valuation criteria for the weekly payment alternative.
  - (b) Inconvenience awards should be standardised across all DRS, with a limit of \$9,000.
  - (c) Interest awards should not be introduced as these are overly complex and risk undermining the efficiency of DRS.
  - (d) All DRS should be required to consider claims about current members, even if the issue arose prior to membership.
  - (e) Time periods should be standardised across all DRS, specifically:
    - (i) The time after which a DRS becomes available where there has been no resolution or deadlock notice should be 90 days.
    - (ii) The time within which a claim must be referred to a DRS following a deadlock notice should be 90 days. There should be a discretionary period for the 90 days following this initial period, where a DRS can hear a claim in exceptional circumstances.
    - (iii) The total deadline after which a DRS should not hear a complaint should be six years from the date on which the complainant became aware of, or should reasonably have become aware of, a bank's action or inaction.

## Financial Cap

6. NZBA supports adopting a consistent financial cap across all DRS of \$350,000 (alignment with the current Banking Ombudsman Scheme (**BOS**) financial cap). Claims above this amount (for products that do not fall within the weekly payment alternative) should not be within the jurisdiction of the DRS unless the lender agrees. A claim for more than \$350,000 (for products that do not fall within the weekly payment alternative) is substantial and lenders should have the option of having these claims proceed through the legal system.

7. This cap should not be tethered to the District Court limit, rather, it should be set through regulation and reviewed by MBIE as appropriate. We think MBIE should preserve flexibility to decide whether the District Court limit is appropriate for DRS, given the differing nature and purpose of these schemes compared to the District Court.
8. The \$350,000 cap should also follow BOS' terms of reference and prevent a scheme from considering a complaint where "*[t]he complainant could reasonably claim, more than \$350,000 for direct loss and direct incidental expenses*", meaning that the threshold amount relates to the maximum amount potentially claimable not the amount the claimant is seeking in redress.
9. NZBA in principle supports a weekly alternative to a financial cap for insurance products that do not have a lump sum component. NZBA does not support a weekly alternative to a financial cap in any other instances. A weekly alternative mechanism is not generally viable for the banking sector for example, as a weekly alternative may allow for these schemes to consider claims that ultimately significantly exceed \$350,000.
10. In relation to a weekly alternative for insurance products, further consultation would be required when drafting the valuation criteria to clarify how and when the weekly payment alternative will be used. This is because each participant and insurance product may have different method in calculating a benefit payment (i.e. monthly or fortnightly).

## **Special Inconvenience Awards and Interest**

11. NZBA supports standardising inconvenience awards across the DRS. We consider the BOS framework and limit (\$9,000) for inconvenience awards works well and should be applied across all DRS.
12. NZBA does not support the introduction of a separate interest award across the schemes. Interest awards can be complex and difficult to calculate, which would risk affecting the efficiency of the dispute resolution process. In our view, the principles of efficiency and effectiveness are best promoted by allowing DRS to award a total amount that is fair and reasonable in the circumstances rather than by prescribing a specific interest calculation. Interest can still be factored into the overall award, but flexibility is preserved.
13. If interest awards are introduced across the DRS, we think it is important that they are linked to undue and unreasonable delays by the lender (and conversely, special inconvenience awards should not take into account undue or unreasonable delay). This requirement will incentivise efficiency by lenders, while limiting the number of complex interest calculations a DRS has to make. Additionally, these interest awards should exclude the time the complaint was dealt with by a scheme and should not be awarded where there is already an obligation (contractual or legislative) to pay interest.

Any interest award should be calculated using the Ministry of Justice's civil debt interest calculator.<sup>1</sup>

## Timing of Membership and Jurisdiction

14. We agree that inconsistent jurisdictional rules may impact accessibility, and support the application of consistent jurisdictional rules across DRS. We agree with option one of the Discussion Paper, that all DRS should be required to consider claims about current members, even if the issue arose prior to membership.

## Applicable Time Periods for Bringing a Claim

15. The Discussion Paper refers to three time periods:
  - (a) The time after which a DRS becomes available after a complainant has brought a complaint for internal dispute resolution with the provider, without deadlock or decision (**Time Period I**).
  - (b) The time within which a claim must be referred to a DRS following deadlock (**Time Period II**).
  - (c) The total deadline after which a DRS cannot consider a complaint (**Time Period III**).

### *Time Period I*

16. NZBA supports a standardising of Time Period I across all DRS. We believe that the current BOS period of 90 days is appropriate. That is because:
  - (a) The ability to reach a resolution is dependent on customer engagement and somewhat outside the bank's control. A 90 day time period allows for delayed customer engagement.
  - (b) Complex claims may require external advice from an independent underwriter or legal adviser. 90 days provides sufficient time for engagement of external advisers if necessary, to ensure claims are dealt with appropriately.
  - (c) Some claims require significant work within an organisation, and additional time is necessary for this work to be undertaken.
  - (d) Any unnecessary or unreasonable delays by a financial institution can be addressed by way of special inconvenience and/or interest awards.
  - (e) For BOS scheme members there is already a shorter timeframe for customers who are experiencing financial difficulty (which, in one member's experience, is difficult to manage).

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<sup>1</sup> [Civil debt interest calculator | New Zealand Ministry of Justice](#).

17. If a shorter time period is implemented, that may cause unnecessary delays in some cases as some complaints that would otherwise have been successfully resolved through internal dispute resolution channels are escalated to DRS.
18. If a shorter timeframe is MBIE's preferred option, and the maximum time period is set at 60 days, we recommend that exceptions to that general rule are introduced, for example, to take into account situations where a customer has not been responsive within the 60 day time period, the claim is particularly complex, or external advice is required. We would welcome the opportunity to work with MBIE on how those exceptions could be operationalised.
19. Additionally, if a shorter period is introduced, we consider it is important that the timeframe take account of the Christmas/New Year period, where lenders and their advisers generally shut down. In our experience, claims are unlikely to be properly assessed and responded to during this period. We suggest adopting the definition of working days used in the District Court Rules (rule 1.4), which excludes the period from 25 December to 15 January.
20. We also recommend that a scheme allow participants to provide submissions before a scheme determines that it has jurisdiction to hear a complaint without deadlock notified by a participant. This is because there may be reasons beyond the control of the participant that means this timeframe has lapsed. For example, customer engagement may be limited, and the participant may be waiting on information to be provided by the participant or the participant believed the complaint had been resolved.

### ***Time Period II***

21. NZBA agrees with MBIE's proposal to create a consistent timeframe of three months after a deadlock notice is granted, combined with the introduction of a discretionary time period after the initial three months. We think that the discretionary period should be a further three months from the expiry of Time Period II, but should only be used under "exceptional circumstances".

### ***Time Period III***

22. NZBA supports the introduction of a consistent limitation period across all DRS. We consider that the current BOS mechanism functions well and should be extended to the other DRS (i.e., the scheme cannot consider a complaint if the complainant became aware of, or should reasonably have become aware of, a bank's action or inaction more than six years ago).