

**Draft Guidelines to Assist Schemes
applying to become an
Approved Dispute Resolution Scheme
under
The Financial Service Providers
(Registration and Dispute Resolution)
Act 2008**

June 2009

Foreword

Everyday, New Zealanders use one or more of an extensive list of financial services available to them. These include:

- Day-to-day transactions such as the use of EFTPOS and credit cards, internet and telephone banking, writing cheques;
- Purchase of insurance for travel, personal effects, health, vehicles, homes and more;
- Obtaining financial advice relating to investments or different credit options;
- Taking out mortgages or credit for consumer goods, from motor vehicles to household goods;
- Depositing money in term deposits, investment shares, debentures.

Despite using such services, however, most New Zealanders don't think of themselves as participants in the financial market. Rather, we are simply going about our daily business paying for goods and services, using banking, insurance and credit services.

For most of us, these transactions occur without any cause for concern and we are confident when using electronic transactions, banks, credit unions etc. It is for this reason that consumer confidence is really important – without it, we cannot have a well-performing financial sector.

But things can go wrong with the provision of financial services, and it can be very stressful for the individual affected when this occurs.

As soon as something does go wrong the consumer should, in the first instance, contact their product or service provider to see whether the matter can be resolved directly. The issue often relates only to a minor fault, problem or misunderstanding and can readily be resolved.

Occasionally, however, the consumer and provider cannot agree. This leads to a dispute.

In order to promote confidence in financial service providers, the Financial Service Providers (Registration and Dispute Resolution) Act 2008 improves consumers' access to redress and dispute resolution by requiring financial service providers offering financial services to the public to sign up to a dispute resolution scheme.

Under the Act, financial service providers have two options: join an industry-run dispute resolution scheme approved by the Minister of Consumer Affairs, or sign up to the government reserve scheme.

This discussion paper outlines draft guidelines to assist schemes considering making an application to become an approved dispute resolution scheme.

Your views on the proposed guidelines are welcomed, and I hope that financial service providers will take advantage of the opportunity afforded by the Act to establish their own schemes have them approved. The best delivery of consumer dispute resolution occurs when the industry is committed to supporting a robust and independent dispute resolution process.

Hon Heather Roy
Minister of Consumer Affairs

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Glossary of Abbreviations and Terms

The Act: Financial Service Providers (Registration and Dispute Resolution) Act 2008.

ASIC: The Australian Securities and Investment Commission. Under the Corporations Act 2001 (Australia), ASIC has an equivalent function to the Minister of Consumer Affairs in approving consumer dispute resolution schemes in the financial sector.

Benchmarks/ Benchmark Principles/Australian Benchmarks: Benchmarks for Industry-based Customer Dispute Resolution Schemes, released in 1997 by the Consumer Affairs Division of the Department of Industry, Science and Tourism. The benchmarks are directly incorporated into section 52(2) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Dispute resolution service provider/service provider: The entity providing the dispute resolution service.

Financial Service Providers Act: Abbreviated reference to the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

FSP: Financial Service Provider.

MCA/ the Ministry: Ministry of Consumer Affairs.

Member: A financial service provider that is a member of the reserve scheme.

The Minister: Unless otherwise specified, the Minister of Consumer Affairs.

The Reserve Scheme: The financial service providers reserve dispute resolution scheme.

1. Seeking Your Views

1. The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires financial service providers (FSPs) to be registered. In order for FSPs to be registered they are required to be members of a dispute resolution scheme if they provide financial services to the public. The dispute resolution scheme may be either an approved dispute resolution scheme or the reserve scheme.
2. Section 50 of the Act provides that an approved dispute resolution scheme is one approved by the Minister of Consumer Affairs. Section 51 of the Act provides for applications to the Minister for approval. Section 52 then sets out the matters the Minister must have regard to in considering whether or not to approve a scheme. Section 53 provides that the Minister may approve a scheme only after consultation with the Ministers of Finance and Commerce.
3. The provisions in the Act providing for the approval of non-government industry-led dispute resolution schemes are a new regulatory approach. With any new regulatory approach, it is desirable to prepare some guidance for those who are either interested or affected parties.
4. Accordingly, this consultation paper has been prepared setting out draft guidelines intended to assist those considering making an application to become an approved dispute resolution scheme. It discusses how a dispute resolution scheme could meet the various matters within its control that the Minister will have regard to in making a decision on approval. The paper also outlines the proposed process for making and considering applications to become an approved dispute resolution scheme.
5. The purpose of the paper is to provide guidance to industry. It is not intended as a manual or type of prescriptive instruction on what must be done to obtain approval. Feedback from consumers, industry and other interested parties on the draft guidelines are welcome, especially where more guidance is needed or where something is not clear or is unhelpful. The discussion paper is also intended to help both industry and consumer interests to better understand the process of obtaining approval.
6. Complementing this discussion paper is a separate consultation paper outlining proposals in regards to the reserve scheme for financial service providers.¹

Making a Submission

7. Parties who wish to make a submission are invited to respond by 5.00pm Friday 31 July 2009. Please contact (fsp.schemes@mca.govt.nz) if you are experiencing difficulties meeting this deadline.
8. Submissions are to be emailed in either Adobe PDF or Microsoft Word format to (fsp.schemes@mca.govt.nz), with “Submission on Approval of Financial Sector Consumer Dispute Resolution Schemes” as a subject heading. Alternately, submitters may send or fax their submission to:

Consumer Policy
Ministry of Consumer Affairs

¹ Financial Service Providers Reserve Dispute Resolution Scheme: A discussion paper, available at this website www.consumeraffairs.govt.nz or contact Anne Yau at fsp.schemes@mca.govt.nz

PO Box 1473
Wellington

Fax 64 4 470 2533

9. Submitters should indicate any documents attached in support of their submission in a covering letter. The Ministry of Consumer Affairs will acknowledge receipt of all submissions electronically. Please contact Hannah Melvin at fsp.schemes@mca.govt.nz or phone 64 4 462 4278 if you do not receive electronic acknowledgement of your submission within five business days.

OFFICIAL INFORMATION ACT 1982

Please note that any submissions you make may be published and subject to a request for release under the Official Information Act 1982.

In providing your submission, please advise us if you have any objections to the release of all or part of your submission, and the basis of your objection. When preparing and releasing any summary of submissions and when considering any Official Information Act request, the Ministry will carefully review any representations you make in this regard.

PRIVACY ACT 1993

Any personal information that you supply to the Ministry in the course of making a submission will be used only by the Ministry when considering matters covered by this discussion paper.

When preparing any summary of submissions on Ministry discussion papers, it is the Ministry's normal practice to set out the names of parties who make submissions. Your name will be included in any such summary unless you inform the Ministry that you do not wish your name to be included. To indicate your wishes, or to view personal information held about you in relation to matters covered by this discussion paper, or to request correction of that information, please contact the Ministry of Consumer Affairs fsp.schemes@mca.govt.nz.

Consideration of Submissions

10. The Ministry of Consumer Affairs will have regard to submissions and will then make recommendations to the Minister of Consumer Affairs on final guidelines to assist schemes applying for approval. The final guidelines will then be published on the Ministry of Consumer Affairs website. Concurrently, decisions will be taken on the rules of the reserve scheme.
11. An indicative overall implementation timetable for the approved schemes and the reserve scheme is given below.

Indicative Timeline for Approval of Schemes and Establishment of Reserve Scheme	
Deadline for submissions	31 July 2009
Finalised approval criteria released; application process to become approved schemes opens.	30 September 2009
Reserve Scheme Council appointment process started	August-September
Tender to provide reserve scheme.	September-November
Council appointed	October
Successful reserve scheme provider announced	November-December
Consultation on levies for reserve scheme	December- February 2010
Reserve Scheme Council to commence working with MCA and Scheme provider to establish Scheme operating procedures	February 2010
Levy regulations finalised	April
Reserve Scheme established	May 2010

2. Background – Improving Regulation of the Finance Sector

12. In September 2008, three pieces of legislation were enacted to improve the regulation of financial institutions, financial products and financial providers: the Reserve Bank Amendment Act 2008, the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
13. The main requirements arising from the new legislation are:
 - Registration of all financial service providers to provide a means of identifying and monitoring financial service providers;
 - Prudential supervision by the Reserve Bank of non-bank deposit takers;
 - Regulation by the Securities Commission of financial advisers to encourage professionalism and improve consumer confidence in the sector; and
 - Providing for a comprehensive approach to consumer dispute resolution and redress.
14. The outcomes desired from this new legislation and existing legislation regulating the finance sector are:
 - Achieving a sound and efficient financial sector;
 - Investment that encourages growth and innovation;
 - An environment that facilitates wealth accumulation; and
 - Confidence in the sector encouraging participation by consumers and market participants.
15. The need for sound regulation of the finance sector has been heightened by the recent collapse of numerous New Zealand finance companies and the current global financial crisis. Full implementation of these Acts is scheduled by December 2010.
16. The Reserve Bank is the sole regulator of New Zealand's financial system, including the non-bank deposit-taking sector. The Reserve Bank Amendment Act 2008 provides for prudential regulation with regard to non-bank deposit takers that are currently being developed by the Reserve Bank. These regulations will introduce consistent standards for the measurement and management of capital, liquidity and related-party exposures, and will require deposit takers to comply with new governance and risk management requirements.
17. The Financial Advisers Act 2008 specifies who may perform a financial adviser service and the financial products and services they may advise on. The Act establishes different tiers of disclosure and conduct obligations, according to the complexity and risk posed by the advice given. Those who wish to provide advice on securities, futures contracts or an interest in land, or who provide a financial planning service, will be required to be authorised by the Securities Commission, as well as registered on the register of financial service providers. Those who wish to provide advice in regards to a call debt security, a bank term deposit, an insurance product (excluding a life insurance product issued after 31 December 2008) or a consumer credit contract will be required to be registered, but not authorised.
18. The Financial Advisers Act also provides for advisers to operate as part of a qualifying financial entity for certain financial adviser services. In this case, the entity itself takes on responsibility for ensuring the individual advisers within its organisation comply with their

obligations under the Act. To receive qualifying financial entity status the entity must seek approval from the Securities Commission.

The Financial Service Providers (Registration and Dispute Resolution) Act 2008

19. The Financial Service Providers (Registration and Dispute Resolution) Act 2008 was enacted to set up a registration for financial service providers and to improve consumer access to redress.
20. The Act has three parts. Parts 1 and 2 concern the registration of financial service providers. The registration system is being developed and implemented by the Companies Office, Ministry of Economic Development.
21. Part 3 concerns consumer dispute resolution, which is a mandatory requirement of registration for those providing financial services to the public. The implementation of the dispute resolution regime is being undertaken by the Ministry of Consumer Affairs. Financial service providers (FSPs) must be either a member of an approved dispute resolution scheme or the reserve scheme. The Act sets out the principles and minimum requirements for the rules of approved dispute resolution schemes and the reserve scheme.
22. In summary, the rules of any approved scheme and the reserve scheme need to comply with the following principles² which are considered international best practice:
 - **Accessibility:** The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers;
 - **Independence:** The decision-making process and administration of the scheme are independent from scheme members;
 - **Fairness:** The scheme promotes decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based;
 - **Accountability:** The scheme publicly accounts for its operations by publishing its determinations and information about complaints and by highlighting any systemic industry problems;
 - **Efficiency:** The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance;
 - **Effectiveness:** The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.
23. This discussion paper provides guidance to those who are considering making applications to the Minister of Consumer Affairs to become an approved dispute resolution scheme. The proposals for the establishment and rules of the reserve scheme are set out in a separate consultation document - Financial Service Providers Reserve Dispute Resolution Scheme: A

² These principles are set out in Part 3 of the Act and are based on the Benchmarks for Industry-based Customer Dispute Resolution Schemes developed by the Australian Department of Industry, Science and Tourism. The description of the principles is taken from the Benchmarks.

Discussion Paper - available at this website www.consumeraffairs.govt.nz or contact Anne Yau at fsp.schemes@mca.govt.nz.

24. The policy underpinning the Financial Service Providers Act anticipates that financial service providers will seek to have their own dispute resolution schemes approved. The National-led Coalition Government considers that a dispute resolution scheme that is developed by FSPs for their own particular industry will be more effective as it will have better knowledge and expertise regarding the participants' products and services and receive more support and commitment.
25. It is anticipated that existing voluntary industry-based dispute resolution schemes, such as the Banking Ombudsman Scheme and the Insurance & Savings Ombudsman Scheme may apply to become approved dispute resolution schemes.
26. Other FSPs such as building societies, credit unions, finance companies and financial advisers, who currently do not have independent dispute resolution schemes, are encouraged to establish a scheme(s) or join another approved scheme if that scheme's rules allow.
27. Where a FSP does not have its own industry-run dispute resolution scheme, the FSP may join the reserve scheme.

3. Legislative Framework Relating to Applications to Become an Approved Dispute Resolution Scheme

28. Section 51 of the Act provides for applications to the Minister of Consumer Affairs to become an approved dispute resolution scheme.
29. An application for approval needs to contain the rules of the scheme.
30. The scheme's rules may be in the form of a single document or may be set out in a variety of documents, including the scheme's terms of reference, specific rules, dispute resolution protocol, constitution, code of conduct and the membership participation agreement. The exact arrangement of a scheme is left to members to decide upon.
31. The rules, as a minimum, must address the requirements for scheme rules as set out in section 63 of the Act and the benchmark principles: accessibility; independence; fairness; accountability; efficiency; and effectiveness.
32. Section 52 of the Act sets out the considerations the Minister must have regard to in evaluating an application. These considerations are:
 - a. Whether the scheme has an appropriate purpose;
 - b. Whether the applicant has undertaken reasonable consultation on the scheme with members or potential members of the scheme, and persons (or their representatives) likely to be substantially affected by the scheme;
 - c. Whether the applicant has adequate funding to enable it to operate the scheme according to the scheme's purpose and in accordance with the rules about the scheme;
 - d. Whether the applicant's directors and senior managers are competent to manage a dispute resolution scheme;
 - e. Whether the scheme is capable of resolving disputes about the types of financial services provided by the members or potential members of the scheme;
 - f. The amounts of money that complaints lodged with the scheme may be about, and whether those amounts are reasonable and appropriate;
 - g. Whether the rules about the scheme are adequate and comply with the benchmark principles (see below), and the requirements of section 63;
 - h. The number of currently approved dispute resolution schemes;
 - i. The types of financial service providers that may be members of currently approved dispute resolution schemes;
 - j. The proposed size of the scheme;
 - k. The types of financial service providers that may be potential members of the scheme;
 - l. Any other applications for approval that have been made.
33. The Act also provides for regulations to prescribe an application fee and other information to be provided with the application. At this stage regulations are not planned.

4. Discussion of Approval Criteria

34. The Act's requirements for a dispute resolution scheme to be approved are at a fairly high level. This document now discusses in more detail possible approaches a dispute resolution scheme might consider in order to meet the various matters within its control that the Minister will have regard to in making a decision on approval. This is intended as guidance material only. As noted earlier, it is not intended as a manual or a type of prescriptive instruction. The Minister will consider all applications and any different approaches to those set out here in any specific application.
35. An applicant scheme must have undertaken consultation with affected parties. Section 52(1)(b) requires that the Minister has regard to whether the scheme has undertaken consultation with parties likely to be substantially affected, including industry and consumers.

Purpose, Objective and Scope of the Dispute Resolution Scheme

Purpose and Objective

36. Section 52(1)(a) requires that the Minister has regard to whether the scheme has an appropriate purpose.
37. As a minimum, it is suggested a scheme clearly states that it will consider complaints with respect to a particular type of financial provider who may be a member of the scheme. Other matters that could appropriately be covered in the scheme's purpose include, but are not limited to:
 - Providing advice to members of the scheme on dispute resolution; and
 - Providing information to potential users of the scheme and community agencies.
38. Documents such as the scheme's constitution, terms of reference or charter would likely set out the purpose and the types of financial service providers who may be members of the scheme. Section 63(a) of the Act requires the scheme to accept all providers of that type. This is to avoid having multiple schemes for the same types of financial service provider.

Example: Banking Ombudsman Constitution

The objects of the Company are:

- To appoint and support a Banking Ombudsman with power:
 - to consider, subject to the Terms of Reference, complaints in connection with the provision of banking and other financial services by any Participant;
 - to facilitate the satisfaction, settlement or withdrawal of such complaints whether by the making of recommendations or awards or by such other means as shall seem expedient;
 - to promote and publicise the Banking Ombudsman scheme and to encourage and provide advice to Participants on the development and maintenance of good complaint-handling practices; and
- To collaborate with government or other authorities (whether national, local or otherwise) or any corporations, companies or persons on all matters relating to and affecting the business of those banking and other financial services [referred to in clause 2.1.1 of the Constitution] and the

Scope

39. Intertwined with the purpose of a scheme is the scope of a scheme. The scope of a scheme is generally defined by two factors:
- The classification of consumer complaints; and
 - The monetary claims limit or cap.

A scheme needs to clearly state which consumer complaints may be considered by the scheme and the amounts of money that complaints lodged with the scheme may be about.

Classification of Consumer Complaints

40. The Act does not define “complaint”. Rather, section 63(g) specifies that the scheme must have a rule that complaints can be made about:
- Breaches of contract;
 - Breaches of statutory obligations;
 - Breaches of industry codes; and
 - Any other matters provided for in the rules.
41. Similar to the Act, a scheme could consider not defining complaint and instead rely on the scope of the scheme’s rules to provide general guidance on the type of complaint that can be considered.
42. Typically, complaints made seek redress related to cost, timeliness, fairness, contractual matters, business practice, poor service or interpretation of service/product rules, terms and conditions.
43. A scheme might want to consider noting what would not be covered as a complaint, for example, that “complaint” does not include dissatisfaction with commercial decisions, prices or interest rates where no actual “harm” requiring redress has been suffered. Generally, dispute resolution schemes do not consider complaints about decisions made in the exercise of the commercial judgement of a member organisation, although it is suggested the scheme rules should provide that the scheme can consider complaints about commercial judgement which involves an act or omission contrary to or not in accordance with a duty owed at law, in a code of practice, or pursuant to the terms (express or implied) of the contract between the scheme member and the consumer. The scheme should also consider investigating administrative matters about how that judgement is effected.
44. A disputed transaction handled by a scheme may also involve matters that are disciplinary complaints. A disciplinary complaint is one related to conduct or competence and is an expression of dissatisfaction or concern that a financial service provider has not acted competently or ethically, or has acted negligently. These complaints are handled by the relevant industry disciplinary body. Disciplinary procedures do not normally involve compensation for consumers. A consumer dispute resolution scheme, however, is aimed at providing redress for consumers. Schemes should include procedures for information sharing with the appropriate disciplinary bodies for their members.

45. The important principle is that consumers are clear which complaints can be taken to the scheme. While categories can be used to demarcate the scheme's jurisdiction, it is suggested there should not be an obligation on a complainant to frame their complaint according to the relevant category.
46. A scheme wanting to define complaint could consider a definition such as the one in the Australian Standard on Complaints Handling (AS ISO 10002-2006), as follows:

Example – Definition of complaint in Australian Standard

A “complaint” should be viewed as an expression of dissatisfaction made to an organisation, related to its products, or the complaints-handling process itself, where a response or a resolution is explicitly or implicitly expected (AS ISO 10002 – 2006).

This definition is well accepted in Australia and ASIC is currently proposing to adopt this definition when approving schemes in the financial sector. ASIC views this definition as advantageous as it “removes the onus on investors and consumers to explicitly state that something is a complaint, promotes more consistent treatment of complaints and helps prevent complaints from falling through the cracks” (Consultation Paper 102 Sept 2008).

47. With respect to **“Any other matters provided for in the rules”**, the important principle to observe is that the scheme rules should not unnecessarily limit complaints. There are many bases on which complaints can be laid. The Disputes Tribunal, for instance, has jurisdiction over claims based on contract, quasi-contract, and certain torts. Other possible bases include unfairness or unconscionable conduct.

Example – ASIC Regulatory Guide on Approving External Dispute Resolution Schemes in the Financial Sector

The ASIC guidelines take the view that, as a starting point, a scheme should be able to consider any complaint where the complainant has suffered a direct financial loss.

When Complaints can be taken to the Disputes Scheme

48. It is expected that the rules of a dispute resolution scheme will provide that in the first instance a consumer's complaint will need to be taken up with the FSP member who provided the product or service. The rules will then need to be clear when the complaint can be taken to the dispute resolution scheme. For example, this may be along the lines that:
 - redress has not been offered to the consumer or the redress offered was considered unsatisfactory or the parties have agreed they are in deadlock and the complaint was lodged within a specified time period of deadlock being reached (and the member had informed the customer of this time limit); or
 - it has been a specified time period (say 2 months) since the complaint was lodged, and the complaint has not been resolved, even if the member has not advised the matter is in deadlock.

49. Essentially, the dispute resolution scheme rules need to provide clear timeframes for when a complaint can be taken to the reserve scheme. The aim should be to provide a suitable period for the complainant and the FSP to resolve the matter; yet also to allow the complainant an avenue for alternative consideration of the complaint if he or she feels that the complaint is not being fairly processed.
50. “Deadlock” refers to the situation where a complaint reaches an impasse in the member’s internal complaints scheme. The consumer is unsatisfied with how the complaint is being dealt with, but the member has not referred the complaint to the external dispute resolution scheme.
51. Section 63(e) of the Financial Service Providers Act requires the scheme’s rules to specify a period after which the scheme, if asked by a complainant, must investigate a complaint that has been made directly to a member. This is to avoid the situation where a complaint remains deadlocked at the internal scheme level. In order for a deadlock provision to operate effectively, a complainant must know that an external scheme exists and that they have a right to access it after a certain period.

Example – Banking Ombudsman Terms of Reference

The Banking Ombudsman shall only consider (or continue to consider) a complaint made to him or her if he or she is satisfied that:

- a. the complaint has been fully considered by the internal complaint procedures of the Participating Bank named in the complaint (set up as required by the New Zealand Bankers’ Association Code of Banking Practice) and the complainant has not accepted any observations made or conditions of settlement or satisfaction offered by that Participating Bank and deadlock has been reached, or the Participating Bank has not advised the complainant that deadlock has been reached within 3 months of the complaint being formally made to it.

52. The scheme rules may also want to provide for an overall time limit for taking complaints to the scheme from the time the complaint was first lodged with the member. For example, it is proposed that the Reserve Scheme has a two year time limit, with discretion to consider complaints outside of the timeframe if there are special circumstances.
53. Schemes imposing a time limitation on claims should do so in a way that is consistent with the principle of accessibility. It is suggested consideration is given to a limitation period of 6 years for money claims, or 3 years after the “late knowledge date”. The late knowledge date is the date on which the person making the claim ought to have known of the facts on which the claim is based. It is also suggested there is a 15 year longstop. This places an ultimate time limit of 15 years on all money claims. These suggestions are in line with the proposed Limitation Bill.
54. The proposals being considered for the Limitation Bill are similar to aspects of the current ASIC proposals to require all schemes to introduce a 6 year time limit from the date that the consumer first became aware, or should reasonably have become aware, that they suffered the loss the complaint is about. The ASIC proposals do not contain a longstop.
55. A scheme should also establish clear rules about when it becomes effective and about retroactive application. For new schemes, it is not expected it would have jurisdiction over complaints arising from an act or omission which occurred prior to the scheme’s establishment. An exception would be where the complainant could not reasonably be aware

of the act or omission until after the establishment of the scheme. Schemes also need to provide rules for when a scheme should have jurisdiction over complaints about new members to the scheme.

Example: Banking Ombudsman Terms of Reference

NB: The Banking Ombudsman was established on 1 January 1992

The Banking Ombudsman shall only consider (or continue to consider) a complaint made to him or her if he or she is satisfied that

- b. the act or omission giving rise to the complaint:
 - (i) first occurred on or after 1 January 1992; or
 - (ii) first occurred not earlier than six months prior to that date, but the complainant did not become aware of it, and could not with reasonable diligence have become aware of it, until on or after that date;

provided that the Banking Ombudsman may in his or her discretion decide not to consider (or continue to consider) a complaint if the complainant has had knowledge of the act or omission giving rise to the complaint for more than 12 months before the complaint is made to the Banking Ombudsman.

Dual Access

- 56. The scheme rules may also want to set out whether its members may refer complaints to the scheme. Dual access is not a requirement in the Act and dispute resolution schemes are established primarily for the benefit of consumers. However, there is some merit in allowing a member to refer a complaint to the scheme in some circumstances, such as when the member's internal scheme is unable to resolve a dispute with a particularly vexatious complainant or if access to an independent dispute resolution scheme would be useful for resolving a complaint that is complex and potentially contentious in a timely and independent manner.
- 57. ASIC recently consulted on dual access for their guidelines for dispute resolution schemes; in other words a financial service provider has the ability to access the scheme if they so choose, not just a consumer who has an unresolved complaint. It is anticipated that this will be useful when a provider is involved in an intractable dispute and wishes it to be resolved independently. The provider, rather than the complainant, could then refer the matter to the scheme.
- 58. If a scheme provides dual access, the rules should identify the circumstances in which it can be invoked by a member, and perhaps any specific fee requirements.

Who can make a Complaint to the Scheme?

- 59. Section 63(c) of the Financial Service Providers Act requires an approved dispute resolution scheme must have a rule stating that consumers and businesses with 19 or less full time equivalent employees may lodge complaints with the scheme. "Business" is defined in the Act to include any profession, trade, or undertaking, whether or not carried on with the intention of making pecuniary profit. This definition is wide-ranging and captures small businesses

through to kindergartens, sports groups and community organisations. A scheme might find it useful to provide a clear description to better assist potential users of the scheme.

60. The scheme may wish to extend access to the scheme to other classes of complainant. This is neither a requirement of the Act; nor is it precluded. For example, a scheme might provide that all primary schools may use the scheme on the basis that some primary schools will have 19 or less employees but others are larger.
61. The scheme rules ideally should not limit the classes of complainant to “past or present customers”. Consumers who have been refused a service, or who have received a service without actually being a customer of the financial service provider should not be excluded from accessing the scheme.

Amount Claims may be About

62. The Act does not specify a monetary limit in respect of complaints that may be considered by an approved dispute resolution scheme. In order for a scheme to be approved the amount of money that complaints lodged with the schemes may be about must be reasonable and appropriate (s52(f)). It is suggested schemes should specifically set either a limit or a cap. In choosing the limit or cap amount, the scheme should be guided by the nature, extent and value of consumer transactions in the relevant industry.
63. A compensation limit usually states the maximum value of a claim that can be brought to the scheme. In such a case, if the value of the transaction at the centre of the claim is above the limit, then the claim can not be lodged. A cap usually means that consumers may bring a dispute to the scheme where the value of the transaction in question is above the cap; however, awards may only be made to the cap. A consumer waives the excess of their claim in order to have access to an external dispute resolution scheme.
64. The current Banking Ombudsman Scheme and Insurance & Savings Ombudsman Scheme can consider claims to the value of \$200,000. The expectation is that any limit or cap is not less than the Disputes Tribunal claims limit. The National-led Coalition Government has introduced to Parliament a Disputes Tribunal Amendment Bill which proposes to raise this limit to \$15,000 and \$20,000 with the consent of both parties. The Motor Vehicle Disputes Tribunal has a limit of \$50,000, and it is proposed to increase this to \$100,000 based on the price of commonly bought new vehicles. A limit of \$100,000 is proposed for the Reserve Scheme.
65. In Australia, ASIC recently consulted on a proposal to replace monetary limits with compensation caps when approving external dispute resolution schemes in the financial sector. ASIC proposes to specify an amount for compensation caps, which will be adjusted every three years using the higher of the increase in the Consumer Price Index or the male total average weekly earnings. Schemes may want to consider indexing their compensation cap or limit. Adjustments to the cap or limit could also be built in as a consideration in each 5-yearly independent review.
66. In addition, under the ASIC proposals consumers could be entitled to claim interest, which may mean that the total amount of compensation is over the cap. Schemes may want to consider including in the rules whether a consumer’s claim for interest can be allowed over and above a cap or limit.

Complaint must be Free of Charge

67. As required by section 63(l) of the Financial Service Providers Act, the rules of the scheme must provide that there will not be a fee charged to any complainant to investigate or resolve a complaint.

Unacceptable Actions by Complainants

68. A scheme may wish to consider having a process for responding to complainants who are abusive or unreasonable in order to remain effective and efficient. Unreasonable complainants may absorb resources that could be used for meritorious cases. Unreasonable complainants, however, should not be confused with complainants who require sensitivity, for instance in areas of mental capacity. If the scheme has a process for responding to unacceptable actions by complaints, the details of complainants that have been rejected should be recorded for accountability and audit purposes.
69. Vexatious complainants may also skew the number of complaints against a member, in particular if that member is a small entity. This could have important ramifications for the funding burden placed on the member (funding is discussed in a later section). The UK Financial Ombudsman Service allows 4 free complaints a year in recognition of this possibility. A free complaint allowance may not be possible in this instance, given the smaller scale of New Zealand's operations, but a scheme may want to consider mechanisms to recognise the effect of vexatious complainants.

Membership Requirements and Obligations

70. The scheme rules need to clearly specify the requirements and obligations of membership to the scheme. Typically, these would be contained in participation agreements between the scheme and the member organisations.

Scheme Membership

71. Section 63 of the Act requires the following rules regarding scheme membership to be included in the scheme's rules:
- the types of financial service providers that may be members of the scheme, and all providers of that type must be eligible (section 63(a));
 - how to become a member of the scheme and how membership may be terminated (section 63(b); and
 - that membership is not open to a FSP who has not taken remedial action imposed on it by another approved dispute resolution scheme or the reserve scheme (section 63(k)).
72. Financial service providers should only be a member of one scheme.

Obligation to Comply and Co-operate

73. It is important that the scheme rules address members' obligations to comply and co-operate with the scheme, and any relevant code of practice. It is suggested that to demonstrate commitment to the scheme, there should be as a minimum an obligation on every member to comply with a recommendation for compensation made by the scheme decision-maker.

74. There should also be an obligation on members to provide the scheme with the necessary information to enable effective investigations by the decision-maker, except where disclosure of such information is prohibited by law. In such an instance, the member may take reasonable measures to protect information that is confidential and/or subject to privilege, such as making deletions to the provided material.
75. Schemes may also like to impose an obligation for scheme members to co-operate with each other.

Example: Banking Ombudsman Participation Agreement

The Participants and the Company will:

- support and pursue the Objects by whatever reasonable means are within their control;
- work collaboratively together to achieve the Objects; and
- not take any action or do any thing in contradiction to the Objects or the spirit or intent of the Objects.

Effective Internal Complaints Handling

76. Front-line internal complaints staff are critical when it comes to recognising complaints, assisting complainants and avoiding the unnecessary escalation of complaints.
77. A scheme may look to include as a basic requirement of scheme membership that there is an effective internal complaints handling process. Suggested options for this requirement include approaches such as:
 - Requiring a basic defined level of training of staff handling complaints;
 - Requiring a system is in place for recording details of the complaint (and for any particular complaint that is taken up by the dispute resolution scheme details in the system may be accessed by the scheme); and
 - Requiring a common system for internal complaints handling by scheme members. It is important though that if this is a condition of membership it does not create an unnecessary barrier to entry for eligible members of the relevant provider type. The scheme could then co-ordinate the training of all members' complaints staff.

Example – common internal systems in the Australian Standard

This standard notably requires the involvement of top management in complaints handling (i.e. promotion, support, direct involvement). The standard also provides a common process for receiving, tracking, acknowledging, investigating and responding to complaints. (AS ISO 10002-2006).

Consumer Accessibility Requirements on Members

78. Section 63(r) of the Act requires that schemes have a rule that members must inform consumers and businesses who may access the scheme about the scheme.

79. An effective disputes resolution scheme is one that people know exists and when someone wants to use it, its processes are accessible. In order to achieve this, the commitment of scheme members to its promotion is crucial.
80. Schemes should demonstrate commitment to accessibility. As such, a scheme may want to impose some promotion obligations on members, such as requiring promotional material available at the point of sale of financial products, and the continued provision of information on bills or disclosure statements. Another suggestion is that a scheme requires its members to have accessible internal processes, such as a clearly labelled “complaints” section on their websites. Consideration could also be given to promotional information targeted both at individual consumers and at the organisations they are likely to go to for help with a complaint, such as Citizens’ Advice Bureaux.
81. A major obstacle to accessibility for consumers in dealing with FSP members can be the manner in which members classify communications from consumers as queries or complaints. As discussed earlier, schemes need to decide whether they will define “complaint”. Consumers need to be clear about which complaints can be taken to the scheme. The suggested good practice is that a scheme has a common definition of complaint on all members’ internal schemes, and in addition educates members about the need to investigate all queries even if the word “complaint” is not used by the consumer.
82. A further accessibility problem at the scheme FSP member level can be the number of complaints left at deadlock stage within the internal complaints procedure. As discussed earlier, schemes should have in place a rule about when complaints can be referred to the dispute resolution scheme. One approach may be for all members of a scheme to commit to a certain process for handling complaints and when to pass them to the dispute resolution scheme.
83. A scheme may also consider requiring members to tell all consumers making a complaint to a member’s internal system at the outset that ultimately an external dispute resolution system is available. Best practice would be to provide the information on the internal and external complaints process when first entering into a contractual relationship with the consumer, and providing this information again when a complaint is laid.
84. The accessibility principle encompasses internal as well as external accessibility. Schemes must be easy to find, and easy to deal with once they are found. The process should be clear, simple and easy for the consumer to use. The scheme should impose requirements on its members that facilitate internal accessibility, such as the provision of information in a timely fashion, and co-operation with the decision-maker and his/her staff.
85. The underpinning principle is that accessibility cannot be achieved without a climate of commitment to the overall aims of the scheme.

Example: Insurance & Savings Ombudsman Rules

Each Participant (and each Subsidiary thereof that provides Services) will have its own internal complaints procedures (set up in accordance with the relevant Codes where applicable) and undertakes to the Commission to publicise the existence and availability of those procedures and the existence, availability and other details of the Scheme to its customers.

Example: Insurance Broking Division of Financial Ombudsman Service of Australia (IBD)

A member who subscribes to IBD will:

- a. make available to Clients information on IBD;
- b. co-operate with the Case Manager and the Referee in the investigation of a dispute involving the Member or any other Member of their representatives; and
- c. have a fully documented internal process for handling disputes with Clients covered by IBD in accordance with the Corporations Act 2001 and ASIC regulatory guide 165.

When Membership can be Terminated

86. The scheme rules need to clearly state when and how there can be termination of membership. It is suggested that grounds for terminating membership include if the member:
 - Fails to pay any fees or charges of the scheme without reasonable explanation;
 - Fails to uphold remedial action recommended/required by the scheme's decision-maker without reasonable explanation; or
 - Continually fails to comply with the rules of the scheme.
87. The scheme rules should also provide for termination of membership at the member's request, and for the notice period required for withdrawing from a scheme. FSP members should bear in mind that in order to be registered as a FSP, they must be a member of an approved scheme or the reserve scheme.

Example: Banking Ombudsman Participation Agreement

A Participant may, at any time, give no less than three calendar months' written notice to the Company to the effect that it wishes to withdraw from this Agreement. Such withdrawal will take effect upon expiry of that notice and will have the effect of terminating this Agreement only insofar as it affects that Participant.

The Company may, by written notice to the relevant Participant, at any time immediately terminate the participation of any Participant if that Participant:

- ceases to be a Registered Bank; or
- has not paid any levy or subscription demanded by the Company pursuant to clause x within three months after written demand is served on the Participant; or
- has, in the reasonable opinion of the Board, failed to comply with an award made by the Banking Ombudsman in accordance with the Terms of Reference within one month after such award is made; or
- breaches, or fails to perform, any other material obligation of that Participant under this Agreement and fails to remedy the breach or perform the obligation within one month after written notice from the Company is served on the Participant specifying the breach or failure and requiring remedy.

Governance Requirements

88. The Act does not specify an exact governance structure for schemes. It is left up to the scheme to determine which structure most adequately meets the needs of members and the benchmark principles.
89. The governance of the scheme should provide for clear independence of the scheme from the FSP members. It is suggested that to ensure independence, the decision-maker and/or the scheme's staff should be responsible for the handling and determination of complaints; be accountable only to the overseeing body; and be adequately resourced.
90. Independence is not just about actual arrangements and processes, but also about perceptions.

The ASIC guidelines state that the principle of independence means that a scheme should be a legal entity in its own right: that is, it should be an incorporated entity.

91. Schemes should aim for a governance structure that avoids industry-capture by interest groups, and prohibits industry from vetoing decisions made by the overseeing body.
92. Schemes may wish to consider having a body to act as a forum for industry members. All members of the industry would be eligible to join this forum. This body could appoint industry representatives to the governance board, and would help co-ordinate industry interests and settle on mandates for the industry representatives. It should not, however, be the rules decision-making body.
93. A further suggestion is that schemes separate the functions of setting the budget and allocating the costs amongst members. For example, an overseeing entity could set or approve the budget for the operation of the scheme, but a separate body such as the member forum could decide how the cost is to be divided amongst the members. Funding arrangements are discussed further in this paper.

Governance Board

94. Good practice suggests a scheme should have a governance board that has the responsibility and appropriate powers to oversee the operations of the scheme. If this approach is adopted, it is suggested that there is a balance of consumer and industry voices on the governance board. Generally, this equates to equal numbers. The governance board needs to represent the interests of both stakeholders to a scheme – the FSP members and the FSP customers.
95. Ideally, the representatives on the governance board are drawn from the top levels of management of the scheme's FSP members. From observing various schemes, top level commitment to a scheme at the governance board level seems to result in more overall commitment to the aim of the scheme by FSP members. There should also be an independent chair. The Minister is required to consider whether the scheme's directors and senior managers are competent to manage a dispute resolution scheme (section 52(d)).
96. The scheme rules should set out how representatives on the governance board are to be appointed. One option for consumer representatives is to use the Ministry of Consumer Affairs consumer representative network as a source of possible nominees³. Other options are

³ Network members are primarily from non-governmental organisations, and are:

to consult with respected consumer organisations, or invite the Minister of Consumer Affairs to make the appointments. The emphasis should be on achieving actual and perceived independence from industry.

Example: Banking Ombudsman Constitution

The Board shall comprise:

A Chairperson, appointed in accordance with clause 10.1;

Two representatives of Participants, appointed by the Council of the New Zealand Bankers' Association;

One person appointed by the Crown by and through the Minister of Consumer Affairs or, if there is no such portfolio, such other Minister of the Crown as the Chairperson may consider appropriate; and

One other person who shall ordinarily be the Executive Director for the time being of the Consumers' Institute of New Zealand or such other person representative of bank customers as the Chairperson may consider appropriate following prior consultation with the Board, who in either case shall be appointed by the Chairperson acting in his or her capacity as Shareholder.

97. The scheme rules should also set out the criteria for appointing industry representatives and the independent chair. One option is to task a members' forum with appointing the industry representatives, but the representatives should be people in whom consumers can have confidence. The Banking Ombudsman and Insurance & Savings Ombudsman schemes provide for a separate process for choosing an independent chair. In the telecommunications sector, the Telecommunications Dispute Resolution Service provides for more consumer than industry representatives with the chair elected from the consumer representatives.
98. The scheme rules should set out the functions for the overseeing body. It is suggested that the functions should be along the lines of:
- Appointing the decision-maker, who it is suggested is to have no relationship with the scheme members that fund or administer the scheme which would give rise to a perceived or actual conflict of interest. It is suggested that the decision-maker is accountable to the governance board rather than the scheme members;
 - Agreeing on the budget;
 - Recommending and promoting consultation about proposed changes to the rules and the terms of reference;

-
- already appointed to represent the interests and concerns of consumers on boards, councils or committees; or
 - meet Cabinet Guidelines for effective consumer representation and are suitable for appointment.

- Receiving and considering complaints about the operation of the scheme (the Governance Board could elect to consider the complaint itself or could seek advice from an independent person);
 - Monitoring systemic issues from complaints lodged with the scheme, including complaints falling outside the terms of reference;
 - Monitoring the reporting of systemic issues and / or serious misconduct by the scheme; and
 - Monitoring the scheme's ability to manage its caseload and perform its functions.
99. It is suggested that the scheme rules set out the governance board's powers (such as recommendations) in the event that the scheme is not performing to the required standards. It is suggested that the scheme is required to respond in a timely and appropriate manner to any recommendations of the governance board addressing complaints about the operation of the scheme.
100. Another suggested function of the overseeing body is responsibility for appointing the person to manage the day-to-day operations of the scheme (normally this person is the decision-maker). That person could then be responsible for appointing, supervising and dismissing the scheme's staff.
101. The Minister is required to have regard to whether the scheme directors and senior managers are competent to manage a dispute resolution scheme.

Decision-making

102. The scheme rules need to set out:
- The powers for the decision-maker; and
 - Matters the decision-maker is required to have regard to.
103. The decision-maker is to be responsible for the determination of complaints. The decision-maker's powers are to be set out in the rules, as required by section 63(i) of the Act, and may include the power to order compensation or to recommend a member takes certain actions.
104. Section 63(h) of the Financial Service Providers Act specifically requires rules providing that the decision-maker may consider any information in relation to a complaint and make any inquiry that is fair and reasonable in the circumstances. It is suggested that the scheme rules require that the decision-maker makes determinations based on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law.
105. The two most common approaches regarding decision-making structure are: one commissioner/adjudicator; or a panel of decision-makers.

Example- Decision-Making Structure in the General Insurance Enquiries and Complaints Scheme Australia

This scheme issues decisions via a Panel, a Referee and an Adjudicator depending on the value of the claim. An Adjudicator may only require the member to pay or be liable for an amount of \$3,000 or less. A Panel or Referee may require a member to pay or be liable for an amount of \$120,000 or less. A Panel or Referee may make a recommendation for an amount greater than \$120,000 but not

exceeding \$290,000.

106. A scheme needs to outline the appointment process and criteria for decision-makers. Typically, decision-makers would have expertise in alternative dispute resolution and/or have a legal background, as well as the necessary attributes and experience to perform the functions of decision-maker.

Example: Disputes Tribunals Act 1988 s6A

No person may be appointed as Principal Disputes Referee unless that person

- a. Holds a Bachelor of Laws from a university in New Zealand or a qualification that the Minister considers is equivalent to such a Bachelor of Laws; and
- b. Is capable, because of the person's personal attributes, knowledge, and experience, of performing the functions of a Referee and the functions of the Principal Disputes Referee.

107. A scheme may also choose to outline a removal process for decision-makers, or may deal with this aspect through the private employment contract.

Insurance & Savings Ombudsman Scheme

3.3 The Commission shall have the power to suspend or to remove the Insurance & Savings Ombudsman (ISO) at any time in its absolute discretion.

16.5 The ISO shall automatically be removed from office if he/she:

- a. becomes bankrupt or makes any arrangement or composition with his/her creditors generally; or
- b. becomes of unsound mind, or becomes subject to an order under the Protection of Personal and Property Rights Act 1988; or
- c. resigns by notice in writing to the Commission; or
- d. is convicted of an indictable offence; or
- e. commits any act of dishonesty whether relating to the Commission or otherwise or is guilty of any serious misconduct or conduct tending to bring the Commission, the Scheme or himself/herself into serious disrepute; or
- f. following a medical examination by two medical practitioners made at the direction of the Commission or at the initiative of the ISO, is declared by both of the examining medical practitioners to be permanently incapable of performing his/her duties; or
- g. shall absent him/herself from his/her duties without the permission of the Commission and the Commission has resolved to terminate his/her appointment; or
- h. by reason of illness or accident, is incapacitated from attending to his/her duties for more than an aggregate period of two months in any period of twelve consecutive months and the Commission has resolved to terminate his/her appointment.

Dispute Resolution Techniques

108. There are several techniques that a scheme may employ to resolve a dispute. The Arbitrators' and Mediators' Institute of New Zealand considers that the main methods are negotiation, facilitation, mediation, arbitration, adjudication, conciliation, investigation and expert determination. It is suggested that the scheme rules should provide that arbitration, adjudication and expert determination are only used after the other techniques have been attempted.

Example: General Insurance Enquiries and Complaints Scheme Australia

IEC's objective is to facilitate the satisfactory settlement or withdrawal of disputes which are referred to it. IEC will make a further attempt to promote conciliation as a means of resolving a dispute to the satisfaction of the parties concerned; but where a conciliated solution is not practicable, a Panel, Referee or Adjudicator may determine the dispute.

Reviews of Determinations

109. The Financial Service Providers Act does not require schemes to provide appeal rights to an outside forum, such as the District Court.⁴ There was some discussion of appeal rights by the Finance and Expenditure Committee which considered the Bill preceding the Act. A number of FSPs considered there needed to be some basic review rights. Accordingly, it is suggested that schemes might want to consider internal mechanisms for reviewing determinations on procedural grounds.
110. If any review processes are provided for in a scheme, it is important that there are clear rules for refusing reviews based on the substantive merits of the case, as allowing such reviews may lead to an unnecessarily protracted process. This would undermine the purpose of dispute resolution schemes as a simple, low cost method of resolving complaints.
111. It may be possible for complainants to seek judicial review of the decision on the complaint. Private organisations can be susceptible to judicial review if they are exercising a public function. For instance, the Institute of Chartered Accountants has been subject to judicial review even though it is a privately funded organisation, as it exercises regulatory powers and functions that are statutory. Approved schemes under the Financial Service Providers (Registration and Dispute Resolution Act) are considered to be analogous.

Example: Insurance & Savings Ombudsman Terms of Reference

No decision of the ISO shall be capable of review or appeal in any form, by any other person, court, tribunal, statutory complaints authority, or other body.

⁴ Although a consumer can take court action at any time, this is as an alternative to the dispute resolution scheme process, rather than to review a scheme decision.

Natural Justice

112. Schemes are required by section 63(f) of the Financial Service Providers Act to include in the scheme rules that complaints about members must be investigated in a way that is consistent with natural justice.
113. Natural justice imposes a duty on the scheme to act fairly towards both consumers and FSP members. The fairness principle in section 52(2) encompasses many aspects of natural justice. In particular, natural justice requires:
 - Adequate notice to be given to both parties of important steps and decisions;
 - The opportunity for both parties to be heard and for their views to be considered before the decision is made.

Remedial Action

114. As required by section 63(i) of the Financial Service Providers Act, the scheme rules must provide for the types of remedial action that the scheme can impose on a member to resolve a complaint, and when different remedies might be appropriate. The examples given in the Act are a requirement to change systems and monetary compensation.
115. According to the British and Irish Ombudsman Association it is vital that schemes offer a range of redress options. Suggested options that a scheme should have within its toolbox are: apology, remedial action by a member i.e. “putting things right” and financial redress. These different tools can be used in isolation or in combination.
116. It is not expected that schemes will impose punitive or exemplary damages. Schemes, however, may want to consider providing for name and shame as a form of penalty.
117. The scheme rules must also provide for how remedial action may be enforced against members, including after members have left a scheme (section 63(j)). The rules must state that a resolution is binding on the member concerned (section 63(m)) and that a resolution is also binding on the complainant, if the complainant accepts the resolution (section 63(n)).
118. As previously noted under membership requirements, the rules must also state that a FSP who has not taken remedial action imposed on that provider by another approved scheme or the reserve scheme cannot join the scheme (section 63(k)).

Example – British and Irish Ombudsman Association view on deciding upon appropriate remedies

The decision-maker should consider “the degree to which the complainant contributed to the failure, the time that has elapsed since the event, and the time and trouble experienced by the complainant in pursuing the complaint. The reviewer should also consider the implications for others similarly affected, the capacity of the organisation to comply and the implications for other similar organisations.”

Complaints where a member ceases to carry on business

119. The scheme’s rules need to address the situation when a complaint is received about a scheme member that subsequently ceases to carry on business. Of interest is that ASIC is currently

proposing to harmonize such rules amongst all schemes, to require all schemes to investigate complaints about a member that has ceased to operate.

120. In the instance where a scheme member has ceased to carry on business and where the scheme has recommended a compensation award, the consumer may not be able to receive any compensation as there is no entity against which the compensation award can be enforced. In addition, liquidators are not bound by the decisions of external dispute resolution schemes. However, the consumer may still receive some benefit from laying such a complaint, for instance where the scheme member has been placed in administration and subsequently recovered and resumed trading. In this scenario, the complainant would be able to enforce the compensation award against the member.

Compliance Monitoring of Members

121. Schemes also should have mechanisms to monitor compliance, and some form of sanction for when there is non-compliance with a rule of the scheme (rather than a ruling of the decision-maker). As previously suggested, schemes may wish to impose an obligation to co-operate with the scheme as a condition of membership.
122. The greatest incentive for compliance is the fact that a FSP must be a member of an approved dispute scheme or the reserve scheme in order to be registered. Without registration, the FSP cannot legally operate in the market. It is suggested a scheme has a scale of sanctions from name-and-shame through to termination of membership for breaches of the membership rules. Schemes may wish to include information on member compliance in the Annual Report.
123. The rules should include a mechanism to enable the scheme to meet its obligation under section 67 to report to the relevant licensing authority where there is a series of material complaints about a particular licensed provider or class of licensed provider.

Alternative Legal Action

124. The scheme rules must provide that the complainant may take alternative court action against the member at any time (section 63(o)). Once this occurs, the scheme may cease investigating the complaint (section 63(p)).
125. The accessibility of consumer dispute resolution schemes can be undermined by allowing members to take alternative court action once a complaint has been lodged. However, there are two situations where a scheme may consider it important to allow a member to pursue the matter before the general courts:
126. The first situation is where a limitation period is about to end. Scheme members should be allowed to preserve their legal rights by taking court action, however, it is suggested the scheme rules should provide that only the minimum necessary action is to be taken. Under this scenario, it is suggested the rules provide that once a complaint is resolved by the scheme decision-maker, the member will discontinue any aspect of the legal proceedings that is inconsistent with the agreement or determination.
127. The second situation where alternative legal proceedings by the member would be appropriate is in test cases concerning an important legal issue for the industry.

Procedural Rules

128. Section 63 of the Financial Service Providers Act provides that a scheme must have procedural rules that:

- specify how a consumer may make a complaint to the scheme (section 63(d));
- provide that a complaint can be lodged free of charge (section 63(l));
- provide for a specified deadlock period after which complaints to a member which remain unresolved can be investigated by the scheme (section 63(e));
- provide, in resolving a dispute, the decision-maker may consider any information and make any inquiry that is fair and reasonable in the circumstances (section 63(h)); and
- provide complaints must be investigated in a way that is consistent with natural justice (section 63(f)).

129. These have all been discussed above. In addition, the Act requires that the procedural rules are adequate in terms of the benchmarks. Some suggestions on how the benchmark principles can be reflected in the procedural rules follow.

Accessibility

130. As already discussed, the scheme's process should be easy to use and have no cost barriers (they must be free to consumers). Approaches that demonstrate accessibility might include, but are not limited to, whether the scheme:

- Uses an informal, non-adversarial approach;
- Has adequate funding allocated in the budget to use on achieving an internally accessible process, such as for promotional materials;
- Has processes that are simple for complainants to use and understand;
- Has flexibility in the way complaints can be made, for example, allowing oral complaints and providing for the scheme to record the complaint and send it to the complainant for confirmation;
- Has a toll free number for consumers to contact the scheme;
- Provides interpreters if needed;
- Allows complainants to use support persons;
- Allows complainants to authorise a person to represent them in respect of a dispute, if the complainant is a child, seriously ill, mentally handicapped, frail, elderly or non-English speaking;
- Utilises a range of techniques such as conciliation, mediation and negotiation before arbitration is considered;
- Provides for the scheme member to pay the legal costs of complainants where the scheme member is the first party to request to be legally represented and the decision-maker agrees to that request;

- Has measures in place to help customers with special needs, be they socio-economic, cultural, language, geographical or physical needs, to access the scheme and use it effectively;
 - Provides material which is easily accessible and simple to use, explaining: how to access the scheme; how the scheme works; major areas the scheme deals with; and limits on the scheme's powers;
 - Does not require complainants to attend hearings or meetings; and
 - Employs other methods to resolve complaints, such as emails, phone calls and online forms.
131. Accessibility issues may be a result of capacity or circumstance. In particular, the information asymmetries and complex nature of financial transactions and products require extra measures to ensure accessibility for consumers.
132. Section 64 of the Financial Service Providers Act requires that the person responsible for an approved dispute resolution scheme must make copies of the scheme's rules available to the public.

Independence

133. The scheme's processes and administration should be independent from scheme members. Approaches that demonstrate independence might include, but are not limited to, whether the scheme:
- Has a decision-maker who is responsible for the determination of complaints, who is not answerable to scheme members for determinations;
 - Has a decision-maker who has no relationship with the scheme members that fund or administer the scheme which would give rise to a perceived or actual conflict of interest;
 - Has staff which are not selected directly by scheme members, and are not answerable to scheme members for the operation of the scheme;
 - Is overseen by a separate entity with a balance of consumer and industry interests; and
 - Has sufficient funding to enable its caseload and other relevant functions necessary to fulfil its terms of reference to be handled in accordance with the principles in section 52(2) and the rule requirements in section 63.

Fairness

134. The scheme's processes should be perceived as promoting decisions which are fair and are seen to be fair. Approaches that demonstrate fairness might include, but are not limited to, whether the scheme:
- Advises complainants of their rights to access the legal system or alternative redress mechanisms at any stage, including if the complainant rejects the resolution of their complaint by the scheme;
 - Allows both parties to put their case to the decision-maker;
 - Informs each party of the arguments and case of the other party;

- When making a decision, relies only on information available to both the parties (i.e. not confidential documents) unless special circumstances apply;
- In making determinations or recommendations, has regard to what is fair and reasonable in all the circumstances; and regard is also given to any relevant industry codes and established legal principles;
- Has procedural guarantees of due process;
- Informs parties of the reasons for a determination, and the procedure by which a recommendation of the decision-maker may be accepted by the parties to the complaint;
- Advises a complainant why a complaint is outside the jurisdiction of the scheme;
- Encourages but does not compel a complainant to provide information relevant to a complaint, but has the ability to compel information disclosure from members, subject to confidentiality and other legal restrictions on disclosure;
- Insures any provided sensitive and confidential information is kept confidential by the decision-making body and its staff, unless disclosure is required by law or in order to meet one of the other benchmark principles; and
- Overall, the process is transparent to both parties.

Accountability

135. The scheme should publicly account for its operations and should highlight systemic industry problems. Approaches that demonstrate accountability might include, but are not limited to, whether the scheme:

- Regularly provides written reports of decisions (with names deleted) to members and other interested parties;
- Publishes a detailed and informative annual report, which is available to the public. Regarding the annual report, it is suggested this contain information such as:
 - information about how the scheme works
 - results of the internal review
 - statistics on caseload, resolved cases, cases rejected on jurisdictional grounds, the amount of time taken to resolve complaints
 - results of feedback surveys
 - some examples of typical cases
 - information on compliance with the benchmark principles
 - the list of members
 - information on performance standards
 - the results of the independent review, if any independent review has been conducted that year
 - financial statements which sufficiently illustrate how the funding is being utilised

- a list of scheme members who committed substantial breaches of their membership obligations
- any systemic issues arising from complaints, and how those issues have been dealt with
- information about new developments or key areas in which policy or education initiatives are required; and
- Requires the governance board to report on member compliance.

Efficiency

136. The scheme should operate efficiently by keeping track of complaints, having a process for ensuring complaints are considered appropriately and regularly reviewing its performance. Approaches that demonstrate efficiency might include, but are not limited to, whether the scheme:
137. Deals only with complaints within its scope, and has procedures for referring other complaints to the appropriate forum. Approved schemes are under a statutory obligation to co-operate with other approved schemes, the Registrar, and the Reserve Scheme; and
138. Keeps track of complaints by using systematic records, having time limits for the resolution of complaints, and provides complainants with receipts indicating acceptance of their complaint and the projected timeframe for resolving the complaint.

Effectiveness

139. The scheme should operate according to appropriate and comprehensive terms of reference or objectives and provide for independent review. Approaches that demonstrate effectiveness might include, but are not limited to, whether the scheme:
- Has clear scope, and that scope is sufficient to deal with the majority of consumer complaints about its FSP members;
 - Grants clear powers to the decision-maker;
 - Has mechanisms in place to refer systemic industry problems to the overseeing entity;
 - Has the power to make monetary awards of sufficient size, according to the nature, extent and value of customer transactions in the financial services industry;
 - Requires the scheme to respond in a timely and appropriate manner to any recommendations of the governance board addressing complaints about the operation of the scheme.

Managing Expectations

140. The overall effectiveness of a scheme is particularly dependent upon managing expectations. It is anticipated that if complainants are kept informed of the progress of their case and feel they are being treated fairly, then overall satisfaction with the scheme will increase even where financial compensation has not been granted.

Discussion of Particular Procedures

Written Decisions

141. In order to satisfy the fairness and accountability benchmarks, decision-makers have an obligation of a degree of consistency and openness in decision-making. One way consistency can be achieved is through issuing written decisions. This does not amount to a requirement to be bound by previous decisions (as in a court when faced with a binding precedent). Fairness and accountability also require that parties to a dispute are able to ascertain the reasons for the decision-maker's determination, and identify the evidence that has been relied on in reaching that conclusion.
142. Written decisions can be used in two ways:
- To provide parties to a dispute with a clear understanding of the decision-maker's reasoning; and
 - As a publicly available education tool.
143. International good practice is that written decisions are made widely available to the public in an anonymous and/or summarised form. Examples are the Banking Ombudsman and the Insurance & Savings Ombudsman Case Notes. Providing case notes allows FSP members of a scheme to educate themselves and adjust their practices, as well as educating consumers. In the long run, this will avoid many trivial or systemic disputes. Written decisions allow schemes to contribute to the development of law in the financial sector. One option may be for case notes to be accessible on the scheme's website.

Example – British and Irish Ombudsman Association view on publishing determinations

“So far as it is possible and practicable, final determinations should be published in a way that enables everyone concerned to understand the evidence, the application of rules and policies and the reasons for any conclusions reached... Some schemes make their determinations public and, where this is the case, they should be available for convenient reference by their stakeholders, who should also have easy access to the policies and procedures that lead to decisions.”

(BIOA Guide to Principles of Good Complaint Handling 2007)

144. The ASIC guidelines recommend the provision of written reasons for decisions. To enhance transparency, one suggestion is to include with the written decision advice specifying the documents relied on, which can be provided to parties upon request. The ASIC guidelines also recognise that endangerment to a third party or security reasons may preclude the sharing of documents.

Legal Representation and Support Persons

145. In the list of approaches that could be considered for demonstrating a scheme meets the accessibility principle, the following were noted:
- If a scheme member is the first to request legal representation and the decision-maker agrees to it, then the scheme member is required to pay for legal representation for the consumer; and

- The scheme allows for support persons for those consumers who are disadvantaged or vulnerable due to capacity or circumstance.
146. Whether or not those taking or defending a complaint should be allowed legal representation is a difficult issue. Industry-led dispute resolution schemes are similar to the Disputes Tribunal, which does not allow for legal representation. Accordingly, the suggested principle is that legal representation should be discouraged, as it may undermine the aims of a simple, quick and inexpensive method of dispute resolution. However, due to the prevalence of in-house legal teams it may be hard to avoid. A blanket ban on legal representation may simply encourage members to “bury” the legal advice that they have received. A good decision-making process should alleviate the problem, as it is the scheme’s and not the complainant’s responsibility to test the member’s case. Legal representation for the consumer therefore becomes less important if the decision-maker is respected.
147. Identifying vulnerable or disadvantaged consumers is often a matter of common sense. For many people, even writing a letter or engaging in a telephone conversation may be intimidating. An accessible and fair process, and an accessible and fair culture amongst the members’ staff and the scheme’s staff, will help many consumers. Schemes should be aware that vulnerability may be caused by the complexity of information involved in the financial sector.
148. A good rule of thumb for deciding what accessibility requirements are necessary is to consider what might remedy the underlying imbalance between the complainant and the member.

Funding Requirements

149. Section 52(1)(c) of the Financial Service Providers Act requires the Minister to have regard to whether the applicant seeking scheme approval has adequate funding to enable it to operate the scheme according to the scheme’s purpose and rules. Accordingly, applicants will need to provide details of their funding arrangements.
150. One suggestion is that the members’ forum sets the funding mechanism, subject to approval by a governance board. The governance board would then be required to ensure that the funding mechanism:
- Has a user pay component which encourages robust internal complaints mechanisms;
 - Ensures efficient and effective resolution of complaints.
151. Suggestions for demonstrating the adequacy of funding and that it will enable the effective operation of the scheme include, but are not limited to:
- Transparency and fairness – the funding details should be clearly set out in the rules, including ongoing fees, one-off fees to establish the scheme, and any per-complaint charges or pro rata charges;
 - Amount to be included in the rules, so that any changes to the funding arrangements must comply with the rule change procedures under the Act. This is to avoid a scheme from later undermining its effectiveness by lowering the fees to an unviable level;
 - User pay component as an incentive for the improvement of members’ internal schemes;
 - Any incentives to promote efficiency;

- Avenues for members to dispute the amount they have been charged by the scheme;
- Independence of the scheme from its members should not be compromised by the funding arrangements – both actual and perceived independence;
- Sufficient funding secured to enable the scheme to operate in accordance with the benchmarks, i.e. scheme must not compromise on its effectiveness in order to lower the fees to members; and
- Adequate funding, and adequate mandate, to carry out promotional activities.

Example: Insurance & Savings Ombudsman Rules – Funding Formula

Subject to Rules 10.2 and 10.4, every Participant shall pay a Levy for each financial year, on or after 1 July 2006, which is made up of:

- a. a share of 40% of the total Levy, based on the number of Accepted Complaints that Participant had in the previous financial year as a proportion of all of the Accepted Complaints for that year; and

[“Accepted Complaints” means a complaint which, in the preceding financial year, the ISO has determined is within his/her jurisdiction under paragraph 4.1 of the Terms of Reference.]

- b. a share of 60% of the total Levy, which is made up of:

(i) the sum of \$1,000 from each Personal Line, Health and Life Insurance Participant; and

(ii) the sum of \$10,000.00 from each Savings Participant; and

(iii) a share of the balance of 30% of the total Levy paid by the Personal Line and Health Insurance Participants, based on Gross Written Premium for each one of them and their Subsidiaries as a proportion of the total Gross Written Premium for all of them and their Subsidiaries; and

[“Gross Written Premium” means the total amount derived in the preceding financial year by a Participant and its Subsidiaries on all contracts for the provision of Personal Line Insurance Services and/or Health Insurance Services (after deducting all returned or rebated premium amounts, but without deducting any commissions or brokerage).]

(iv) a share of the balance of 30% of the total Levy paid by the Life Insurance Participants, based on the total number of Contracts held by each one of them and their Subsidiaries as a proportion of the total number of Contracts held by all of them and their Subsidiaries;

[“Contracts” means each separate agreement for the provision of Life Insurance Services or Savings Services at the end of the previous financial year.]

10.4 For a Participant first joining the Scheme, that Participant’s Levy in the financial year in which the Participant first joins the Scheme shall be determined as the sum of:

- a. in respect of the Participant’s Gross Written Premium, as defined in paragraph 10.3(b), (for Personal Line and Health Insurance Participants) and the Participant’s total number of Contracts, as defined in paragraph 10.3(b), (for Life Insurance and Savings Participants) by the Participant, a Levy at the same rate as payable by all other Participants, and;

- b. the sum of \$10,000 in respect of each Savings Participant and \$1,000 for any other Participant, and;

- c. a fee per complaint accepted for consideration by the ISO during the Participant's first financial year of participation, at the same rate as is charged to all other Participants in the relevant financial year; provided that:
- d. there shall be a reduction on a pro rata basis in respect of the Levy in (a) above for any period of participation less than a full financial year, and
- e. the Commission may require the Levy calculated as above to be paid in arrears or in advance (or part in arrears and part in advance) on giving notice in accordance with Rule 10.8, and
- f. for the purposes of (c) above the determination of complaints accepted for consideration shall be as set out in paragraph 10.3(a).

Performance Monitoring of Schemes

"If you can't measure it then you can't manage it" Barry Adams Queensland Energy Ombudsman

152. The performance of approved schemes will be monitored and assessed through a number of avenues:
 - The scheme's rules must require an independent review of the scheme at least once every 5 years, and that review is to be supplied to the Minister. (section 63(q));
 - The scheme must supply the Minister with an annual report containing prescribed information (section 68); and
 - The Minister may also ask for further information in order to assess compliance with the principles of fairness, independence, accountability, efficiency, effectiveness and accessibility.
153. It is suggested that schemes look at monitoring their performance through a mix of objective and subjective data. Objective measures might include collecting data on the number of complaints received, the average time per complaint, demographic information on the complainants accessing the scheme, the range of complaints and the types of product or service being complained about. To round out the impression of the objective data, information such as user satisfaction could be helpful.

Setting Performance Standards

154. The Act does not explicitly describe or require performance standards for approved schemes. It is suggested, however, that schemes consider having some performance standards. These can be particularly important when reviewing a scheme. Performance standards should enable third parties to determine that the scheme is operating according to the principles.
155. Members of the various sectors are best placed to develop their own performance standards that reflect the complexities of their business. Scheme applicants are expected to apply their institutional knowledge with the benchmark principles. For example, a scheme may set a time period for resolving disputes based upon a balance of the efficiency, effectiveness and fairness principles. Performance standards could also include broader issues such as the overall accessibility of the scheme.

156. ASIC is currently proposing that financial service providers should provide a final response to complaints to their dispute resolution scheme within a maximum of 45 days, but within 30 days if possible. If the financial service provider cannot respond within 45 days, it should inform the complainant of the reasons for the delay and their right to refer the complaint to the EDR scheme.

Example – Banking Ombudsman’s Accessibility Benchmark

“Is it [the scheme] easily accessible to, and easy to use for, consumers regardless of their location, resources (intellectual and material), literacy, language skills, health status and other personal circumstances?” (2006 Independent Review)

Performance Monitoring

157. Apart from setting performance standards, performance monitoring consists of three aspects – developing programmes to achieve goals, measuring performance to see if it meets the goals, adjusting and implementing new programmes to ensure continued high performance.

Independent Review

158. Schemes are required by s63(q) to have a rule that an independent review of the scheme will take place every 5 years. Section 63(q) also requires that the independent review is supplied to the Minister of Consumer Affairs within 3 months of completion.
159. Schemes might wish to consider appointing the independent reviewer through the governance board, following consultation with the Ministry of Consumer Affairs. The terms of reference for the review could be determined using a similar process.
160. A further suggestion is that schemes make copies of the independent review available to relevant stakeholders. A summary of the review may be included in the Annual Report for that financial year. It is a requirement in the Financial Service Providers Act that annual reports are made available to the public (section 70).

5. Further Features of the Approved Schemes System

Amending the Scheme Rules

161. If a scheme wishes to amend the scheme rules, the scheme must notify the proposed changes to the Minister (section 65). The Minister will consider whether the changes are adequate in regards to the benchmark principles, and whether the rule requirements under section 63 are met. If the Minister does not approve the change, then the change must not be made.
162. If the Scheme has not heard from the Minister within 45 working days of the notification being made, the change is treated as having been approved by the Minister. The scheme cannot have rules that conflict with this process.
163. As discussed earlier, good practice suggests there should be a governance board responsible for overseeing the operations of the scheme. If a governance board is in place, it is suggested it is responsible for recommending changes to the scheme rules and promoting consultation on those changes. While members should be consulted about changes, it is not advisable to give members the power to veto any proposed amendments. Giving members a veto power:
- Gives members a disproportionate influence compared with other stakeholders, particularly consumers; and
 - Undermines the Scheme's independence from those that provide funding.

Exit Requirements

164. The Minister must withdraw approval if the person responsible for an approved scheme so requests. The withdrawal takes effect from any future date requested (section 56(3)). The members of the scheme will become members of the reserve scheme unless other arrangements have been made to join another approved scheme (section 61).

Revoking Approval

165. Approval does not expire. The indefinite period of approval is intended to encourage investment in resources and staff capability. The Minister is able to review the functioning of approved schemes through mechanisms such as the annual report (section 68), and the independent reviews (section 63(q)).

When the Minister may withdraw approval (section 56)

166. The Minister may withdraw approval under section 56 for a number of specified reasons. These include:
- A breach of a requirement prescribed in regulations;
 - A failure to comply with scheme rules;
 - A list of current members has not been maintained or published;
 - The scheme's rules have not been published;
 - Required information has not been supplied to the Minister, such as the annual report, information requested under section 69, and the independent review required under the scheme rules;

- Changes to the rules have not been notified to the Minister;
 - The provision for co-operation and information sharing was not been complied with; and
 - The scheme no longer satisfies the principles of fairness, independence, accountability, efficiency, effectiveness and accessibility.
167. When deciding whether to withdraw approval, the Minister must have regard to a number of the initial approval considerations, in light of the principles of fairness, independence, accountability, efficiency, effectiveness and accessibility. These considerations are:
- Whether the scheme has an appropriate purpose;
 - Whether there has been reasonable consultation with persons likely to be substantially affected by the scheme;
 - Whether there is adequate funding for the scheme to operate according to its rules and its purpose;
 - Whether the directors and senior managers are competent to manage a dispute resolution scheme;
 - Whether the scheme is capable of resolving disputes about the types of financial services provided by its members;
 - The claims limit, and whether this is reasonable and appropriate; and
 - Whether the scheme rules comply with section 63, and with the principles of fairness, independence, accountability, efficiency, effectiveness and accessibility.

Notice of Intention to Withdraw Approval (section 57)

168. Once the Minister decides to withdraw approval, he or she must give notice to the person responsible for the scheme stating the reasons for withdrawal. The Minister's notice may require the person responsible for the scheme to notify all members, or to provide the Minister with a contact list so that the Minister may notify the members. During the notice period, the scheme must not accept any new members (section 58(1)(b)).

Objection to Withdrawal of Approval (section 58)

169. A notice period of 20 working days applies, during which the person responsible for the scheme may object to the Minister's intention to withdraw approval. Once the Minister receives an objection, he or she cannot proceed with the withdrawal until satisfied that any or all of the withdrawal reasons in section 56 apply.

Notification, Publication and Effect of Withdrawal of Approval (sections 59 – 61)

170. After withdrawing approval, the Minister must notify both the Registrar and the person responsible for the scheme as soon as practicable. The withdrawal becomes effective from the date the person responsible for the scheme is notified. Members of the scheme then become members of the Reserve Scheme.
171. The Minister must ensure that the withdrawal is published in the Gazette, and that the Chief Executive updates the details that are available for public inspection under section 78.

6. Process for Approval of Scheme

Lodging an Application for Approval

172. A scheme seeking approval should lodge a written application with the Minister of Consumer Affairs.
173. An application for approval should include a cover letter addressed to the Minister and must include documentation that clearly indicates how the scheme meets the approval criteria of section 51(2) of the Financial Service Providers Act:
- The rules about the scheme (which may be contained in a number of different documents such as code of conduct, terms of reference and constitution);
 - Any other prescribed information concerning the mandatory approval considerations. (There are currently no additional prescribed requirements.)
174. The Minister will acknowledge receipt of the application. The Minister can only make a decision on the application following consultation with the Ministers of Finance and Commerce. It is anticipated that the approval process will take 3 – 6 months.

Notification and Publication of Decision

175. The Minister will provide applicants with written notification of the outcome of their application. If the application has been successful, the approval will be published in the Gazette. The details of the scheme, and the name and business address of the person responsible for the scheme, will be made available to the public at the Ministry of Consumer Affairs' head office and internet site.

Appendix 1: Quick Checklist for Applicants for Approved Industry-Based Dispute Resolution Schemes

NB: Schemes may wish to separate these requirements into a number of different documents

Objective and Scope

Pg ref	Title	Achievement Standard	FSP Act
	<i>Objectives</i>		
	Overall Objective	<p>The scheme rules provide for an appropriate purpose.</p> <p>Suggestion:</p> <p>The scheme purpose includes –</p> <ul style="list-style-type: none"> • To consider complaints with respect to member FSPs; • To provide advice to members; and • To provide information to potential users of the scheme. 	s52(1)(a)
	Consultation	The scheme has undertaken consultation with parties likely to be substantially affected, including industry and consumers.	S52(1)(b)
	<i>Scope</i>		
	Clear Scope	The scheme rules are clear on the scope of the scheme and the powers of the decision-maker.	Effectiveness
	Scheme Rules	The scheme rules cover the requirements of s63, and satisfy the benchmark principles.	s52(1)(g) s63
	Coverage of Sector	<p>The scheme states in its rules which types of financial service providers may be members of the scheme. All providers of that type must be eligible for membership.</p> <p>The scheme rules state that a member who has not taken remedial action imposed on them by another approved dispute resolution scheme or the reserve</p>	s52(1)(k) s63(a)

Pg ref	Title	Achievement Standard	FSP Act
		scheme cannot join the scheme.	
	Complainants	<p>The scheme states in its rules that consumers and businesses that have no more than 19 full-time employees may access the scheme.</p> <p>Suggestion:</p> <p>The scheme may wish to extend access to the scheme to other classes of complainant.</p>	s63(c)
	Free Access	The scheme rules specify that it is free of charge for consumers to lodge a complaint.	s63(c)
	Definition of Complaint	<p>Suggestion:</p> <p>The scheme may wish to adopt a definition of complaint.</p>	
	Coverage of Complaints	<p>The scheme states in its rules that complaints about members may be made regarding:</p> <ul style="list-style-type: none"> • Breaches of contract; • Breaches of statutory obligations; • Breaches of industry codes; • Any other matter. <p>Suggestions:</p> <p>The scheme rules provide that a complainant is not required to frame their complaint within one of these categories in order to access the scheme.</p> <p>The scheme is not required to investigate areas of commercial judgement, but should address complaints about the administration of commercial judgement.</p> <p>The scheme does not have to investigate complaints that are the subject of alternative court action.</p>	s63(d) s63(g) s63(p)
	Amount Claims May be About	The scheme's scope is sufficient to deal with consumer complaints involving monetary amounts up to a specified maximum that is consistent with the	Effectiveness s52(1)(f)

Pg ref	Title	Achievement Standard	FSP Act
		<p>nature, extent and value of customer transactions in the relevant industry. The scheme may utilise either a cap or a limit. The cap or limit is specified.</p> <p>Suggestions:</p> <p>The scheme rules consider whether a consumer's claim for interest can be allowed over and above a cap or limit.</p> <p>Consideration is given to indexing the cap or limit, or providing for the cap or limit to be reconsidered by the 5-yearly independent review.</p>	
	Unacceptable Actions by Complainants	<p>Suggestion:</p> <p>The scheme rules provide a procedure for dealing with vexatious complainants.</p>	Effectiveness Efficiency
	When complaints can be taken	<p>The scheme rules provide for when complaints can be taken. These rules cover:</p> <ul style="list-style-type: none"> • Deadlock; • Limitation periods; • Retroactive application. <p>Suggestion:</p> <p>The scheme rules provide that in the first instance a consumer's complaint will need to be taken up with the FSP member who provided the product or service.</p>	s63(e) Accessibility
	Dual Access	<p>Suggestion:</p> <p>The scheme rules allow a member to refer complaints to the scheme in certain instances.</p>	

Membership Requirements and Obligations

	Title	Achievement Standard	FSP Act
	<i>Membership Rules</i>		
	Joining the Scheme	The scheme rules describe how a financial service provider may become a member of	s63(b)

		the scheme. The scheme rules provide that membership is not open to an FSP who has not complied with remedial action imposed on it by another approved scheme or the reserve scheme.	s63(k)
	Termination	The scheme rules provide for how membership is terminated.	s63(b)
<i>Obligation to Comply and Co-operate</i>			
	Obligation to comply	Suggestion: The scheme rules impose on members an obligation to comply and co-operate with the scheme.	
	Co-operation with Other Members	Suggestion: The scheme rules impose an obligation for scheme members to co-operate with each other	
	Information provision	Suggestion: The scheme rules require that members provide to the scheme's staff and the scheme's decision-maker all information relevant to the complaint in a timely fashion.	Effectiveness Fairness
	Confidentiality and other prohibited disclosures	Suggestion: The member is not obliged to provide information to the scheme where such a disclosure is prohibited by law. The member may also take reasonable measures to protect information that is confidential and/or subject to privilege, such as making deletions to the provided material.	Fairness
<i>Effective Internal Complaints Handling</i>			
	Internal dispute resolution	Suggestions: The scheme rules require all members to have a robust internal complaints resolution system. The scheme sets specific standards for the internal systems to achieve, or imposes a common system.	Effectiveness

	Staff Training	Suggestion: Members have robust training programmes in place to give front-line staff the competency to deal with complaints within the internal dispute resolution system.	Effectiveness
	Top Management	Suggestion: Internal dispute resolution systems have commitment from the top levels of management.	Effectiveness
	Promotion of internal systems	Suggestion: The scheme rules require all members to promote their internal dispute resolution systems.	Accessibility
<i>Consumer Accessibility Requirements on Members</i>			
	Promotion of scheme	The scheme rules require the scheme's members to inform consumers and businesses with less than 19 full time employees about the scheme. Suggestion: The scheme rules have promotion obligations on members to ensure the accessibility of the scheme for consumers.	s63(r) Accessibility
<i>Binding Determinations</i>			
	Binding on Members	The scheme rules state that a determination of the decision-maker is binding on the scheme member concerned. The resolution is binding on the complainant if the complainant accepts the resolution.	Effectiveness s63(m) s63(n)

Governance Requirements

<i>Governance Board</i>			
	Oversight Role	Suggestion: The scheme rules require a governance board with responsibility to oversee the operation of the scheme according to the benchmark principles.	Independence

	Composition	<p>Suggestion:</p> <p>The governance board has equal numbers of consumer and industry representatives, with an independent chair.</p>	Independence
	Consumer Representatives	<p>Suggestion:</p> <p>The scheme rules state how consumer representatives are appointed to the governance board.</p>	Independence
	Industry Representatives	<p>Suggestion:</p> <p>The scheme rules require that the representatives of industry interests are:</p> <ul style="list-style-type: none"> • Persons in whom consumers and consumer organisations can have confidence; • Elected by members, for instance through a members' forum if one exists. 	Independence
	Independent Chair	<p>Suggestion:</p> <p>The scheme rules require an independent chair.</p>	Independence
	Functions	<p>Suggestion:</p> <p>The scheme rules require that the functions of the governance board include:</p> <ul style="list-style-type: none"> • Appointing the decision-maker; • Agreeing on the budget; • Considering changes to the scheme rules; • Receiving and considering complaints about the operation and performance of the scheme; • Receiving information about, and taking appropriate action in relation to, systemic industry problems referred by the scheme. 	Independence
	Competency	<p>Suggestion:</p> <p>The scheme directors and senior managers must be competent to manage a dispute resolution scheme.</p>	S52(d)

<i>Members' Forum</i>			
	Members' Forum	<p>Suggestion:</p> <p>The scheme considers allocating certain governance tasks to a forum comprised of industry members. Appropriate tasks would be deciding how the budget is to be allocated amongst members, and electing industry representatives to the governance board.</p> <p>A members' forum should not have the power to amend the scheme's rules.</p>	
<i>Appointing Decision-Maker</i>			
	Appointment of Decision-Maker	<p>Suggestion:</p> <p>The scheme rules require that the decision-maker is appointed by the governance board and has no relationship with the scheme members that fund or administer the scheme which would give rise to a perceived or actual conflict of interest.</p>	Independence
	Qualifications of Decision-Maker	<p>Suggestion:</p> <p>The scheme rules provide for the necessary qualifications for a decision-maker, such as legal or arbitration expertise and relevant attributes and experience.</p>	
	Other Staff	<p>Suggestion:</p> <p>The scheme rules require that the scheme staff are independent of members and are to be appointed by either the governance board or the decision-maker.</p>	Independence
<i>Handling Complaints about the Scheme</i>			
	Referred to Governance Board	<p>Suggestion:</p> <p>The scheme rules require that the scheme receives complaints about the operation of the scheme, and refers them to the governance board. This excludes complaints about the content of a determination by a decision-maker, but includes procedural complaints about a determination (also noted above under governance board).</p>	Independence

	Governance Board Recommendations	<p>Suggestion:</p> <p>The scheme rules require the scheme to respond in a timely and appropriate manner to any recommendations of the governance board addressing complaints about the operation of the scheme.</p>	Effectiveness
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Decision-Making

<i>Decision-Maker</i>			
	Function	<p>Suggestion:</p> <p>The scheme rules require the scheme to have a decision-making body/person responsible for the determination of all complaints.</p>	
	Powers	<p>Suggestion:</p> <p>The scheme rules require that the decision-maker has the power to:</p> <ul style="list-style-type: none"> • Recommend that a complaint should be settled or withdrawn; • Uphold a complaint against a member. <p>Suggestion:</p> <p>If a complaint is upheld, the decision-maker has the power to:</p> <ul style="list-style-type: none"> • Recommend a member to take certain actions to make amends; • Recommend a member to pay compensation to the complainant. 	s63(i)
	Independence	<p>Suggestion:</p> <p>The scheme rules require the decision-maker to be independent of the scheme members.</p> <p>Suggestion:</p> <p>The decision-maker is accountable to the governance board rather than the scheme members.</p>	Independence
	Fair and Reasonable Determinations	<p>Suggestion:</p> <p>The scheme rules require that the decision-maker makes determinations based on what is fair and reasonable, having regard to good industry practice, relevant industry codes of</p>	Fairness

		practice and the law.	
<i>Written Determinations</i>			
	Reports	<p>Suggestion:</p> <p>The scheme rules require the scheme to provide written reports of determinations to scheme members and any interested bodies for the purposes of:</p> <ul style="list-style-type: none"> • Educating scheme members and consumers; • Demonstrating consistency and fairness in decision-making. 	Accountability
	Sensitive information	<p>Suggestion:</p> <p>The scheme rules provide for certain types of information to be withheld from published determinations, such as confidential, commercially sensitive, legally privileged or personal information.</p>	
<i>Remedial Action</i>			
	Types of Remedial Action	<p>The scheme rules must provide for the types of the remedial action that the scheme can recommend in order to resolve a complaint.</p> <p>Suggestion:</p> <p>The rules outline when each type of remedial action would be appropriate.</p>	s63(i)
	Not punitive	<p>Suggestion:</p> <p>The scheme rules do not allow the decision-maker to award punitive or exemplary damages.</p>	
	Enforcement	<p>The scheme rules state how remedial action may be enforced against members, including members who have left the scheme subsequent to the determination.</p> <p>Suggestion:</p> <p>The scheme rules also provide for how remedial action is to be enforced on a member who ceases to carry on business.</p>	s63(j) Effectiveness

Accessibility

<i>Promoting the Scheme</i>			
	Publicity	<p>Suggestion:</p> <p>The scheme provides material which is easily accessible and simple to use, explaining:</p> <ul style="list-style-type: none"> • How to access the scheme; • How the scheme works; • Major areas the scheme deals with; and • Limits on the scheme's powers. 	Accessibility
<i>Accessing the Scheme</i>			
	Rules	The scheme rules are expressed clearly and made available to the public, free of charge, at the scheme's head office (during ordinary office hours) and on the internet.	s64
	Processes	<p>Suggestion:</p> <p>The scheme has processes that are simple for complainants to understand and easy to use.</p>	Accessibility
	Easy Access	<p>Suggestion:</p> <p>The scheme provides mechanisms for easy access, such as a free phone number, a freepost service and an online submission form.</p>	Accessibility s63(d)
	Assisted Access	<p>Suggestion:</p> <p>The scheme has measures in place to help customers with special needs, be they socio-economic, cultural, language, geographical or physical needs, to access the scheme and use it effectively.</p>	Accessibility
	Assisted Complaints	<p>Suggestion:</p> <p>The scheme rules do not require a complainant to put a complaint in writing. If a complainant would like, the scheme will record the complaint in writing and send it to the complainant for confirmation.</p>	s63(d)

	Free Access	<p>The scheme rules specify that the scheme is free to complainants.</p> <p>Suggestion:</p> <p>This fact is highlighted in all promotional material.</p>	s63(l)
	Support Persons	<p>Suggestion:</p> <p>The scheme rules provide support persons to complainants. These support persons should help complainants overcome barriers to access, be they socio-economic, cultural, physical or related to the technical nature of the subject matter.</p> <p>Suggestion:</p> <p>Defined vulnerable complainants are permitted by the rules to authorise a person to represent them in all correspondence involving the dispute.</p>	Accessibility
	Other Languages	<p>Suggestions:</p> <p>Schemes provide information about the resolution process in languages other than English which are common amongst its consumers (this could be ascertained by consultation).</p> <p>Schemes provide an interpreter if necessary.</p>	Accessibility
	Legal Costs	<p>The scheme rules provide for the member to pay the legal costs of a complainant where the member is the party seeking to be legally represented and the decision-maker agrees to that request.</p>	Accessibility
	Experts	<p>If a scheme member chooses to engage an expert to give evidence to the decision-maker, then that expert must also be made available to the complainant.</p>	Accessibility
	Informal Approach	<p>Suggestions:</p> <p>The scheme rules are flexible in the way complaints can be made.</p> <p>The scheme rules discourage a legalistic, adversarial approach.</p> <p>The scheme does not require complainants to attend hearings or meetings.</p> <p>The scheme employs other methods to</p>	Accessibility

		resolve complaints, such as emails, phone calls, online forms.	
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Procedural Requirements

	Title	Achievement Standard	FSP Act
	<i>Natural Justice</i>		
	Natural Justice	<p>The rules will state that parties to a complaint are entitled to be treated according to natural justice.</p> <p>Natural justice requires:</p> <ul style="list-style-type: none"> • Adequate notice to be given to both parties of important steps and decisions; • The opportunity for both parties to be heard and for their views to be considered before the decision is made. 	Fairness s63(f)
	Parties Informed	The scheme rules require that both parties are told the reasons for the determination.	Fairness s63(f)
	<i>Other Fairness Requirements</i>		
	Withholding Information	<p>Suggestion:</p> <p>The scheme rules do not allow the decision-maker to compel disclosure of information by the complainant.</p>	Fairness
	Exclusions from Scheme	The scheme rules require that complainants are advised of the reasons why their complaint is outside the jurisdiction of the scheme or otherwise excluded.	Fairness
	Complaint information	<p>Suggestion:</p> <p>The scheme rules require that confidential or sensitive information provided for the purpose of dispute resolution is kept confidential by the decision-making body and its staff, subject to disclosure required by law.</p>	Fairness
	<i>Accountability</i>		

	Written Decisions	<p>Suggestion:</p> <p>Schemes publish summaries of final decisions, with reasons, subject to any confidentiality requirements. The summaries of decisions should be available to interested parties.</p>	<p>Accountability</p> <p>Accessibility</p> <p>Fairness</p>
		<i>Commencement of Legal Proceedings</i>	
	By the Consumer	<p>The scheme rules provide that the complainant may take alternative court action against the member at any time, including if the complainant rejects the resolution. If the complainant takes alternative court action against the member, the scheme may cease investigating the complaint.</p>	<p>s63(o)</p> <p>s63(p)</p>
	By the Scheme Member	<p>Suggestion:</p> <p>The scheme rules provide that after a complaint has been lodged, the scheme member may only lodge legal proceedings in the following circumstances:</p> <p>a. To preserve their legal rights where a limitation period is about to expire, subject to the following conditions:</p> <p>(i) while the scheme is dealing with the complaint, the member will not pursue the legal proceedings beyond the minimum necessary to preserve its rights; and</p> <p>(ii) if the complaint is resolved, whether by agreement or determination, the member will discontinue any aspect of the legal proceedings that is inconsistent with the agreement or determination;</p> <p>b. in test case situations.</p>	
		<i>Efficiency – Referrals and Information Sharing</i>	
	Referring complaints	<p>Suggestion:</p> <p>The scheme rules require that scheme staff have the information, mechanisms and procedures for referring relevant complaints to other, more appropriate, forums.</p>	<p>Efficiency</p>

	Information Sharing about complaints	The scheme rules require that scheme staff have the mechanisms and procedures in place to share prescribed information with other approved schemes, the Reserve Scheme and the Registrar.	S67(a) and (b)
	Systemic Problems	The scheme rules require that there are mechanisms and procedures in place for referring systemic industry problems that become apparent from complaints to the relevant licensing authority. Schemes should also notify scheme members of such issues.	S67(c) Effectiveness Efficiency
<i>Efficiency - Tracking Complaints</i>			
	Systems	The scheme rules require the scheme to keep systematic records of all complaints and enquiries, their progress and outcomes.	Efficiency
	Time limits	<p>Suggestions:</p> <p>The scheme rules require the scheme to have time limits for the resolution of complaints. The scheme is also required to have a mechanism to ensure that the time limits for dealing with complaints are complied with as far as possible.</p> <p>Suggestion:</p> <p>A complaint should be resolved within 2 months of receipt by the scheme. Rules should be in place regarding the extension of this time frame for more complex complaints, or in extenuating circumstances.</p>	Efficiency
	Receipts	<p>Suggestion:</p> <p>The scheme rules require staff to provide complainants with a receipt indicating the acceptance of the complaint within a certain period upon receiving the complaint. The receipt should include information on the process for resolving complaints, including the projected timeframes.</p>	

Funding and Budgeting Requirements

<i>Funding Arrangements</i>		
Adequacy	The scheme rules ensure that the scheme has adequate funding to enable its operation according to the scheme's purpose and in accordance with the scheme rules.	S52(c)
Funded by Members	The scheme rules require that the scheme is funded by the members.	
Transparency	Suggestion: The scheme rules require that the funding arrangements are clear and transparent to stakeholders.	Accountability
Funding Mechanism	Suggestion: The scheme rules state how the funding mechanism is set.	
<i>Budgets</i>		
Budget Setting	Suggestion: The scheme rules provide for a system of budget setting which ensures actual and perceived independence of the scheme from industry, and allows the effective operation of the scheme.	Independence

Compliance Monitoring and Enforcement

<i>Rules to provide for compliance</i>		
Compliance Monitoring	Suggestion: The scheme rules provide mechanisms to monitor member compliance with the scheme.	
Compliance Enforcement	Suggestion: The scheme rules state any mechanisms aimed to ensure compliance, such as naming and shaming, reporting to regulatory agencies.	Effectiveness
<i>Overseeing Entity to Report on Compliance</i>		
Annual Report	Suggestion: The Annual Report includes information on	Accountability

		member compliance.	
	Reports to Licensing Authority	The scheme rules require that if there is a series of material complaints about a particular licensed provider or class of licensed provider, the overseeing entity must report that fact to the relevant licensing authority.	s67

Amending the Scheme Rules (for explanatory purposes)

<i>Amending the Scheme Rules</i>		
Notification	Any changes to the scheme rules are to be notified to the Minister of Consumer Affairs. The scheme rules must not contain any provisions inconsistent with this.	s65
Approval by Minister	The Minister may approve a change to the scheme rules if the Minister considers the proposed change complies with the benchmark principles, and the statutory requirements for scheme rules. The scheme rules must not contain any provisions inconsistent with this.	s66(1)(a)
Rejection by Minister	The Minister may refuse to approve the changes if they are not adequate and do not comply with the benchmark principles and the statutory requirements for scheme rules. If the Minister does not approve the change then the change must not be made. The scheme rules must not contain any provisions inconsistent with this.	s66(1)(b)
Deemed approval	If the Minister does not notify the scheme within 45 working days of the notification of the change, the change is treated as having been approved by the Minister. The scheme rules must not contain any provisions inconsistent with this.	S66(3)

Performance Monitoring Requirements

<i>Performance Standards</i>		
Standards to be set	Suggestions:	Efficiency

		<p>The scheme rules include standards against which the performance of the scheme will be measured.</p> <p>The performance standards set are sufficient to allow external parties to readily determine if the scheme is operating according to the benchmark principles.</p>	
	<i>Annual Reports</i>		
	Annual Reports	<p>The scheme rules require the scheme to provide the Minister of Consumer Affairs with an annual report within 3 months after the end of the scheme's financial year (this timeframe is required by s68)</p> <p>The Annual Report may contain information such as:</p> <ul style="list-style-type: none"> • information about how the scheme works • results of the internal review • statistics on caseload, resolved cases, cases rejected on jurisdictional grounds, the amount of time taken to resolve complaints • results of feedback surveys • some examples of typical cases • information on compliance with the benchmark principles • the list of members • information on performance standards • the results of the independent review, if any independent review has been conducted that year • financial statements which sufficiently illustrate how the funding is being utilised • a list of scheme members who committed substantial breaches of their membership obligations • any systemic issues arising from complaints, and how those issues have been dealt with • information about new developments 	<p>Accountability</p> <p>s68</p> <p>s69</p>

		or key areas in which policy or education initiatives are required.	
	Annual Report Publicly Available	The scheme must have copies of the Annual Report available to the public at the scheme's head office and on the internet.	s70
<i>Independent Review</i>			
	Scope of Review	The scheme rules require an independent review of the scheme.	s63(q) Effectiveness
	Terms of Reference	Suggestion: The scheme rules require that the terms of reference for any independent review will be determined by the governance board following consultation with the Ministry of Consumer Affairs.	Effectiveness
	Reviewer	Suggestion: The scheme rules require the independent reviewer to be appointed by the governance board following consultation with the Ministry of Consumer Affairs.	
	Frequency of Review	The scheme rules require that an independent review must occur at least once every 5 years after the date of the scheme's approval.	s63(q)
	Supply to the Minister	The scheme rules require that the independent review must be supplied to the Minister of Consumer Affairs within 3 months of completion.	s63(q)
	Independent Review Publicly available	Suggestion: The scheme makes copies of the Independent Review available to relevant stakeholders. Suggestion: A summary of the independent review is included in the Annual Report for that financial year. The Annual Report is required by s70 to be made available to the public at the scheme's head office and on the internet.	Effectiveness

Exit Requirements

<i>Winding up the scheme</i>			
	Request to Minister	The Minister of Consumer Affairs must withdraw the approval of the scheme upon the scheme's request.	s56(3)
	Date of Effect	The removal of approval takes effect from any future date requested by the scheme.	s56(3)
	Transfer of Members	The scheme rules require the scheme to give its members adequate notice to make arrangements to join another approved scheme if the members wish. If no alternative arrangements have been made then members will automatically be transferred to the reserve scheme on the date of effect.	

Appendix 2: The Australian Benchmarks

The Australian Benchmarks for Industry-Based Customer Dispute Resolution Schemes are directly incorporated into the Act in section 52(2). They provide the key standards for schemes to meet. The benchmark principles were developed by the Consumer Affairs Division of the Australian Department of Industry, Science and Tourism, in consultation with the New Zealand Ministry of Consumer Affairs. The benchmarks were chosen as an illustration of international best practice in consumer dispute resolution schemes.

- **Accessibility:** The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
- **Independence:** The decision-making process and administration of the scheme are independent from scheme members.
- **Fairness:** The scheme promotes decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
- **Accountability:** The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
- **Efficiency:** The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
- **Effectiveness:** The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Examples of how the benchmarks might be incorporated into a scheme's rules are discussed in Part Four.