New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Banking Ombudsman Scheme

on the

Consultation on proposed rule changes

13 December 2024

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen registered banks in New Zealand are members of NZBA:

   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - China Construction Bank (New Zealand) Limited
   - Citibank N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank N.A.
   - KB Kookmin Bank Auckland Branch
   - Kiwibank Limited
   - MUFG Bank Ltd
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Contact details

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

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Banking Ombudsman Scheme (**BOS**) on its consultation paper on proposed rule changes (**Consultation**) following Deborah Hart's independent review. NZBA commends the work that has gone into developing the Consultation.

5. We support changes that make BOS more accessible for customers and ensure fair and balanced consideration of banking industry issues and practices.

6. However, we strongly recommend deferring some rule changes until the banking industry finalises its work around authorised payment scams. Banks will make several scam protection commitments and introduce a framework to address failures to meet those commitments. Some of the proposed rule changes directly address matters intended to be covered by that framework and need further discussion to ensure consistency.

7. We also anticipate needing to engage and adjust content in the Fraud Practice Note and would like to understand if BOS plans to amend the Operational Guidelines (dated 18 October 2024).

8. Although not explicitly stated, we assume that any rule changes will not be applied retroactively, and will take effect from the amendment date.

9. Our specific responses and feedback on the four recommendations are set out below.

Recommendation 1

BOS should amend its terms of reference so it can deal with complaints against recipient banks, provided banks amend the Code of Banking Practice to institute rules relating to recipient banks, which BOS should encourage them to do.

Timing of implementation

10. NZBA supports changing the rule to allow BOS to consider complaints about a recipient bank only in connection with authorised payment scams. We accept that receiving banks have a key role to play in the protection of customers from fraud and scams.

11. However, we strongly recommend deferring this change until the industry completes work on the framework for authorised payment scam compensation and related updates to the Code of Banking Practice (**Code**) to ensure consistency. This is consistent with the independent review's report, which notes at section 6.4.3.1 that "an applicable code or legislation setting out obligations on recipient banks" is required first.

12. We recommend deferring this change because if it is not aligned with changes to the Code and the banking industry's commitments on authorised payment scams, it may create inconsistencies and risk including scenarios outside of that framework, or where there is no evidence of widespread issues previously being investigated (such as payment disputes about supply or quality of goods and services or actions of direct debit initiators, or where banks act as agents or intermediaries).

13. We also note that the banking industry's commitments on authorised payment scams will require technological changes, including to enable banks to share mule / digital fraud identifier information as part of our data exchange / fraud reporting exchange initiatives. Specific service levels and industry processes will be developed and agreed and will impact on this proposed change.

14. NZBA also considers that any changes to the terms of reference should align with the rollout of changes to the Code and the commitments the industry will meet.

Scope of implementation

15. We do not agree that the rule should extend to complaints about recipient banks in other payment situations, including mistaken payments where customers accidentally pay the wrong person.

16. The explanation given in the Consultation relates specifically to scams / recipient banks and mistaken payments, which aligns with the wording in Option Two. However, the proposed drafting of the rule change is much wider, where BOS can consider a complaint "about any bank involved in the banking service, including banks that receive payments". We would like to understand what other scenarios (other than in the recipient payment context) that BOS would consider a complaint against a bank by a non-customer.

17. Banks will face practical challenges in responding to non-scam related payment complaints from non-customers. Banks will have limited records on the processing of an inward payment and may be unable to use its customer's account records to address the complaint for privacy reasons. Nor is there any current legal responsibility to a third party, or other contracts or terms & conditions that would govern that relationship or the activities the bank performs in that context.

18. Further discussion is needed on the privacy issues that arise in relation to payment complaints about a recipient bank. A receiving bank will not be able to disclose any information to BOS or the complainant about its customer or the details of transactions on their account without that customer's consent.

19. Importantly we believe that Confirmation of Payee, which allows customers to check the name of the person they intend to pay matches the name on the account for domestic payments, will help to reduce these types of events, as has been seen overseas. We do not see a clear driver for change in light of this development.

20. To the extent there are drivers for change, these are likely to be addressed through other legislative and regulatory changes that may affect the liability assessment of receiving banks, meaning changes to the terms of reference are likely unnecessary. For example:

    20.1. The Government has announced further amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, which will impact several obligations including customer due diligence requirements.

    20.2. The Commerce Commission has recommended to the Minister of Commerce that the interbank payment network is designated under the Retail Payment System Act 2022 to drive competition and efficiency, including through real time payments.

Recommendation 4

BOS should consider a rule change to enable claimants to waive the amount of their claims in excess of the jurisdictional limit.

21. As a general comment, and as noted above, we consider that any change to this rule should align with the finalised outcome of our updates to the Code in respect of authorised payment scams.

22. We support Option One, which keeps the compensation limit at $500,000 and allows larger claims only if both parties agree.

23. We would only support Option Two, which would allow a complainant to limit their claim to $500,000, if:

    23.1. it is limited to authorised payment scam cases;

    23.2. the customer waives any rights to recover amounts over $500,000; and

    23.3. complainants would not be allowed to divide a single claim relating to the same set of facts into separate claims in order to bring them within the jurisdictional limit.

24. An appropriate and well-defined operational process would need to be agreed if this approach is taken.

Wider dispute resolution framework considerations

25. Changes to the Financial Service Providers (Rules for Approved Dispute Resolution Schemes) Regulations 2024, made in July 2024, aligned the compensation limits for all external dispute resolution schemes. We believe BOS should not deviate from this policy.

26. The Ministry of Business, Innovation, and Employment (**MBIE**) set the limit at $500,000, to be reviewed every 5 years. We suggest BOS consult with MBIE to ensure the limit remains aligned with other dispute resolution schemes, to avoid unintended outcomes.

27. The Consultation justifies the proposed change using six scam cases. We are concerned about unintended consequences for customers and the banking industry in non-scam dispute cases.

28. We also want to ensure customers do not limit their claim to test their position before taking further legal or court action.

29. We do not think the independent review intended for the compensation limit to be waived in all scenarios. BOS is designed to provide simple resolution for customers, considering the law, relevant codes, and good banking practice, including fairness. We believe the courts are better suited to handle significant claims that are not scam-related (where customers may face barriers in bringing proceedings).

30. The Government's decision to align compensation limits for dispute resolution schemes aimed to ensure judicial fairness, appropriate decision-making, and effective avenues of appeal, for all parties. Complaints involving contract interpretation or other commercial matters are better resolved through the courts.

31. Allowing a customer to limit their claim requires care. Limiting their claim for BOS's review is different to waiving their right to recover the additional amount. This could lead to customers seeking to recover the balance through other channels, creating unfairness and unnecessary compliance costs as customers are not bound by a Scheme's decision.

32. Customers need to waive rights to recover the balance and be bound by BOS's decision, in a form a participant bank can rely on and enforce. The proposed rule change does not go far enough in this regard.

33. We also query how this proposal would be managed in respect of BOS's usual apportionment of liability when it considers there is shared liability in respect of a complaint. For example, if BOS considers that a 60/40 split of liability is appropriate given the facts of a case, would the 60% compensation paid by the bank be capped at $500,000, or would the total 100% be capped at this level? This may be further complicated if the complaint involves both a paying and receiving bank.

Recommendation 7

BOS should amend its rules and operational guidance to reflect that BOS may seek expert advice from a range of experts as it thinks fit.

34. We support BOS seeking expert advice where appropriate. However, it is crucial BOS consults the banking industry, as its participants. We consider BOS must also share expert advice and recommendations with the banking industry. Engagement and transparency of decisions are essential for dispute resolution schemes to maintain trust, confidence, and fairness, leading to better outcomes for all parties.

35. As stated above, we do not support removing the requirement to consult the industry, and therefore submit that the highlighted wording below, which is currently included as part of clause 9 of BOS's terms of reference, must be retained:

> *9. In making any decision, BOS must be fair in all the circumstances, having regard to the law, any relevant code of practice, and principles of good industry practice. (BOS must consult the banking industry in determining these principles)*

36. While we do support BOS consulting with relevant experts, industry, and consumer advisors, there should be clear, public and robust operational guidelines outlining:

    36.1. How experts will be identified and appointed: this can be difficult to quantify for experts in, for example, the vulnerability or consumer advocate spaces. The range of subject areas in which BOS will appoint experts should be specified in this framework. We would also expect experts would be subject to similar rules regarding independence as is the case in, for example, legal proceedings.

    36.2. How the banking industry is engaged: for example, how the industry is advised and consulted. Clarity on how experts' services are paid for, and whether this would be recharged to banks, is also needed.

    36.3. How findings and results are shared: would the view or written report of an expert be available to be reviewed by the industry, or does BOS propose for these to be internal reports.

    36.4. How privacy laws apply: rules, operational guidelines and agreements that clearly set out how and when sensitive information can be shared with relevant experts (which should only be with the agreement of the bank).

    36.5. How the industry can test or challenge conclusions if there is a disagreement.

37. As participants are bound by BOS's decisions, a fair and transparent approach with consultation and ability to challenge findings is critical for procedural fairness. This can be done while respecting legal privilege where applicable. BOS should also explain the weighting given to expert advice in any decisions.

38. Engaging experts outside of New Zealand needs care. While it is appropriate to look at the practices of other external dispute resolution providers like the Australian AFCA, the UK FOS, and Canada's OBSI, these jurisdictions often have different laws, codes

and industry practices. Visibility on how overseas approaches influence decisions is crucial for fairness.

39. New Zealand laws apply and New Zealand courts have jurisdiction under BOS's Participation Agreement. BOS can consider guidance from international experts, but must apply New Zealand law, codes, and practices in its decisions, especially when relying on its fairness jurisdiction.

40. We are willing to explore how experts could be appointed by BOS to support complex complaints, including the necessary objectivity, qualifications, and experience.

41. We also suggest enhancing BOS's approach to industry surveys with a clearer structure, outlining all relevant facts, appropriate response timeframes, feedback on findings, and the ability to discuss further is essential. We are happy to work with BOS to determine an effective engagement model.

Recommendation 8

BOS should amend its rules to change "principles of good banking practice" to "principles of good industry practice.

42. Further context on the rationale for this change would be helpful – i.e., what problem is this change proposing to solve? We note that BOS already deals with 'other kinds of banking-related disputes, such as insurance and finance'. We would welcome the introduction of scenarios or examples that may clarify this position.

43. However, if intended for clarification only, rather than altering the current scope of services considered, we support, in principle, the proposal to change "good banking practices" to "good industry practices" – provided it is clear that the "industry practice" referred to is only relevant to the services offered by banks, and banks are assessed against the activities of their peers in the banking industry and not wider.