



Submission to Commerce Commission on draft consumer remediation guidance for businesses

August 2022

Background

Mosaic is a consultancy firm, focusing on improving operational performance for financial services firms. Our views are shaped by our experience working across the financial services sector, with a range of clients from large banks, insurers and fund managers to boutique providers.

Mosaic and its clients have an interest in and welcomes the opportunity to provide feedback on the draft consumer remediation principles for businesses. Mosaic would also welcome the opportunity to discuss our submission and the current approach to remediation by financial service providers with the Commerce Commission (the Commission).

Summary

We recognise the timely and helpful nature of this remediation guidance. It will assist businesses to undertake customer remediations more effectively and in a way that meets the expectations of the Commission and consumers.

We support the principles-based approach the Commission has taken in the guidance and have provided detailed comments and suggestions below. Some key points from our submission are:

- Alignment is sought across the Council of Financial Regulators (CoFR) to guidance issued regarding remediation.
- The guidance should include more detail and consideration of remediation actions beyond compensation.
- More examples used throughout the guidance would improve businesses understanding of the Commissions expectations.
- Consideration be given to the inclusion of a *de minimis* principle which would apply in appropriate circumstances.

Specific Feedback

1. General comments

- 1.1. It is very helpful to have such clear, principles-based guidance from the Commission. This recognises the different scales and complexities of remediation activities.
- 1.2. It would be beneficial to ensure alignment across CoFR so any future guidance from other CoFR members share similar principles or one set of remediation principles can be issued by CoFR.
- 1.3. The guidance is very heavily focused on compensation. It would be good to see more detail on refunds, corrections (providing information or undertaking actions to remedy error) and (the rarer cases of) recovery. There may be different tax treatments of different types of payments (compensation or refund) so it is important to be clear about the terminology used and other actions required for remediation such as corrective disclosure or the undertaking actions to correct the error. This should include the acknowledgement that sometimes multiple types may be required concurrently.
- 1.4. The guidance refers to “breach” or “likely breach” throughout. A breach will only be confirmed by a court or regulator. It would be useful to use the word “issue” or similar instead of “breach” or “likely breach”. We note that “issue” has been intermittently issued on this basis but is not consistent. This approach will support remediation outcomes occurring in advance of a likely, or actual breach being confirmed.
- 1.5. The example given in para 13.4.4 of how an organisation can assist customer self-identification provides additional guidance on how to interpret the principle. More examples like this through the guidance would further assist in explaining the Commission’s expectations.
- 1.6. To assist interpretation, having a section for defined terms would assist businesses. For example, the terms: “compensation”; “residual remediation payment”; “low-value minimum threshold”; “minimum value threshold”; and “time-cost-of-money component”.

2. Approach to remediation (para 7-10)

- 2.1. We support the key principle that consumer remediation is to “put right” the harm caused. As the concept of harm may be wider than just in “likely” breach situations, it would be of assistance to provide examples and/or more detail on the types of harms caused and link these directly to the issue (“likely breach”).
- 2.2. The reference in paragraph 7 to “Each remediation process will be different....” seems a different point to “put right” as a principle. Because of the principles-based nature of the guidance, it would assist business to focus on the core principle of “putting it right” by not including this last sentence in that principle. Instead, this sentence seems to better relate to para 8, as it relates more to the process rather than the purpose of the remediation.
- 2.3. Paragraph 9.5 refers to “being objective, unbiased and fair to consumers”. Given the inherent conflict of interest by the business, being objective and unbiased will be difficult for businesses to demonstrate. We believe the concept of “fairness” on its own, acknowledging its subjectivity, is a suitable approach to ensure that businesses adopt a

consumer-focused approach. Noting that fairness is repeated in the next principle at paragraph 10.

- 2.4. We are concerned at the broad statement in paragraph 10.3.2, around the necessity of customers participating in the process to assess their individual circumstances. It is our view the business is already obliged under paragraph 10.3.1 to consider consumer's individual circumstances.
- 2.5. We propose more guidance is required on the detail in paragraph 10.3.5 about not taking a legalistic approach to limit consumer entitlements. In particular the use of other timeframes businesses could look to when identifying affected customers, particularly if the issue is historic or relates to periods when legal obligations were not in force.
- 2.6. The reference to "avenue for consumers to seek independent review" in paragraphs 10.3.7, 14.1.4 and 14.1.5 is a repetition of financial service providers obligation to belong to an approved external dispute resolution scheme (AEDRS) (and AEDRS require their participants to have an internal complaint process). Most issues can be resolved through the internal complaints process so customers should be directed there first.

If businesses, who are not financial service providers, are not members of an approved external disputes resolution scheme then this may place an additional obligation on them. If the intention is that all businesses governed by this must belong to an external dispute resolution organisation, then this paragraph lacks the detail needed for them to address this principle.

- 2.7. Paragraph 10.4.5 is repeated in paragraph 13.4.4. We proposed that this removed and addressed solely in paragraph 13.4.4 which is more comprehensive.
- 2.8. It would be helpful to have more detail about paragraph 10.4.6 regarding feedback. It is not clear from the guidance who businesses should be looking to get feedback from or when this feedback should be sought, nor that proactive avenues for feedback are required at all.

3. Calculating compensation (para 11)

- 3.1. We recognise that the focus of remediation activities in the guidance is on compensation, so the more focused detail on how compensation is calculated will assist businesses. To assist businesses further, it would be helpful to have more detail or examples in paragraphs 11.1.1, 11.1.2 and 11.1.4, as these are areas where there could be multiple interpretations of the Commission's expectations.

4. Other issues requiring guidance for calculating compensation

- 4.1. We believe that the principles should include a provision for a concept of *de minimis*. In our experience, in practice it is often practical to adopt a *de minimis* rule to avoid causing problems and inconvenience for customers when trying to refund or compensate very nominal sums.

Paragraph 13.3 includes the ability for an organisation to not pay compensation where the cost of tracing and contacting a customer is disproportionate to the amount of the compensation. There is also a reference in paragraph 18.1.5 to "low-value minimum

threshold”. We believe this is a reference to a *de minimis* concept and could be explicit by way of inclusion in section 11.

It would be of value to include both concepts together and provide greater detail on what the “low-value minimum threshold” is, the circumstances it would be appropriate and how decisions around it should be documented.

5. Engagement with consumers (para 12-15)

- 5.1. The references in paragraph 13 to engaging with consumers through a range of channels (including SMS and social media) and other methods may create some privacy concerns given the personal information that may be provided or collected as part of a remediation. Has the Commission had advice on the privacy aspects of this guidance? We would suggest that 13.1.2 be constrained to ways in which the consumer has consented to be contacted.
- 5.2. See earlier comment at 2.6 in relation to paragraphs 14.1.4 and 14.1.5 where we believe it is appropriate for consumers to be initially directed to the business’ internal complaint process before engagement with external complaints organisation for review.
- 5.3. Point 15.1.1 provides priority on compensation being returned as ‘credit’. This may be particularly relevant for financial entities, but may confuse alternative business types, i.e., it may be interpreted as a ‘credit note’ or credit to an invoicing account already paid. We would suggest that some customers may prefer a refund, credited to an existing account or an alternative account, rather than referenced to as a ‘credit’. While the option of a ‘credit’ may be applicable to some business types (i.e., store credit), we suggest this is not the priority for customer financial remediation.
- 5.4. In relation to the reference to cheques in paragraphs 15.1.2, domestic cheques ceased to be issued and accepted by New Zealand banks on 31 August 2021¹.
- 5.5. It would be helpful, particularly to smaller businesses, to provide examples or more explanation of what the Commission considers “secure methods” for consumers to provide updated bank account details.

6. Governance and Record keeping (para 16-18)

- 6.1. We agree it is important to have appropriate governance and assurance over remediation activities. It may assist, particularly smaller businesses, to make clear that existing governance structures may be able to be utilised for these purposes.
- 6.2. There are two unrelated references to public reporting in the guidance: paragraphs 16.1.4. and 19. We believe the reference at 19 should be removed because the main focus of the remainder of this paragraph is on the need for legal advice or independent expertise.
- 6.3. We are concerned with the wide scope of the statements in the guidance at paragraphs 16.1.4. and 19 regarding the public reporting of remediations. Remediation activities may also overlap with engagement with regulators and/or court processes. Businesses may risk inadvertently interfering with these processes by providing public information without more clarity and detail in the guidance about the scope of what the Commission’s intention and expectations of this public provision of information would be.

¹ [December 2021 update | Payments NZ](#)

6.4. See comments at 1.6 and 4.1 above regarding the meaning of the term “low-value threshold” in paragraph 18.1.5.

7. Other feedback/ comments

7.1. The section at paragraph 19 and 20 regarding advice, we believe should also include a reference to seeking tax or accounting advice to assist with the design and implementation of the remediation programme. This will be particularly important for smaller businesses who do not have this expertise internally.

7.2. The guidance in paragraphs 21 -23 about the Commission’s approach to considering remediation activities in its investigations provides good clarity for businesses.

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