

# **Five Yearly Review**

## **Financial Services Complaints Limited**

Sir David Carruthers KNZM

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**Independent Review of Financial Services Complaints Limited  
(FSCL)  
March 2020**

**1. Background**

- 1.1. Financial Services Complaints Limited (FSCL) operates an independent resolution scheme established in 2010 and approved by the Minister of Consumer Affairs under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the FSP Act). The role of FSCL is to resolve complaints by consumers about financial services and advice provided by their financial service providers, who are participants in the FSCL scheme, which includes those relating to insurance, loans, financial advice, managed funds and trustee and related services.
- 1.2. FSCL is a not-for-profit company funded by a combination of membership and complaint activity fees levied on participating financial service providers (members). The service of resolving disputes is provided to consumers free of charge.
- 1.3. FSCL is governed by a Board of Directors, part of whose governance role is to protect the independence of its decision making and to ensure that the processes which are employed are independent of the scheme members.
- 1.4. Section 63 of the Act requires that every five years an independent review of the Scheme is to be completed within the requirements of the statutory framework.
- 1.5. The Board of FSCL has appointed the Reviewer to conduct this review. The purpose of the review is to ensure that the Scheme is meeting its standard approval criteria of independence, fairness, accessibility, accountability, efficiency and effectiveness.
- 1.6. In this Review the Board has asked for those headings to be addressed as part of the Review, but has asked the Reviewer to consider in particular the principles of fairness, independence and accessibility as key criteria for FSCL at the present time.

- 1.7. Among the questions asked of the Reviewer are the following:
- (a) are the Scheme's promotional activities adequate and appropriate for today's requirements;
  - (b) are there any barriers to use of the Scheme by consumers;
  - (c) is there anything more or different which could be done to make the Scheme more accessible to all consumers;
  - (d) is the Scheme's process transparent and clear;
  - (e) does the Scheme's process sufficiently allow both parties to the dispute to be heard;
  - (f) are principles of natural justice met;
  - (g) does the Scheme demonstrate a rigorous and credible approach to reaching its decisions and giving adequate reasons for those decisions;
  - (h) is there anything more or different which could be done to improve fairness; and
  - (i) is there anything more or different which could be done to ensure the Scheme's independence.
- 1.8. A copy of the Terms of Reference for the Review (ToR) is attached as Appendix A.
- 1.9. The Reviewer has previously held office as the Chief District Court Judge for New Zealand. He has been the Chair of the Independent Police Conduct Authority and is currently a member of the New Zealand Insurance Council's Code Compliance Committee. He has been a sitting Judge for many years and continues to be involved in the training of judicial officers in various Pacific Islands. In these and other ways the Reviewer has had significant involvement with complaints processes, with governance and management issues, and with issues which relate to the criteria mentioned above.

1.10. The ToR also detail further requirements for the assessment of FSCL's performance and ask the Reviewer to assess its performance against the Scheme's terms of reference and, in particular, the requirement to resolve complaints in a co-operative, efficient, timely and fair manner whilst proceeding with minimum formality and technicality. He is also to review FSCL's processes to ensure consistency and high quality decision-making in resolving complaints on their merits, and to do what, in its opinion, is fair in all the circumstances, having regard to the law, any applicable legal rule or judicial authority, general principles of good industry practice and any applicable code of practice.

## **2. Executive Summary**

- 2.1. As an overall conclusion I can confirm that I am satisfied that the Financial Services Complaints Limited is a very well-managed, professionally run Scheme which provides an excellent service to users.
- 2.2. In my view it fully complies with the provisions of the FSP Act. There is an excellent environment for its operation both internally in the sense of its operational management and externally in the sense of the governance oversight provided by its Board.
- 2.3. I am satisfied that the scheme is very well led and provides an effective and efficient service. The service it provides is both timely and professional and it fully complies in my view with the six principles which are set out in the legislation and are drawn from the benchmarks for industry-based customer dispute resolution which are set out there. These aspects of accessibility, independence, fairness, accountability, efficiency and effectiveness have all been covered by me in this Report. I am satisfied that those principles are given proper effect by the organisation. I have made some comments and recommendations which will enhance some of those matters for the future.
- 2.4. In summary, I am satisfied that the scheme meets all of its objectives and that the service is of a very high standard.

### **3. Recommendations**

#### **3.1 Risk**

The biggest risk to the organisation is also its biggest strength. It is that of the CEO, Susan Taylor, who has been the CEO since it began operations. She has the loyalty and respect of all staff and of her Board and in my opinion, it is well earned. But succession planning, which has been talked about by the Board for some time, has not advanced at all and it is crucial that there be such a plan in the event that she does not wish, or is not able, to continue in office.

#### **3.2 Resources**

I will refer to criticism made by a few members of the excessive resources now available to FSCL. It is true that there are healthy reserves. I do not however support the return of any of those reserves to members or a diminution of the level of contribution for the reasons already given. The resources in my view are sensible and should be safeguarded at the present time.

#### **3.3 Members**

There appears to be reasonable stability of membership across the various schemes at the present time. Whether that will continue is hard to predict. What is important, however, is that the standard of operation continues to be as high as I have observed. But there is also a need to ensure that members' own internal dispute mechanisms are monitored and enhanced by FSCL to proper standards. At the moment this is applied unevenly and needs action.

#### **3.4 Accessibility**

This is an issue which find its way across a number of aspects of the national life of New Zealand at the present time.

Internally I am satisfied the services provided by FSCL are well organised in a professional and clear way. Once access to the organisation is achieved then the services are provided are very good indeed.

Externally however there is a lack of knowledge of the existence of FSCL and indeed of other alternate dispute resolution schemes. And then there are barriers to its use. There are a number of aspects which must be addressed in a



collaborative way to redress this absence and these barriers. A coordinated effort across all Schemes accessing those organisations and people who are likely to be in contact with vulnerable parts of the New Zealand population is an important aspect of that. Community law centres, Salvation Army, budget advisers, and churches are an obvious source of information to such people and should be accessed in a planned and collaborative way with others. FSCL needs to develop a focussed accessibility strategy effort in order to be available to vulnerable communities and part of that plan must involve collaboration with other Schemes.

I also make some comment about the importance and nature of necessary Government involvement in this area and I confirm those views.

### **3.5 Natural justice**

Natural justice rules in common law terms require that any party who is to be adversely affected by an outcome or decision be given a chance to respond to it before that decision is promulgated. FSCL has a practice of giving its preliminary view to all parties to a dispute. In my view that is unhelpful and has been shown to lead to difficulties. In my view a reversion to the traditional model is sensible, as I have recommended in paragraphs 12.5 et seq.

### **3.6 Public good and reporting**

There are two aspects to this heading. One of the values of a service such as FSCL is in the collection of data and the ability to interpret patterns and trends so as to advise members and others about them, in order to prevent complaints in the first place. Such data would also assist in making submissions about any envisioned changes.

3.7 Secondly, as from 29 June 2020 there is a duty to report to regulators on “material” and “likely material” breaches. There will be uncomfortable matters to be faced, with a potential conflict between members’ expectations of confidentiality and the duty to report. Systemic issues which are thus identified are already included in FSCL’s own terms of reference and require FSCL to refer these to the relevant member for action and also to the “relevant licensing authority”. Dissemination of information to government agencies, with a mandate to collect it, is important and will need to be supported by good data

collection processes. That is only just beginning and will require further planning and action. Such plans are urgently required and will necessarily be associated with IT updates. The schemes will also need to revise any existing Memoranda of Understanding or enter into new Memoranda of Understanding with the regulators, once the regulators have told the schemes what types of breaches they consider to be “material”.

The need for a uniform approach by Schemes in this area is important to avoid exacerbating, in an unprincipled way, obvious aspects of the competitive environment.

#### **4. Scope of Review**

- 4.1. The Reviewer has interviewed members of the staff of FSCL and all of the members of the Board and the chairperson. The Reviewer has also reviewed the Scheme's own terms of reference and FSCL's written procedures, systems, websites and other material, and has reviewed well over 40 dispute and complaint files.
- 4.2. The Reviewer has also conducted interviews with Ministry of Business Innovation and Employment (MBIE) representatives, the Financial Markets Authority (FMA) and other Ministry representatives, participants and consumer representatives. The Commerce Commission elected to provide a written submission.
- 4.3. The Reviewer has also conducted telephone interviews of numerous previous complainants and people who have contacted FSCL with an enquiry but have not lodged a formal complaint.
- 4.4. Finally, the Reviewer has met with the responsible Minister, the Honourable Kris Faafoi, Minister of Commerce and Consumer Affairs, to discuss his expectations of dispute resolution schemes and possible future plans.

## 5. History

- 5.1. FSCL has been operating since May 2010 and began investigating complaints in January 2011. It is governed by a board consisting of two consumer representatives, two industry representatives and an independent chairperson. It currently has a staff of 11 people, including its chief executive officer (CEO), Susan Taylor, who has been chief executive officer since October 2010. FSCL has over 7,800 Scheme participants drawn from all sectors of the financial services industry, except for retail banking and life insurers.
- 5.2. This review is required to assess the Scheme over the last five years, but the focus has been predominantly on the Scheme in its current form, using its current structures and exercising its present jurisdiction and operational priorities.
- 5.3. It is recognised that there have been significant changes in personnel and structure over the last five years, but it is thought that although annual reports and minutes show what has occurred over that time, there is little to be gained from analysing former processes and practices which have now been superseded. The concentration is on the present-day operation.
- 5.4. I add, however, that there is no evidence to suggest that FSCL was not operating and performing effectively over the whole of the period of this review.

## 6. Context

- 6.1. This review takes place in the context of significant changes and public scrutiny. The Royal Commission into Banking and other services in Australia, the recent changes to legislation in New Zealand, and the discussion papers and announcements by relevant Ministers about possible further change have heightened the public interest in FSCL and the other approved schemes.
- 6.2. There have been a significant number of legislative changes with more possibilities of change presently being considered.
- 6.3. Over the previous year, FSCL has been involved in the passing of the Financial Services Legislation Amendment Act. This introduced licensing for financial advisers and a number of new legal duties, including the duty to prioritise customers' interests.

In addition the Act amended section 67 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 so that FSCL and other dispute resolution schemes will have to report material breaches and likely material breaches of relevant legislation, including financial markets legislation, to the appropriate regulators.

- 6.4. A new Code of Professional Conduct for Financial Advice Services will apply to all advisers from 29 June 2020.
- 6.5. There have also been reviews of the Credit Contracts and Consumer Finance Act 2003, the Fair Insurance Code and insurance contract law. Those reviews are complete or ongoing. The revised Fair Insurance Code is to be implemented on 1 April 2020.
- 6.6. There have been recent reports by the FMA and Reserve Bank into the conduct of banks and life insurers, all of which aim to lift standards within the industry and to improve customer experience when dealing with financial advisers or financial service providers. In late December 2019, the Minister of Commerce and Consumer Affairs introduced into Parliament legislation regarding the Conduct of Financial Institutions (COFI).

- 6.7. The recent law changes and discussion of further change have brought about an increase in work for FSCL and different challenges and demands.
- 6.8. Susan Taylor as CEO of FSCL has been involved in submissions and discussion with the appropriate government departments regarding these changes, and that involvement continues.
- 6.9. New responsible lending obligations for lenders and the Responsible Lending Code have been in effect now since mid-2015, bringing with them additional responsibilities and the possibilities of further complaints. The CEO is a member of the advisory group for the Code.
- 6.10. FSCL also made submissions on the Farm Mediation Bill (now Act) and it is now considering whether to have one of its case managers/mediators apply to be an approved mediator for the farm debt mediation scheme.
- 6.11. Finally, this Reviewer met with the Minister of Commerce and Consumer Affairs to discuss possibilities for the future. There are political decisions yet to be made but it is very clear that there is at the present time substantial government scrutiny of financial service providers, their regulation and the way in which complaints are made about those services. The rate and extent of change is not expected to slow down and will inevitably result in more complaints being made to FSCL and other schemes.
- 6.12. A particular concern picked up later in this review, and mentioned by the Minister, is concern about accessibility of services. This is a subject which does have a direct relationship to this review of FSCL's operations.
- 6.13. The Australian action in merging three previous complaint resolution schemes into one new Australian Financial Complaints Authority (AFCA), is relevant to the issue of accessibility, and will no doubt be part of the scrutiny to be expected at some future time.

## **7. Current operations and processes**

### **(a) Operations:**

- 7.1. Under the FSP Act, four dispute resolution schemes have been approved, two of which are most significant for the purposes of this review.
- 7.2. FSCL was the first scheme to be approved in April 2010. It now has some 7,800 Scheme members. The largest areas of work are consumer credit and travel insurance, although some other insurance is necessarily involved. Complaints about financial advisers are increasing
- 7.3. The Insurance and Financial Services Ombudsman (IFSO) Scheme was later approved and that scheme opened up membership to other financial service providers as well as insurers, who had previously made up its entire scheme membership.
- 7.4. In its most recent report IFSO confirms it has 4,770 members comprising 53 insurance companies, 2,209 financial advisers, 520 financial adviser businesses and 1,988 other financial service providers. The two largest areas of complaint to IFSO were fire and general insurance and health, life and disability insurance.
- 7.5. The Banking Ombudsman Scheme was established in 1992 and later approved under the FSP Act. There are 19 members in that Scheme comprising all major banks and a building society. That Scheme has made a deliberate decision that it will not be involved in any other than the major retail banking institutions.
- 7.6. Financial Dispute Resolution Service (FDRS) was approved in 2014. This had been in existence earlier as a government scheme. It is operated by Fairway Resolution Limited, which is a conflict resolution company. It resolves disputes in a broad range of areas, largely ACC and Family Court disputes. In the latest report available to me FDRS had 1,874 scheme members.
- 7.7. This is therefore a competitive environment for approved dispute resolution schemes. This has been the subject of discussion over the years and has again been discussed in all of the recent five yearly reviews of the Schemes.

- 7.8. There have been international moves towards having only one dispute resolution scheme and not a number, as in New Zealand, which compete with each other. There are arguments both ways. It is of interest that the Australian government has decided on one scheme and has set up that scheme. Inquiries have been made about its operation which will be later reported on. But when I met with the Minister, he did not indicate any interest in pursuing that matter further at this time. This review must be conducted on the basis of the existing law so there is no point in recanvassing once again the theoretical arguments.
- 7.9. But the subject is, however, of relevance to this review in one important respect. One of the arguments about a competitive arrangement between the resolution schemes is whether such an environment is conducive to a fair result for consumers or whether it plays into the hands of members. In other words whether the Schemes are truly independent. The problem is that it is not a competitive field for the consumers/complainants (who have no choice about who they use). It is only competitive for the members, who can be expected to choose the scheme that provides them with the best service in terms of their own interests.
- 7.10. An easy criticism of these schemes therefore is that as they are member-funded, there is likely to be a bias in favour of those who do the funding. As will be said later, I have found that not to be true. In fact, if there is a bias, it seems to me that it is in favour of the consumer rather than the funder, and I have not been troubled by any concerns about lack of independence. The Board of FSCL is energetic and active in ensuring that independence is protected, as are the Chief Executive Officer and members of staff.
- 7.11. Issues to be dealt with later are those of accessibility and consistency of outcome. These will be discussed below.
- 7.12. I am aware that MBIE is scrutinising all Schemes' Terms of Reference to ensure consistency on issues such as the monetary caps; timing of membership and jurisdiction issues; and timing requirements for bringing a claim. I am confident that any discrepancies between the Schemes in those aspects will receive proper attention and need not be part of this Review.



- 7.13. What needs to be acknowledged at the present time is that the competitive environment is real. Participants in all schemes have the option of transferring to others if they are dissatisfied with the result of a particular complaint. This does not appear to be happening and there seems to be a stability of membership at the present time which, of course, cannot be assumed for the future.
- 7.14. All members I spoke to were, however, unanimous in their view that a competitive environment worked in New Zealand and was useful, since all the Schemes were watching each other to ensure that the quality of their service and standards were maintained. The members' view was that that would not necessarily happen if there was one scheme only with no competition. That of course is the view of members, not consumers, whose views may well be different as I have already mentioned.
- 7.15. For the sake of completeness, I add at the end of this section a summary of the present Scheme participants (members of FSCL). In addition to the numbers shown there, there are a further 5,220 "children" members, the majority of which are advisers under companies. There is a total at the present time of 7,808 current or provisional members. That may change if there are alterations to concepts of "single entity" and registration requirements, but FSCL is alert to those possibilities.
- 7.16. I also add at the end of this section a summary of cases, outcomes, and categories, which give a snapshot of the activities of FSCL. For the last financial year FSCL investigated and resolved 258 cases and received 4,952 enquiries and complaints about financial service providers.
- 7.17. Finally, and in addition, at the end of this section I attach a copy of the latest exit survey showing consumer and participant satisfaction as an indication of satisfaction with FSCL processes. I emphasise that this is an indication only as a mere 20% of surveys were returned. Whilst that rate of return maybe in the range of normal for such response rates, the accuracy of this type of response has to be questioned.

**(b) Processes:**

- 7.18. In general terms, there are three aspects of FSCL's work.

- 7.19. The first is what might be called the early assistance activity. There are dedicated staff for this work. It relates to the first notification of a complaint, whether this is received directly by FSCL or indirectly in other ways. In both cases FSCL staff promptly advise the member of the complaint or enquiry. Often this is the first time that more senior and responsible staff within the member's organisation become aware of the issue.
- 7.20. As soon as responsible staff are aware of a complaint, they are able to take some action, and there is often an immediate resolution.
- 7.21. I spoke to a significant number of complainants whose involvement with FSCL was simply asking for assistance about a dispute. They all reported that within days of approaching FSCL, the matter had been settled, whereas months had gone past of anxiety and distress before they had made that approach.
- 7.22. This means of settling a matter almost immediately is of real value. What is distressing is that people have not known of the existence of FSCL and not known who they could approach. It is only when FSCL has been approached that action is taken in this way.
- 7.23. Sometimes the Early Assistance team has gone beyond simply notifying the complaint, and has been active in suggesting appropriate outcomes, without full enquiry or investigation. This is reflected in the statistics.
- 7.24. The second aspect of FSCL's operations involves a formal process when the Member continues to dispute the matter after a complaint has been drawn to their attention. That is when case managers become involved and there are processes of negotiation, conciliation, mediation and, finally, adjudication which follow. There can be delays in those matters, of necessity, because there is information to be gathered and submissions to be considered, but largely these seem to have been efficiently and effectively dealt with. The final stage of this process is when FSCL's CEO has to make a final recommendation which is, if accepted by the complainant, binding on the participant member. It is not, of course, binding on the complainant. It is pleasing to record that a good number of complaints which move to dispute resolution are often settled on the journey by sensible discussion,

or by negotiation or mediation techniques. Two of the present four case managers employed by FSCL are accredited mediators. All have legal qualifications.

- 7.25. The last aspect of the work done by FSCL is not captured by any case statistics. It is the aspect of member education and training, of outreach by FSCL to members and participants, and to complainants and to vulnerable communities. I will have more to say about that later, but a significant part of the work now being done by FSCL does involve assisting member participants to have their own effective internal dispute mechanisms, to register on the Financial Service Providers' register, to know what is required in a changing legislative and regulatory environment, and to be kept informed with case studies and in other ways about expectations and standards. This aspect of work which is linked to the membership fees is invaluable, can be seen as preventive and proactive work, and seems to be very well done at the present time by a small office which finds the time to be proactive in this way.
- 7.26. Under this general heading this Reviewer also wants to comment on FSCL in terms of its office culture, environment, leadership and internal and external relationships.
- 7.27. I have formed a most satisfactory view of these things.
- 7.28. I have interviewed a number of members of the staff and, of course, Board members and the CEO herself. Some staff members went out of their way to tell me that this was the happiest office environment they had been in. All of them were warmly appreciative of the leadership and the culture which had been established. Very deliberate and thoughtful attempts have been implemented to ensure that there is constant sharing of ideas, problems and issues within the office, and a good atmosphere of training and education which is done both formally and informally.
- 7.29. The office and financial systems seem to me to be efficient and effective. They are overseen by a very experienced person whom I also interviewed.
- 7.30. It was impressive to find that the Board supports the CEO in ensuring that these aspects are not neglected. For example, a review of HR is planned in a

comprehensive way with confidential staff interviews being undertaken by an independent outside organisation. There is a need to look at flexibility of employment relationships in the light of changes in the working environment generally in New Zealand at the present time. There is to be a further review of IT requirements and in my view that is important and necessary. There are planned audits of the financial systems, including scrutinising plans against cyber-attacks and other forms of fraud. Further education in privacy issues is also planned. All of that needs to be advanced if FSCL is to retain what is clearly a leadership role in this important area of New Zealand's national life.

- 7.31. The CEO maintains an open office environment so that all those who wish to discuss things with her are able to do so. There are very good and supportive internal relationships and arrangements for the sharing of problems of workloads. I gained a favourable impression of a very good office working well together doing hard and sometimes complex work, but achieving good results in a respectful environment.
- 7.32. Obviously those things can never be regarded as complete and I think there is work to be done in reviewing the flexible employment, remuneration and IT areas, but I am satisfied that they are receiving attention now.

<b>Scheme participant types</b>	
<b>Name</b>	<b>Total Members</b>
Individuals, Companies	1,723
QFEs (Companies)	197
Transaction Service Providers	123
Lenders	367
Funds Managers	107
Insurers	14
Charity/Not for Profit organisations	17
Securities On Issue Providers	25

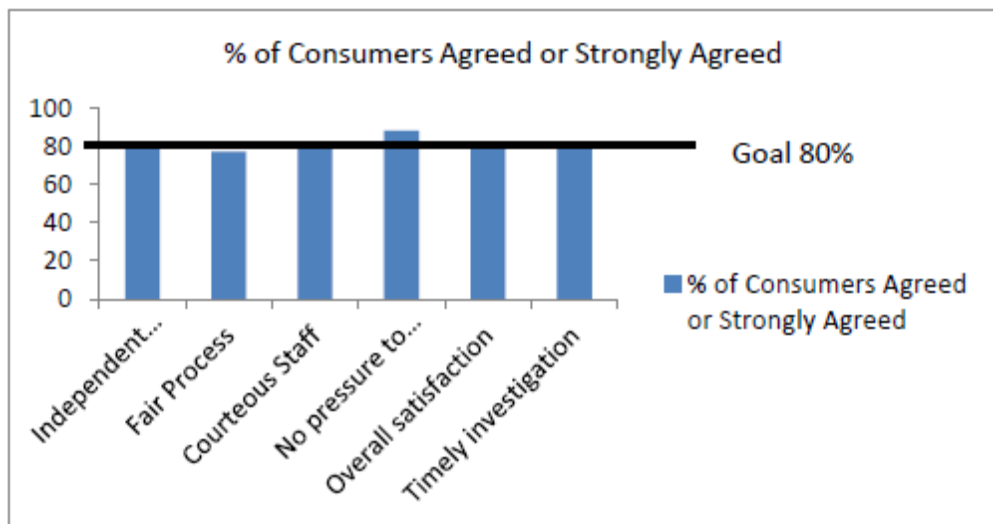
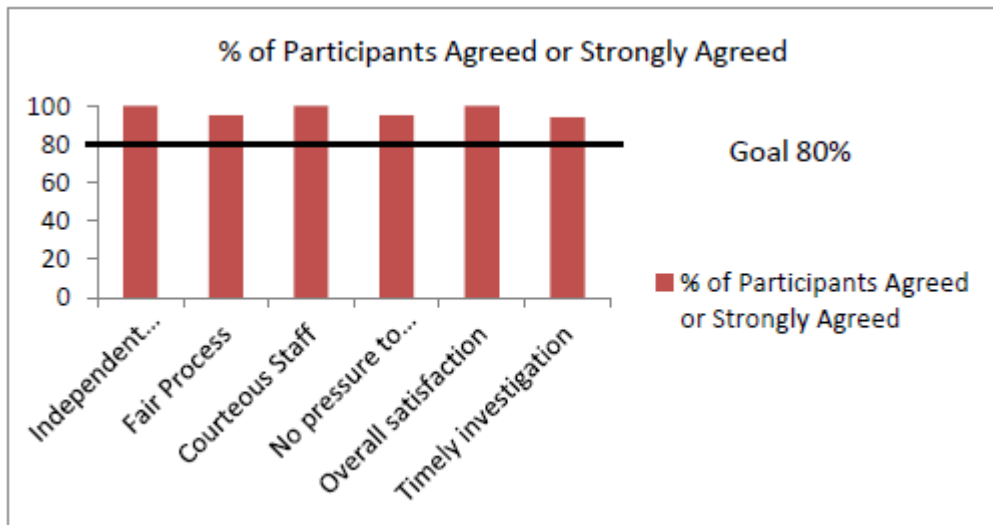
7.33. Numbers of cases, categories and outcomes.

<b>Outcomes</b>	<b>18/19</b>	<b>17/18</b>	<b>16/17</b>
Settled (facilitation/conciliation/negotiation)	77	71	54
Discontinued	87	89	60
Resolved early by participant	39	25	36
Jurisdiction declined	12	17	20
Not upheld – formal recommendation	21	32	13
Partly upheld – formal recommendation	17	8	20
Upheld – formal recommendation	5	3	5
<b><u>Total:</u></b>	<b><u>258</u></b>	<b><u>245</u></b>	<b><u>208</u></b>

7.34. Categories for cases investigated.

<b>Category</b>	<b>18/19</b>	<b>17/18</b>	<b>16/17</b>
Consumer credit	49	41	45
Travel insurance	44	65	39
Other	23	33	39
Credit cards	17	6	9
Estate administration	16	17	14
Trading platforms / foreign exchange	15	8	8
Travel cards	12	19	9
Mortgage loans	10	-	-
Home and contents insurance	10	3	3
Motor vehicle insurance	8	10	9
KiwiSaver	8	3	3
Public liability	7	-	-
Material damage insurance	5	6	3
Marine insurance	5	2	-
Health	4	4	3
Income protection	4	3	3
Superannuation and managed funds	4	-	-
Business finance	3	3	3
Business interruption	3	2	8
Life	3	2	7
Timeshares	3	-	-
Pet insurance	2	6	3
Peer to peer	2	2	-
Debt collection	1	5	-
<b>Total:</b>	<b><u>258</u></b>	<b><u>240</u></b>	<b><u>208</u></b>

7.35. Latest Exit Surveys



Approximately 20% of participant surveys and 20% of complainant surveys sent were returned. A very small percentage as I have already mentioned.

## 8. Previous Review Recommendations

8.1. The February 2015 Independent Review of FSCL was conducted by The Foundation for Effective Markets and Governance. It made some 15 recommendations. The recommendations were all accepted by the FSCL Board at the time with the exception of two. The recommendations are set out below.

8.2. 2015 recommendations:

1. FSCL publish summarised results in its annual reports of the questionnaires completed by complainants and participants at the end of the resolution process.
2. FSCL seek agreement on standardisation of exit survey questionnaires with other financial services disputes resolution scheme providers.
3. FSCL explore further opportunities for the promotion of EDR schemes in collaboration with other schemes.
4. FSCL seek to have the issue of joint promotion further considered at the quarterly meetings of EDR schemes and seek agreement including from Government on a collaborative approach to increasing accessibility/awareness including:
  - Consulting with relevant community organisations and commissioning research to determine the most cost-effective means of:
    - (a) Informing all citizens, especially the least privileged and least financially literate, that complaining or raising a problem is a positive thing to do as it may assist in improving the service of the financial service provider and the financial services industry and benefiting all consumers; and
    - (b) informing them of the ways they may make complaints or raise problems.



- Based on that research, a pooling of resources on a proportional basis to achieve increased propensity to complain/raise problems and increased awareness, including through relevant community organisations and professions such as lawyers and accountants, of the ways to do that; and
  - Considering pooling of resources to develop a single toll free consumer complaint phone referral facility possibly associated with Complaint line.
5. FSCL constitution be amended to require public advertising of board vacancies and to prescribe a three-term limit for directors.
  6. FSCL establish a charter to assist the directors in carrying out their duties to ensure the scheme meets its purpose and adheres to its principles.
  7. Paragraphs 2.2 of FSCL’s key practices to be amended to read:
 

The scheme regularly publishes anonymised copies of all recommendations and decisions on its website unless such a copy would not prevent the identification of a participant or a complainant in which case only summary with non-identifying information about that determination is to be published for the purposes of:

    - Educating scheme participants and consumers, and
    - Demonstrating consistency and fairness in decision making.
  8. FSCL seek agreement with other financial services disputes resolution scheme providers on publishing participants’ names against statistics in annual reports and websites.
  9. The Terms of Reference (ToR) be amended to require participants – as they renew annually – to renew their compliance undertaking.
  10. FSCL consider the appointment of a further senior staff member to assist the CEO in the final stages of complaint handling.

11. FSCL seek to have the current financial jurisdictional limit considered at the quarterly meeting of EDR schemes and if necessary seek a direction from Government on the appropriate amount.
  12. FSCL consider increasing the amount available for an award in relation to inconvenience from the present \$500 to \$2000.
  13. The CEO be given a discretionary power to investigate an issue, including a systemic issue, regardless of how that issue is brought to the CEO's attention, after consultation with the relevant Participant or Participants affected by the issue and to institute the normal procedures for recommendations and decisions.
  14. The FSCL ToR be amended to:
    - Require each participant to have an internal dispute system that is appropriate to the nature of its services and scale of its operations and to require them to provide information on this system including the name or names of staff responsible for complaint handling and update this information as needed, and
    - Make it clear that if FSCL becomes concerned about the performance of a Participant's complaint handling processes or performance, the FSCL may undertake an audit of the Participant's processes and provide advice to the Participant on necessary remedial action.
  15. FSCL seek to have the issue of Disputes Tribunals dealing with financial service complaints considered at a quarterly meeting of EDR schemes.
- 8.3. The two recommendations that were not accepted were Recommendations numbers 8 and 10. Recommendation 8 was as follows: "that FSCL seeks agreement with other financial services disputes resolution scheme providers on publishing participants' names against complaints statistics in the annual report and website".
- 8.4. The FSCL Board did not agree. The Board stated in its letter to the Minister that it was "concerned that the publication of participants' names would discourage

participants from referring complaints to FSCL for investigation and resolution, at a time when the Board is eager to encourage the referral of more complaints to FSCL. Also, given that a FSCL determination is binding on a participant but not a consumer, the quid pro quo for the participant is that the complaints are investigated in confidence and without publication of the parties' names. The Board will review its view on name publication at a later date". I comment here that AFCA does publish participants' names. I accept, however, that all the Schemes in New Zealand would have to adopt the same practice for obvious commercial reasons.

8.5. The other matter from the recommendation which was not agreed to was recommendation 10 about the appointment of a further senior staff member. The comment then made was: "The FSCL Board does not think it necessary as yet to appoint a senior staff member to assist the CEO in the final stages of complaint handling but will give this recommendation further consideration if and when the case load increases".

8.6. The FSCL Board recently asked the CEO for an update about the actions taken on those recommendations. The CEO reported as follows:

- Recommendations 1, 5, 6 and 12 to 15 were accepted and have been completed.
- Recommendation 2 – the other dispute resolution schemes had not been asked about standardisation of exit surveys as it was thought unlikely that the other dispute resolution schemes would agree to this. However, MBIE may look at requiring standard exit survey questionnaires as part of their upcoming review of the Schemes' rules and processes.
- Progress on Recommendations 3 and 4 was ongoing.
- Recommendation 7 – FSCL published anonymised case notes on nearly all of its decisions with the aim of educating Scheme participants and consumers and demonstrating consistency and fairness in decision making.

- Recommendation 8 had not been carried out as it was thought there was unlikely to be agreement from the other Schemes, apart perhaps from the Banking Ombudsman Scheme.
- Recommendation 9 – this recommendation had not been actioned as it was thought impractical to implement.
- Recommendation 10 was under review.
- Recommendation 11 – the Government has indicated an intention to regulate to have the Schemes increase their financial limit to \$350,000 (the Banking Ombudsman Scheme having already increased their limit to \$350,000). Regulations are expected in the next six months.

8.7. It will be seen that some of these recommendations and the responses to them were of the moment rather than systemic or enduring. Others are of greater consequence.

8.8. I will return to some of these recommendations because some are still of relevance and await attention. Particularly is this true of the issue of joint promotion of the Schemes and a collaborative approach to increasing accessibility.

8.9. The other matters are of less consequence, although some of these outstanding issues will find their place in this Review.

## **9. The statutory principles**

- 9.1. Under the Act, the Minister is to consider all aspects of the Scheme such as its purpose, membership, governance, resources and skills in the light of six principles that are listed in the Act.
- 9.2. These principles are the key criteria to be addressed in this Review and have been mentioned already. To some extent they overlap but I will refer to each of them separately. I will begin with the three principles which fall to be considered naturally in a review of this nature but in respect of which, as already indicated, I have been asked to pay particular attention.
- 9.3. These six principles are drawn from the “Benchmarks for industry-based customer dispute resolution” which are recognised as benchmarks for good practice in industry-based dispute resolution schemes.
- 9.4. The other aspects which the Minister is to consider as part of this Review are covered in different ways.

## 10. Accessibility

- 10.1. The first of the six benchmark principles set out in the Act is that of “accessibility”. This word is not defined in the Act but clearly has regard to the way in which FSCL promotes its availability to consumers, is recognised and acknowledged by them, and then can be used by them in a way which minimises any barriers to that use.
- 10.2. Accessibility in the sense of knowledge of the existence of a dispute resolution scheme available to consumers and in this case the one operated by FSCL has wider ramifications than simply the financial and insurance markets. Accessibility to complaints systems generally throughout New Zealand suffers from cultural and structural barriers and difficulties. One which must be acknowledged at the outset are the cultural differences between some segments of the population, namely Māori and Pacific Island, who have traditionally not exercised their rights to complain, even when they are aware of the bodies to whom such complaints may be made. It is thought that such cultural barriers have to do with ingrained notions of respect and authority.
- 10.3. In some cases, there are also suggestions that complaints systems, although known about, are not accessed because of a suspicion that such access might in some way turn out to be harmful rather than useful. Those suggestions came from some organisations which are closely involved with vulnerable communities such as Salvation Army, FinCap, who run the budget advisory services throughout the country, and Christians Against Poverty.
- 10.4. A different type of accessibility issue comes from those same organisations and is that some people with legitimate complaints are hesitant to do so because they thereby gain a reputation for troublemaking or complaining which might deny them the opportunity of getting help from the same people at a later stage when they need it. These are very real barriers not easily overcome.
- 10.5. It is across those three different types of inaccessibility, knowledge, cultural and transactional that FSCL has been active in conducting some incursions into areas of New Zealand which are thought to be in need of the information referred to.

- 10.6. FSCL has conducted and continues to conduct lectures, addresses, programmes, and workshops throughout the country and in particular in areas where the cultural difficulties referred to are highlighted, in an effort to reach those who would benefit from the systems and to reduce the barriers to accessibility referred to. A good example are the workshops conducted in South Auckland.
- 10.7. Notwithstanding that effort, problems remain, and every complaints system in New Zealand has difficulty in making their services known to the more vulnerable parts of this country and in showing how easy access can be obtained without detriment. I say this in spite of the comment by the Commerce Commission in its submission to me that “through our interaction with the community sector and NGOs who are users of FSCL, we have observed an increase in Scheme awareness and use over the last year which may be the result of FSCL’s promotional activities”.
- 10.8. Whilst therefore efforts to contact parts of the community and also, perhaps more importantly, to contact people who themselves in turn have contact with these difficult parts of New Zealand, has been made well in the past, there is a continuing challenge to address this and new ways need to be found. The FSCL website seems to be an excellent one containing very good information. But it has been distressing to hear continual stories from complainants about the anguish, despair and delay they have experienced before contacting FSCL when the problem has then been efficiently resolved. Those stories are too consistent and similar to deny the view that knowledge and access remain a problem. They also point to the probability of an unknown number of potential complainants who never found their way into the system.
- 10.9. During the course of the interviews a number of suggestions were made to me about how accessibility could be improved. These suggestions ranged from digital information transfers, the specific targeting of national organisations who reach into vulnerable areas of the country, such as Salvation Army, the Budgeting Advice services (FinCap) and Christians Against Poverty (both of which latter organisations now also lodge complaints on behalf of clients), Community Law Centres and so on. Other suggestions related to advertising, to meeting with consumer advocates on a regular basis, to using local and ethnic radio

programmes and to promoting knowledge of the resolution service through other social and traditional media in very many different ways and in different languages. It has been interesting to hear about the Australian experience where the one stand-alone resolution scheme (AFCA) continues to have similar problems.

- 10.10. An interesting suggestion was that every member should be required to have a website and the website should show in a prominent “one click” way who the dispute resolution service is and how it can be contacted so that anyone accessing that website would immediately know of the availability of the dispute resolution provider. One further suggestion related to developing strategies and programmes about accessing Māori and Pacific Island communities on an ongoing basis. There are a large number of suggestions and all of these have aspects of worthiness which need to be considered as part of an overall plan.
- 10.11. Sensible efforts have been made in the past but must be enhanced and continued. A national complaints system may one day be available on-line through Government initiatives. In the meantime, FSCL has to cope with what is presently available. Collaboration with other Schemes is essential. There are Government departments whose functions include accessing and advising vulnerable parts of the population of this country in such systems. Access to refugee and immigrant groups through religious organisations and in other ways, needs to be part of an ongoing, committed and planned strategy with adequate resources allocated to it. Such a strategy needs to be at least part of a joint Schemes’ response to this overarching single issue.
- 10.12. One of the philosophies behind the existing Schemes is that where a complaint is made then in the first instance (unless there is good reason not to do this), the internal complaint processes of the body complained about must be accessed. I have found in my surveys that FSCL does this unless there is good reason because of delay or other matters, to omit doing so. Very often with responsible lenders who have good internal complaint processes, once they have become alerted to the complaint, the issue is quickly resolved.



- 10.13. During the course of the interviews it is clear that this happens on a regular basis and that there is a high rate of successful resolution of the complaints when internal complaint dispute resolution systems are accessed. Some members even report percentages in the 80% to 90% as success rates. But plainly some members do not have such processes and/or do not consider them to be of value.
- 10.14. There is a rule that requires all members to display prominently and in appropriate ways, the advice that the member is attached to the EDR scheme which is available in the event of a complaint. This advertising of accessibility of the Scheme needs to be supervised and enhanced, as mentioned. There is evidence that at the moment that is inadequately done. There is also some evidence that some entities have inadequate internal complaint processes. FSCL has an obligation under its terms of reference to audit and enhance those of its members in a principled way.
- 10.15. In one file I read, the issue arose as to whether a dispute had arisen and therefore the obligation to advise of the existence of the service provided by FSCL had been triggered. It would be preferable to display this advice prominently in all cases so that it does not rely on a member advising the customer at a particular point only.
- 10.16. The principle is easily stated. The Government Centre for Dispute Resolution located in the MBIE has issued a guideline document entitled “Dispute Resolution Best Practice Principles” (Best Practice Principles) which under the heading of “Accessibility” says of its purpose: “Dispute resolution is easy for potential users to find, enter and use regardless of their capabilities and resources”.
- 10.17. So the accessibility issue is how people can find the Scheme that applies to them, and have confidence in it, when they have need of it. Focused efforts must be increased to achieve that. It is beyond my brief to detail the ingredients of such a plan, although I have passed on here some of the suggestions I received. I simply add from what I have heard, people are not interested in dispute resolution services until they have need of them and therefore targeting those to whom they would most likely turn in such a need seems sensible.

- 10.18. I wish to make one final comment. Accessibility to schemes of this nature is a much wider problem than can be fully addressed by approved dispute resolution schemes themselves. For one thing, while the present system involves an element of competition with a number of schemes operating in the area, it would be undesirable for obvious reasons if they appeared to be touting for business from dissatisfied consumers. This is not something that should happen and the schemes themselves would not wish to do so. A public information programme of this nature raising awareness of the schemes and then maintaining their profile on an ongoing basis is in my view, desirable, as may also be a single 0800 complaint line assisting access to the schemes.
- 10.19. I consider that a suitably devised programme advertising the availability of the dispute resolution process can only come from an authoritative independent source i.e. the Government. A public information programme of this nature raising awareness of such schemes and then maintaining their profile on an ongoing basis is, in my view, desirable.

## 11. Independence

- 11.1. The Best Practice Principles says this as the purpose of “independence”:  
“Disputes are managed and resolved in accordance with applicable law and natural justice. All dispute resolution functions are and are seen to be carried out in an objective and unbiased way.”
- 11.2. Independence is a many headed aspect with flavours which are sometimes nuanced and complicated.
- 11.3. In the context of these schemes, it is clear that disputes need to be seen to be resolved in an objective and unbiased way, particularly without being influenced by members’ funding arrangements.
- 11.4. A criticism made in the past has been that because the Scheme is funded by members with, first, a basic membership fee and, secondly, a case activity fee, that then creates a bias in favour of that member when a dispute arises.
- 11.5. This reviewer has been through a large number of files, selected at random and including both complaints and requests for information, and has seen no sign of any bias towards members in this way. In fact, if there were to be a detectable tendency in the resolution of schemes it would be in favour of the consumer rather than the member. Also, I have recorded that FSCL is active in identifying issues arising from the financial transaction involved that may not have been identified by the complainant. This helps to redress any power imbalance.
- 11.6. This in turn has given rise to complaints from a few members that the Scheme actually operates against them, since the requirement of having “regard to the law”, but also having to have regard to principles of natural justice and fairness means that the law is not always fully applied when it is in their favour. Whilst this may be true in the sense that insurance law, for example, often requires the interpretation of a written contract, there are many instances of ambiguity and of the written contractual words being mitigated by discussions at the point of sale, so that questions of interpretation in all of the circumstances arise not just from the written word. I would take this further. The intention of setting up non-judicial review schemes such as FSCL’s cannot have been to confine their

function to decide on a purely legal basis. It must have been intended that they are expected to exercise a wider remit, judging transactions and treatment on a broader basis than just legality. The legal position is always relevant, but is not always determinative.

- 11.7. Having reviewed a number of files this reviewer is satisfied that there is no question of bias in favour of the members of the Scheme. In all of the files which I have seen which have decisions and explanations, these are objectively fair in the circumstances and, indeed, often impressively so.
- 11.8. The decisions provided in the cases that I have seen show compliance with natural justice, good reasons for the decision and the basis for decision-making, with no undue weighting towards either consumer or Scheme member.
- 11.9. One other thing needs to be noted under the heading of independence. I have been impressed by the number of members who, whilst indicating that sometimes they disagreed with the resolution recommended by FSCL, nevertheless were content with the overall working of the Scheme and the certainty of decision-making which it gave.
- 11.10. The basis of the Scheme is of course that a final recommendation by the Scheme to a member is binding on the member but not on the complainant. All members who spoke to me were satisfied that the process leading up to a final recommendation was always fairly conducted. In some cases they went on to speak of their admiration and respect for the careful decisions arrived at, even when they may have disagreed with those final decisions.
- 11.11. Having reviewed a large number of case files I add my own admiration and respect for what I see as careful work done in a principled and thoughtful way with results which are always able to be explained and have good reasons supporting them. I have been impressed with this.

## 12. Fairness

- 12.1. Some of the matters which I have already discussed have also covered questions of fairness. Fairness of course not only relates to procedural fairness, but resolution fairness. Questions of fairness of the procedures and process are as equally important to the outcome as the outcome itself.
- 12.2. The question of fairness has to be seen across the board as relating to all participants, both members and complainants, and to staff and others.
- 12.3. I have assessed fairness on this basis. I think the outcomes that I have seen seem to me to be fair and reasonable and I think the processes adopted have also been fair in the sense that they have been timely and have given both sides a full opportunity to address the issues which have arisen and to be conscious of them.
- 12.4. There is one particular point which I can make under the heading of fairness which I think deserves to be considered by management. It is about natural justice.
- 12.5. One of the principles of natural justice is that any person who is to be the subject of an adverse finding should have the opportunity of commenting on that finding before it is finally confirmed.
- 12.6. While this principle can be expressed in simple terms, it must be applied in a variety of individual circumstances and contexts. I appreciate that how natural justice is applied by a body such as FSCL is not expected to be as formal and elaborate as it would be in a court of law. One of the advantages of a dispute resolution scheme such as this is that the adjudicator can employ greater speed and flexibility of process (and, I may add, at lower cost, than can a court). I understand that FSCL's practices are consistent with other Schemes operating under the Act. Nevertheless, I do have a concern as to how this principle of natural justice is applied.
- 12.7. The ToR require that a formal Notice of Recommendation be given by FSCL to both parties at the same time. This is clearly appropriate. But if this is the first intimation to a party of an adverse finding against it, then it seems to me to be wrong that it should be communicated at the same time to the other party to the

dispute. In my view elementary fairness requires that any party against whom FSCL has formed an adverse view should be given an opportunity to comment on that view before it is made public by being released to another party in a Notice of Recommendation.

- 12.8. The major unfairness with making such comments available to others who may be beneficiaries of such a preliminary view that is untested, is that if those comments are not ultimately sustained, the reputation of the party concerned has been traduced and that this is publicly on the record by being in the other party's possession. I consider that it is basic fairness to allow the party who is to be the subject of an adverse comment, the opportunity to persuade the adjudicator that the comment is unwarranted before it is communicated to anyone else.
- 12.9. I am told that in the course of the interaction between the Schemes and their members the Schemes often make known their preliminary view so that an adverse finding is rarely a surprise to a member. This is all to the good and in most cases there may be no need to do more than ensure that this has been done explicitly before proceeding to embody the finding in a formal, albeit provisional, view that is sent to both parties. But in one case that I have seen, this did not occur and the Notice of Recommendation containing adverse findings was the first intimation of this to the member, occasioning considerable protest from him.
- 12.10. I do not consider that there needs to be any change to the ToR, but I do consider that FSCL's practice needs to ensure that a member who may have an adverse finding against it included in a Notice of Recommendation is fully aware of this fact before the Notice is issued and has had an opportunity to comment on it.

### **13. Accountability**

- 13.1. The Best Practice Principles speak of the purpose of accountability: “There is public confidence in dispute resolution. Those involved in its design and delivery are held to account for the quality of their performance. Regular monitoring and assessment and public reporting encourages ongoing improvement and better outcomes across the system.”
- 13.2. This benchmark principle of accountability refers of course to the way in which the Scheme operated by FSCL is responsible and transparent, both to its Board and publicly, and to members for the quality of its decision making. Regular monitoring assessment and public reporting encourages improvement and better outcomes.
- 13.3. In this case the annual report of FSCL indicates in a publicly accountable way, the areas where FSCL has met or exceeded key performance indicators and includes the times involved and statistics of members’ and complainants’ satisfaction.
- 13.4. The contents of FSCL’s annual report are in line with expectations contained within the key practices document. This Review, which will be publicly available on the website, is also part of that accountability – as are the Case Studies; information on the internet which is being constantly upgraded; and the newsletters to consumers and members which FSCL regularly issued.
- 13.5. Targets used by other schemes are broadly similar. I am satisfied that the Scheme is accountable both to its Board and to the public through the annual report and its website in an effective and sensible way.

## 14. Efficiency

14.1. Efficiency relates not only to the value for money which members rightly insist upon for the operation of a good scheme, but also to whether the Scheme itself is timely and produces results within a framework which makes sense to both complainants and members.

14.2. Both Scheme members and consumers need to have confidence that the Scheme operates efficiently, that it keeps track of the complaints through to resolution, and that the Scheme is constantly reviewing its own performance.

14.3. The Best Practice Principles have this to say as to purpose for efficiency:

*“Dispute resolution provides value for money through appropriate, proportionate, and timely responses to issues. It evolves and improves over time and makes good use of information to identify systemic issues.”*

14.4. I am satisfied that this is the case with FSCL with only one exception which can be confined to its own facts. All cases I have read or was told about appear to be satisfactorily progressed, well monitored and with timely outcomes well achieved. The one case which I have seen which was delayed but not excessively, related to a case manager going on leave at a particularly busy time and not being replaced.

14.5. Most complainants and members whom I spoke to were satisfied with the timeliness of the case management in which they had an interest.

14.6. One other matter, however, is worthy of comment at the present time. There has been a recent surge in the number of complaints. I am told this happens from time to time.

14.7. It is of course a matter of judgement by management as to whether this is a surge of a temporary nature at the present time or whether this is likely to be more permanent and requiring of greater staff resources.

14.8. Most of the comments which I received from all those I interviewed indicated that New Zealanders are becoming more conscious of their ability to complain generally when they are dissatisfied, and that it is more likely than not that



complaints will increase in future because this is being encouraged at a number of levels and in different ways. For example, the organisation “Christians against Poverty” which has 550 members has just become active in supporting complainants with difficult credit contract cases, and helping them lodge complaints when previously those persons (usually because they have other serious personal problems) had abandoned their rights to complain.

- 14.9. I will have more to say about this in terms of resourcing of FSCL, but it seems to me that, when a surge has continued for a sufficient time, decisions need to be made about additional staffing because timeliness will otherwise suffer. There is some evidence that this may be beginning to happen already and I recommend that management now look at the time for which these statistical increases have occurred and decide whether it is now appropriate for additional resources to be applied. In this Reviewer’s opinion that time has already come.

## 15. Effectiveness

15.1. The Best Practice Principles have this to say about effectiveness and its purpose:

*“Dispute resolution delivers sustainable results and meets intended objectives. It fulfils its role in the wider government system by helping minimise conflict and supporting a more productive and harmonious New Zealand.”*

15.2. Effectiveness of course depends on whether the Scheme delivers final results, meets its intended objectives and delivers the results of those objectives to those who are involved in the Scheme.

15.3. As indicated, the basis on which final decisions in the event of dispute are made is in the form of recommendations which are binding on members but not on complainants. That seems to me to be very well done and generally to the satisfaction of all parties.

15.4. But it is very clear to this reviewer that earlier interventions in terms of effectiveness are always desirable.

15.5. There are usually many opportunities for FSCL, through its case managers, to give a view to both complainants and members complained about, as to the results of the dispute. And there are many opportunities which are often taken to resolve these matters at a very much earlier stage than final recommendation.

15.6. Indeed, both complainants and members made the significant point of saying that they saw access to FSCL from the moment of dispute onwards, to be helpful in resolving it. Very often expectations which were unrealistic can be adjusted by sensible discussion at an early stage and possible solutions advanced by experienced case managers at an early time when that is still acceptable and before attitudes have hardened and options become limited. Sometimes these opportunities can be taken quite informally.

15.7. This usually happens and is part of an effective system.

- 15.8. I am satisfied that opportunities for early involvement, sensible discussion, preliminary discussions and advice are always offered and taken and in a most useful and effective way.
- 15.9. FSCL's early assistance team is particularly helpful in this area. I spoke to a good number of complainants who had accessed the early assistance team. What is distressing to record is that they had all of them been through a particularly harrowing time before it had become known to them that FSCL could assist. But all spoke in glowing terms about what happened as soon as FSCL was involved. Some talked about an immediate response through FSCL's intervention. Others spoke about wishing that they had been in touch with FSCL much earlier. Yet others spoke about FSCL's respectful and professional conduct in receiving their information and getting on with it, and then checking that things had been resolved appropriately. The over forty files, chosen at random, which I have reviewed, testify to the truth of those observations.
- 15.10. There was no person that I spoke to in this randomly selected group who did not speak highly of the service FSCL provided, leading to either an outcome or an apology which was satisfactory to them.
- 15.11. And, as another aspect of this, it is clear that quite frequently members who are not sure themselves about an appropriate outcome often take the opportunity to seek advice by having an early discussion with either case managers or the CEO to clarify their own thinking about what would be fair in the circumstances and act accordingly. The CEO is to be congratulated for making herself personally, and her staff, available for those informal discussions, which often lead to early resolution and save others considerable anxiety and distress. In these unseen and unrecorded ways sensible progress has been made and civilised results obtained for people who would otherwise be in dispute.

## 16. Other Issues

**I list these as follows:**

### **A. Scheme conflict**

- (i) Some members told me that there is perceived to be a difference in outcomes depending on which of the Schemes is used, usually IFSO or FSCL. One Scheme (FSCL) is said to be more concerned with the more general fairness provisions of the legislation, whilst the other (IFSO) is said to be more inclined to adopt a legal approach to the issue.
- (ii) It is certainly true that in the case of insurance matters there is a tendency for all parties to start with a basic assumption about the law, in the sense for example of the terms of a contract. The information which I have been given show that all schemes have the law as their starting point and then turn to the relevant surrounding facts and context to see whether in all the circumstances an application of the law is fair.
- (iii) My sole concern is with the decision making made by FSCL which I have scrutinised. I am satisfied that its philosophical approach to issues raised before it on dispute is a sound one. It is based on the law which applies in a particular circumstance, mitigated by any fairness issues which arise, and it is within the spirit of the law and of the purpose of those Schemes. As I have said previously, I have been impressed with the decisions I have seen and the reasons supporting them.
- (iv) Nor has there been the movement between Schemes or poaching of members which was feared at one stage. Indeed, membership of the Schemes now appears to be relatively stable. Obviously, this cannot be predicted for the future and indeed some observers have said that it is likely to become more unstable as a greater number of complaints are received. That remains to be seen. At the present time, however, I see no evidence of unprincipled poaching between the Schemes' membership and no movement of members which would indicate a desire for forum shopping. The one case which I was referred to when a member became

disgruntled with a decision and moved from one scheme to another, seems to be readily confined to its own facts.

- (v) Indeed, there are barriers to changing Schemes which sometimes can be based on established relationships and known methods of working, costs, and convenience. All that may contribute to stability, but the possibility of change as recourse for dissatisfaction always exists in a competitive environment.

## B. Resources

- (i) This is a subject which I particularly wanted to review myself which is linked to basic principles but requires a separate heading.
- (ii) It is important to note that the income for FSCL consists of levied members' fees and of a complaint activity fee based on three standards – an early, intermediate and final resolution standard. As is to be expected the three fees are scaled depending on the intensity of the work required by FSCL.
- (iii) The fee structure for FSCL has been an efficient one and has enabled FSCL to lower membership fees to members when it has seemed that the operations of FSCL have not required the level of commitment previously assessed.
- (iv) At the present time FSCL is well resourced and well managed and its finances are in good order. It holds healthy reserves.
- (v) Some members have suggested to me that FSCL should either be returning money to members since it was originally the members' money in the first place, or should be further lowering fees.
- (vi) I recommend against doing either at this stage for the following reasons which have been advanced to me by participants in the interviews.
- (vii) First it seems clear that this is an uncertain time. More political activity and more legislation are promised, although exactly how and when that will take place is not yet certain. It is however a time of change and change is definitely coming. It is the precise nature of that change which presently cannot be predicted. FSCL needs to be ready for that, including having the resources to make submissions and to discuss proposals with other players in the area and to collaborate when important with other Schemes.
- (viii) Secondly, there has been a surge in activity recently and all the indications from most of the participants in the interviews that I held

were that further complaint activity is to be expected, arising from a number of initiatives around the country, not just confined to financial markets. It does seem that New Zealand might be entering into a period where complaints are encouraged, and resolution schemes are challenged to be more accessible to citizens of this country than they have been in the past. It is likely therefore that complaint levels will continue to rise. A FSCL Board member who is very experienced in this area commented that at the present time the New Zealand economy is in good heart, as is the share market. She said that cannot last and a downward cycle is to be expected at some time when complaints associated with financial advice and investment will then escalate. Those comments seem prophetic now in the light of global reaction and the likely economic consequences of Covid-19 strain of coronavirus at the time of issuing this review.

- (ix) Thirdly there is a level of complexity which continues to vex complaint bodies generally. Some of the files which I have examined during the course of this review have shown a level of complexity which is quite remarkable. That can be expected to continue as financial markets show greater sophistication in their operation. As the level of complaint complexity and sophistication increases, so will the expertise and costs of case managers who have the ability to deal with these issues. Costs are likely therefore to increase not decrease. In the specialised areas which are now beginning to emerge in FSCL, it needs to have the ability to retain and develop well qualified staff in such matters.
- (x) Next, it seems desirable that all the approved Schemes find ways to work collaboratively in the difficult areas of accessibility and public knowledge of the existence of dispute resolution teams. That is going to require additional resources.
- (xi) Finally, location in Wellington and the possibility of disaster relocation and the costs associated with this must always be regarded as potentially significant.

- (xii) I think at this time given these uncertainties it is particularly important that reserves are maintained to deal with these exigencies. FSCL seems to me to be well balanced in a sensible way and I would counsel against any reduction in its resources at the present time.



### **C. Succession planning**

- (i) This is an aspect which was discussed by a number of members in interviews and which was brought to my attention at a very early stage. There is no doubt that at the present time FSCL is well led by Susan Taylor as its CEO. She is very experienced, very well qualified and very well suited by personality to running the organisation. That fact and her success are also weaknesses. Were she to discontinue her involvement with FSCL for any reason, there would be a significant gap in its structures and its ability to function effectively.
- (ii) Managed succession planning has been talked about for some time but now must be actively grappled with. It seems clear that, if the present CEO were not available, then access to the market would be sensible to try and find someone of comparable qualifications, experience, authority and leadership. However, there needs to be a structure in place in the meantime which would enable FSCL to carry on functioning in its existing high-level way whilst awaiting a new appointment.
- (iii) The appointment of a deputy may be an option, although that sometimes can give a signal about inevitable promotion which may not be realistic. A senior leadership model might achieve the same result without that promise, but whichever model is adopted, the matter is now urgent and needs to be dealt with by the Board forthwith. A senior staff member with an appropriate salary enhancement could act as a mentor to others and may also assist the present CEO with what seems to me could quickly become an unmanageable workload, particularly if accessibility initiatives are to be added. There are a number of options and I leave it with confidence to the Board to decide. What is not satisfactory at present is that no final decision can be made by any person in FSCL or any group of such persons in the absence of the present CEO and that is inefficient and could lead to unacceptable delays.

**D. Readiness for change**

- (i) I looked at the readiness of this organisation for change because of the matters which I have referred to already, which clearly predict further change in this whole area. There have been many changes in the recent past.
  
- (ii) Of course, it is impossible to plan for every exigency, but I looked at the nature and flexibility of the organisation, the professionalism of the Board, the present leadership, the resources available and the readiness of staff to adjust. I have been impressed at the ability of this organisation to change as needed. I think nothing more is needed in this area.

## **E. Diversity**

- (i) This heading is necessary in a New Zealand context when efforts are being made to add value to all organisations by considering the changing nature and diversity of New Zealand and its citizens. There is increasing need for Māori and Pacific Islanders to take their place in the leadership structures of this country, and of course we now have a large number of different ethnic groups in New Zealand who are similarly mobile and looking for opportunities.
- (ii) That is by way of general observation. By way of specific observation, it is clear that the best people to deal with complaints from citizens are those who can best relate to and communicate with such people; a diverse staff has that advantage. I do not discount the initiatives taken for and by staff in Maori Language training and the refreshers being offered. That effort is admirable. But it is not enough on its own.
- (iii) Of course, the first and fundamental requirement is the ability to do the particular job well with the skills required, but the added value of ethnic and other cultural diversity adds significantly to the ability to make accessible these services to other parts of the country.
- (iv) I recommend that in considering staff additions and changes, the diverse nature of New Zealand society be a consideration along with the others.

**F. Training and outreach**

I am satisfied that this is done well. FSCL has excellent arrangements for keeping members informed, running sensible and different programmes and opportunities for information to be disseminated as changes are made by government and others. I notice from the latest annual report that FSCL conducted 19 training presentations and webinars in the last financial year. There are also many occasions of informal discussion which are appreciated by members. That outreach is important; it is done well and needs to continue.

## 17. Acknowledgements

17.1. The Reviewer wishes to thank the following groups and people for their cooperation and support:

- (a) Senior personnel from the following government departments and agencies:
  - › Ministry of Business Innovation and Employment
  - › Government Centre of Dispute Resolution
  - › Commerce Commission
  - › Financial Markets Authority;
- (b) The Chairperson and Members of the Board of FSCL;
- (c) The CEO, Susan Taylor, and staff members of FSCL;
- (d) The Insurance and Financial Services Ombudsman, Karen Stevens and senior staff members of IFSO;
- (e) The Banking Ombudsman, Nicola Sladden;
- (f) The FDRS Scheme Manager, Liz Hogan;
- (g) The CEO of the Insurance Council of New Zealand, Tim Grafton;
- (h) The Executive Director of Financial Services Federation, Lyn McMorran;
- (i) The many members and participants of FSCL and complainants and inquirers who were happy to share their experience and ideas for FSCL and for general public benefit; and
- (j) Dr David McGee QC for his assistance and guidance in compiling this Review.

**TERMS OF REFERENCE  
FOR INDEPENDENT REVIEW OF  
FINANCIAL SERVICES COMPLAINTS LIMITED**

**1. Background**

- 1.1 Financial Services Complaints Limited ("FSCL") is an independent external dispute resolution scheme approved by the Minister of Consumer Affairs under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the "Act"). FSCL is a not for profit operation and is funded by a combination of membership and complaint fees levied on its participants. FSCL's services are free to consumers.
- 1.2 FSCL has over 7,300 scheme participants drawn from all sectors of the financial services industry, excluding retail banking and life insurers.
- 1.3 FSCL has been receiving and investigating complaints since January 2011. FSCL investigates complaints in accordance with its terms of reference.
- 1.4 FSCL is governed by a Board consisting of two consumer representatives, two industry representatives and an independent chairperson. FSCL currently has a staff of twelve, including its Chief Executive Officer, Susan Taylor.
- 1.5 FSCL is required to have an independent review of its operations at least once every five years (see s 63(q) of the Act). FSCL's first independent review was completed in February 2015.

**2. Review Scope**

- 2.1 As an approved scheme, FSCL is required to meet and comply with 6 benchmark principles set out in the Act, namely:
  - accessibility
  - accountability
  - effectiveness
  - efficiency
  - fairness
  - independence.

The reviewer is asked to consider and report on whether or not FSCL is meeting these principles, with particular regard to the principles of independence, fairness and accessibility.

- 2.2 A more detailed explanation of factors to be considered and questions to be addressed under these headings are set out in Appendix 1 to these terms of reference.
- 2.3 The reviewer is asked to assess FSCL's performance against the scheme's terms of reference, in particular:
- the requirement to resolve complaints in a cooperative, efficient, timely and fair manner, whilst proceeding with minimum formality and technicality, and
  - FSCL's processes to ensure consistency and high-quality decision making in accordance with its obligations under the TOR to resolve a complaint on its merits, to do what in its opinion is fair in all the circumstances, having regard to:
    - (i) the law
    - (ii) any applicable legal rule or judicial authority
    - (iii) general principles of good industry practice and any applicable code of practice.

### **3. Methodology**

- 3.1 It is expected the review process will include the following:
- (i) Interviews of FSCL management and some staff
  - (ii) Review of FSCL's terms of reference, written procedures, systems, statistics, website and other material
  - (iii) Review of about 25 dispute files and 10 complaint files (where a complaint has been referred to the scheme participant for processing through its internal complaints process)
  - (iv) Stakeholder interviews, including FSCL Board members, Ministry of Business Innovation and Employment representatives, FMA and Commerce Commission representatives, participants, and consumer representatives
  - (v) Telephone interviews of 5 previous complainants, and

- (vi) Telephone interviews of 10 people who in the last few months have contacted FSCCL with an inquiry but who have not lodged a formal complaint with FSCCL.

**October 2019**



## APPENDIX 1 - REVIEW OF BENCHMARK PRINCIPLES

### Benchmark 1 - Accessibility

1. **Principle** - The Scheme makes itself readily available to consumers by promoting knowledge of its existence, being easy to use and having no cost barriers.

#### Key Practices

- 1.1 The Scheme seeks to ensure that all financial services consumers are aware of its existence;
- 1.2 The Scheme produces readily available material in plain language to explain:
  - how to access the Scheme
  - how the Scheme works
  - the major areas with which the Scheme deals, and
  - any restrictions on the Scheme's powers.
- 1.3 The Scheme requires scheme participants to inform their customers about the Scheme.
- 1.4 Complainants can make initial contact with the Scheme orally or in writing but the complaint must ultimately be put in writing.
- 1.5 The Scheme's Terms of Reference are expressed clearly.
- 1.6 The Scheme's staff have the ability to handle customer complaints and are provided with adequate training in complaints handling.
- 1.7 The Scheme's staff explain to complainants in simple terms:
  - how the Scheme works
  - the major areas it deals with
  - any restrictions on its powers, and
  - timelines applicable to each of the Scheme's processes.
- 1.8 The Scheme's staff assist complainants to put a complaint in writing, where complainants need assistance to do so.
- 1.9 The Scheme's processes are simple for complainants to understand and easy to use, particularly for vulnerable consumers.
- 1.10 The Scheme uses appropriate techniques, including conciliation, mediation and negotiation in attempting to settle complaints.

### Specific questions

- Are the Scheme's promotional activities adequate and appropriate?
- Are there any barriers to use, including cost?
- Is there anything more, or different, you believe could be done to make the Scheme more accessible to all consumers?

### Benchmark 2 - Accountability

2. **Principle** - The Scheme publicly accounts for its operations by producing written determinations, published in case notes and information about complaints and highlighting any systemic industry problems.

### Key Practices

2.1 The Scheme regularly provides written reports of determinations to Scheme participants and complaints.

2.2 The Scheme regularly publishes case notes on its website for the purposes of:

- educating Scheme participants and consumers, and
- demonstrating consistency and fairness in decision making.

Case notes do not name the parties involved.

2.3 The Scheme publishes a detailed and informative Annual Report containing specific statistical and other data about the Scheme's performance including:

- information about how the Scheme works
- the numbers and types of complaints it receives and their outcome
- the time taken to resolve complaints
- any systemic problems arising from complaints
- examples of representative case studies
- information about new developments or key areas in which policy or education initiatives are desirable.

2.4 The Annual Report is distributed to relevant stakeholders and published on the Scheme's website.

### **Benchmark 3 - Effectiveness**

- 3. Principle** - The Scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

#### **Key Practices**

- 3.1 The Scheme's scope and decision-maker's powers are clear.
- 3.2 The decision-maker has the power to make monetary awards of sufficient size and other awards (but not punitive damages) as appropriate.
- 3.3 The Scheme has a policy for dealing with systemic issues.
- 3.4 The Scheme has procedures in place for receiving complaints about the Scheme including responding to any such complaints in a timely and appropriate manner.
- 3.5 The Scheme requires participants to set up internal complaints processes.
- 3.6 The Scheme has the capacity to advise Scheme participants about their internal complaints processes.
- 3.7 The Scheme has mechanisms to encourage Scheme participants to abide by the Scheme's rules.
- 3.8 The decision-maker's determinations are binding on the Scheme participant if complainants accept the determination.

### **Benchmark 4 - Efficiency**

- 4. Principle** - 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.

#### **Key Practices**

- 4.1 The Scheme deals only with complaints that are within its Terms of Reference and have not been dealt with, or are not being dealt with, by another dispute resolution forum, and
  - which have been considered, and not resolved to the complainant's satisfaction, by a scheme participant's internal complaints resolution process, or

- Where a scheme participant has refused, or failed within a reasonable time, to deal with the complaint under its internal complaints process.
- 4.2 The Scheme has mechanisms and procedures for referring relevant complaints to other, more appropriate, dispute resolution bodies and/or regulatory authorities.
  - 4.3 The Scheme has mechanisms and procedures for referring systemic industry problems that become apparent from complaints to relevant regulators.
  - 4.4 The Scheme excludes vexatious and frivolous complaints at the decision-maker's discretion.
  - 4.5 The Scheme has reasonable time limits set for each of its processes which facilitate speedy resolution of complaints without compromising quality decision-making.
  - 4.6 The Scheme's staff keep the parties informed about the progress of their complaint.
  - 4.7 The Scheme keeps records of all complaints and inquiries, their progress and their outcome.
  - 4.8 The Scheme conducts regular performance reviews.
  - 4.9 The Scheme's staff seek periodic feedback from the parties about the parties' perceptions of the Scheme's performance.
  - 4.10 The Scheme reports regularly to the overseeing entity on the results of its monitoring and review.

#### **Benchmark 5 - Fairness**

5. **Principle** - The Scheme produces decisions which are fair and are seen to be fair by observing the principles of procedural fairness and natural justice, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

## Key Practices

- 5.1 The decision-maker bases determinations on what is fair and reasonable, having regard to the law, good industry practice and relevant industry codes of practice.
- 5.2 The Scheme's staff advise complainants of their right to access the legal system or other redress mechanisms at any stage if the complainant is dissatisfied with any of the Scheme's decisions or with the decision-maker's determination.
- 5.3 Both parties can put their case to the decision-maker.
- 5.4 Both parties are told the arguments, and given sufficient information, to know the other party's case.
- 5.5 Both parties have the opportunity to rebut the arguments of and information provided by the other party.
- 5.6 Both parties are told of the reasons for any determination.
- 5.7 Complainants are advised of the reasons why a complaint is outside jurisdiction or is otherwise excluded.
- 5.8 The decision-maker encourages but cannot compel complainants to provide information relevant to a complaint.
- 5.9 The decision-maker can require that Scheme participants provide all information which, in the decision-maker's view, is relevant to a complaint, unless that information identifies a third party to whom a duty of confidentiality or privacy is owed, or unless it contains information which the Scheme participant is prohibited by law from disclosing .

## Specific questions

Is the Scheme's process transparent and clear?

Does the Scheme's process sufficiently allow both parties to the dispute to be heard?

Are principles of natural justice met?

Does the Scheme demonstrate a rigorous, credible approach to reaching its decisions?

Is there anything more, or different, you believe could be done to improve fairness?

## Benchmark 6 - Independence

- 6. Principle** - The decision-making process and Scheme administration are independent from scheme participants.

### Key Practices

- 6.1 The Scheme has a decision-maker who is responsible for the determination of complaints.
- 6.2 The decision-maker is not selected directly by Scheme participants and is not answerable to Scheme participants for determinations.
- 6.3 The decision-maker has no relationship with the Scheme participants that fund or administer the Scheme which would give rise to a perceived or actual conflict of interest.
- 6.4 The Scheme's staff are not answerable to Scheme participants for the Scheme's operation.
- 6.5 There is a separate entity set up formally to oversee the independence of the Scheme's operation. The entity has a balance of consumer and industry interests.
- 6.6 Representatives of consumer interests on the overseeing entity are:
- capable of reflecting consumer's viewpoints and concerns, and
  - persons in whom consumers and consumer organisations have confidence.
- 6.7 As a minimum the overseeing entity's functions should include:
- appointing or dismissing the decision-maker
  - recommending or approving the Scheme's budget
  - recommending and being consulted about any changes to the Scheme's Terms of Reference
  - receiving regular reports about the Scheme's operation, and
  - receiving information about, and taking appropriate action in relation to, systemic industry problems referred to it by the Scheme.
- 6.8 The Scheme has sufficient funding to enable its case load and other relevant functions necessary to fulfil its Terms of Reference to be handled in accordance with these benchmarks;

6.9 Changes to the Terms of Reference are made in consultation with relevant stakeholders, including Scheme participants, industry and consumer organisations and Government.

**Specific questions**

Is there anything more, or different you believe could be done to ensure the scheme's independence?