



## **Memorandum of Understanding**

between

**Financial Markets Authority**

and

**Financial Services Complaints Limited**

# Memorandum of Understanding dated

2021

Between

**Financial Markets Authority (FMA);**

And

**Financial Services Complaints Limited (FSCL).**

## 1. Roles and responsibilities of FMA and FSCL

- 1.1 The FMA is an independent Crown entity established under the Financial Markets Authority Act 2011 (**FMA Act**), with statutory functions under that Act and the Acts listed in Schedule 1 of that Act. The FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets. It monitors, investigates, and enforces compliance with securities, financial reporting, and company law as they apply to financial markets participants and financial markets. The FMA regulates securities exchanges, financial advisers and brokers, discretionary investment managers, derivatives issuers, trustees and statutory supervisors, and managed investment schemes (including KiwiSaver).
- 1.2 **FSCL** is an approved dispute resolution scheme under section 50 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSPR Act**). FSCL's main objective is to investigate, resolve and determine complaints made by complainants against financial service providers that are FSCL members. Under the FSPR Act the schemes are intended to be accessible, independent, fair, accountable, efficient, and effective.
- 1.3 The parties have agreed to enter into this Memorandum to record the basis upon which they will endeavour to assist each other in the performance of their respective functions.

## 2. Principles

- 2.1 This Memorandum is a statement of the intent of the FMA and FSCL to consult, cooperate and exchange information in relation to financial services providers (as defined in the FSPR Act) that are members (as also defined in the FSPR Act) of FSCL. The consultation, cooperation and exchange of information will assist both the FMA and FSCL to achieve their complementary objectives and facilitate fair, efficient and transparent financial markets and investor confidence in financial service providers.
- 2.2 The FMA and FSCL anticipate that cooperation will be primarily achieved through on-going information sharing, supplemented when necessary by more in-depth cooperation. The provisions of this Memorandum are intended to support such cooperation as well as to facilitate the exchange of non-public information where necessary.

- 2.3 The FMA's ability to share information it holds in relation to the exercise of its powers or the performance of its functions and duties is governed and limited by section 59 of the FMA Act. That section prohibits the FMA from publishing or disclosing information or documents supplied or disclosed to, or obtained by, the FMA under the FMA Act or any financial markets legislation (as defined in the FMA Act) unless the publication or disclosure of the information or document is to certain persons (as set out in section 59(3) of the FMA Act). Such persons include a person who the FMA is satisfied has a proper interest in receiving the information or document. The FMA will therefore only disclose or supply other information to FSCL under this Memorandum where the disclosure is permitted under section 59 of the FMA Act. Furthermore, the FMA may, by written notice, impose any conditions on FSCL in relation to the publication, disclosure, or use of information or documents provided to it by FMA in accordance with section 60 of the FMA Act.
- 2.4 The FMA acknowledges that FSCL's ability to share information with the FMA is limited by FSCL's Terms of Reference (TOR). The TOR provide that if any party to a complaint supplies information to FSCL and requests it be treated as confidential, FSCL must not disclose that information to any other person, except with the consent of the party supplying the information. However, before supplying such information to the Chief Executive Officer (defined as a person appointed to that position by the Board of FSCL under its constitution) the Participant (any FSCL member in respect of which the TOR are applicable) shall first notify the Chief Executive Officer of the request for confidentiality and the reasons for such confidentiality.
- 2.5 In addition, under general privacy laws, FSCL cannot share "personal information" (information about an identifiable person as defined in the Privacy Act 2020) about either party to a complaint to any third party, except when required by sections 67 and 67A of the FSPR Act or section 25 of the FMA Act.
- 2.6 Section 67(d) of the FSPR Act requires FSCL to disclose information to the FMA (the contents of which could include "personal information") if FSCL has reasonable grounds to believe that a member which is a "financial markets participant" (as defined under s4 of the FMA Act) has contravened or is likely to contravene any financial markets legislation in a material respect.
- 2.7 Subject to relevant legislation, the FMA and FSCL agree that in their dealings with each other as contemplated under this Memorandum they will:
- (a) act in good faith, and approach issues in a timely, collaborative, open, and transparent manner;
  - (b) cooperate in the performance of their respective functions;
  - (c) seek to achieve a complementary and consistent approach, so far as it is appropriate given their independent roles and respective objectives;
  - (d) endeavour to keep each other informed, and to exchange information and views, in areas relevant to each other's responsibilities, where appropriate, including through regular meetings;

- (e) identify opportunities to coordinate activities in order to enhance efficiency, promote consistency, and avoid unnecessary duplication in the regulation of financial service providers (as defined in the FSPR Act); and
  - (f) maintain an appropriate degree of transparency on principles and practices relating to the performance of their respective functions.
- 2.8 In accordance with the principles of consultation, cooperation and exchange of information, but without limiting their general application, both parties agree to make relevant information available to the other as set out in clause 3, and subject to any legislative requirements.

### **3. Information Sharing**

- 3.1 The FMA and FSCL agree the following operational procedures for information-sharing:
- (a) FSCL will confer with the FMA and report any trends arising out of its work, including trends and issues relating to specific financial services, financial products or providers;
  - (b) FSCL will provide the FMA with information that comes to its attention which is relevant to FMA's function as the regulator of financial service providers. This will include six-monthly reporting on the number and types of complaints received and any other matters FSCL and the FMA agree to assist the FMA in carrying out its functions and duties;
  - (c) FSCL will share information with the FMA pursuant to section 67 of the FSPR to the FMA either immediately, or quarterly, depending on the seriousness of the breach;
  - (d) Whether information is released to the FMA immediately (as opposed to quarterly) will depend on several factors including, but not limited to, the level of harm that could be caused to consumers if the 'actual or potential serious breach' is not immediately reported to the FMA, and whether the 'actual or potential serious breach' may indicate high or widespread consumer harm. The discretion to share immediately sits with FSCL's Chief Executive Officer. Examples of situations where it is appropriate for FSCL's Chief Executive Officer to determine that information should be shared with the FMA immediately include where the actual or potential breach has one or more of the following characteristics:
    - The breach indicates an actual or potential systemic issue that could detrimentally affect other customers or clients of a FSCL participant;
    - FSCL has issued a preliminary view, a preliminary decision, or a recommendation, which includes a finding that there has been a material breach of financial markets legislation;
    - There has been a series of similar complaints, either about one participant, or about a particular group of participants providing a similar financial service, that indicates an industry-wide problem.
  - (e) Any other complaints which indicate, at FSCL's discretion, a high level of actual or potential consumer harm. Should FSCL not be able to voluntarily supply specific

information about an individual service provider or its financial products or services, FSCL acknowledges that the FMA may issue a notice under section 25 of the FMA Act which will compel FSCL to provide the information specified in the notice.

- 3.2 The FMA will provide quarterly reports to FSCL relating to complaints it receives in relation to financial service providers. The form of the quarterly report shall be as agreed between the FMA and FSCL from time to time but will include information about the number and general characteristics of the complaints.

#### **4. Referrals**

- 4.1 The FMA may receive complaints which may be suitable for referral to FSCL. To support the efficient and effective resolution of complaints, the FMA will develop an internal process to ensure complainants are aware of the services FSCL offers for appropriate complaints. FSCL may provide training opportunities about the role of FSCL to the FMA at mutually agreed times.

#### **5. Meetings**

- 5.1 The FMA and FSCL will meet quarterly at such times and places as the parties agree from time to time. The meetings will facilitate regular contact between the parties on routine operational matters, trends, financial service providers operating on the perimeter of financial markets legislation and risks relating to specific financial services or products.
- 5.2 Senior representatives of the parties will meet at least annually to review and discuss the operation of this Memorandum and cooperation and coordination between the parties.

#### **6. Contact Persons**

All communications between the FMA and FSCL should be between the principal points of contact as communicated by the parties to each other from time to time.

#### **7. Confidentiality**

- 7.1 For the purposes of this Memorandum "Confidential Information" includes all information, whether written or oral or by any other means, relating to any engagement between the parties pursuant to this Memorandum and all information provided by a party in accordance with this Memorandum, other than information that:
- (a) is in or comes into the public domain through no fault of the relevant party or any of its officers, employees, agents or contractors;
  - (b) was and can be demonstrated to have been, lawfully in the relevant party's possession or known to the relevant party before its disclosure; or

- (c) is disclosed to the relevant party by a third party having no obligation of confidence in relation to that information.
- 7.2 Each party agrees:
  - (a) to keep confidential all Confidential Information; and
  - (b) to use the Confidential Information solely for the purposes of performing its functions.
- 7.3 The parties will abide by all relevant privacy obligations and legislation and not disclose any personal information which it is not permitted to disclose to the other party, or which the disclosure of, would amount to a breach of any privacy obligations or legislation or governing rules that apply to that party.
- 7.4 Nothing in this Memorandum will prevent the disclosure of information that is required or permitted to be disclosed by law. Where either party is required by law to disclose information obtained under this Memorandum or intends to disclose information obtained under this Memorandum which it is expressly permitted by statute to disclose in the particular circumstances, the disclosing party will notify the other party in writing as soon as practicable.

## **8. Legal Nature of Memorandum**

- 8.1 This Memorandum is intended to be facilitative only and to assist the FMA and FSCL in the performance of their respective functions, and is not intended to create legally enforceable rights or obligations.
- 8.2 Without limiting clause 3.1:
  - (a) nothing in this Memorandum limits the exercise by the FMA of any of its powers or the performance by the FMA of any of its functions under the FMA Act or any other legislation, or requires the FMA to act in a particular manner in the exercise of its powers or the performance of its functions;
  - (b) nothing in this Memorandum limits the exercise by FSCL of any of its powers or the performance by FSCL of any of its functions under the FSPR Act or other legislation, or requires FSCL to act in a particular manner in the exercise of its powers or the performance of its functions;
  - (c) requires or obliges either party to provide any information to the other except as regulated by law under financial markets legislation or other relevant legislation.
- 8.3 This Memorandum does not affect any right of the FMA or FSCL to communicate with or obtain information or documents from any person (as defined in the FSPR Act).

## **9. Disputes**

Where there is a disagreement over any matter related to issues in this Memorandum, the parties will seek to resolve the issue by negotiation at an operational level. If these negotiations fail, the matters will be referred to the Chief Executive Officers of each party for discussion and resolution.

## **10. Term and Review**

10.1 This Memorandum will continue in full force and effect unless and until terminated in the following manner:

- (a) by agreement of both parties; or
- (b) by either party on not less than 6 months written notice to the other party.

10.2 Upon termination of this Memorandum, the parties must meet, as soon as practicable, to discuss and agree the process by which any joint initiatives or protocols developed under this Memorandum will be terminated. This includes ensuring, to the maximum extent possible, that their respective interests and objectives and on-going performance of their respective functions are not prejudiced by such termination beyond the extent of any prejudice necessarily caused by virtue of the termination.

## 11. Execution

Signed for and on behalf of

Financial Markets Authority



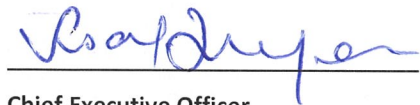
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Acting Chief Executive

Date: 10 December 2021

Signed for and on behalf of

Financial Services Complaints Limited



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Chief Executive Officer

Date: 13 December 2021