

**TERMS OF REFERENCE
OF
THE FINANCIAL SERVICES COMPLAINTS LIMITED SCHEME
OPERATED BY
FINANCIAL SERVICES COMPLAINTS LIMITED (FSCL)**

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A. PRELIMINARY MATTERS

1. Introduction

1.1. Purpose of the Scheme

The FSCL Scheme is an independent external dispute resolution scheme to resolve complaints between Complainants and Participants. The Scheme is free of charge for Complainants. The Scheme's costs are met by the Participants.

1.2. FSCL's main objectives are to:

- provide Complainants free of charge with an accessible alternative to legal proceedings for the resolution of their complaints against FSCL's Participants
- act as an approved external financial dispute resolution scheme for the financial services industry, and
- actively facilitate the resolution of complaints about financial services.

1.3. In dealing with complaints, FSCL:

- must do what in its opinion is appropriate with a view to resolving complaints in a cooperative, efficient, timely and fair manner
- shall proceed with minimum formality and technicality
- shall be as transparent as possible, whilst also acting in accordance with its confidentiality and privacy obligations, and
- must comply with the principles of accessibility, independence, fairness, accountability, effectiveness and efficiency.

1.4. Scope of the Terms of Reference

These Terms of Reference set out:

- who is eligible to lodge a complaint
- the types of complaints that FSCL can consider
- how FSCL resolves complaints
- the types of remedies that FSCL can provide, and

- other related matters.

These Terms of Reference are binding upon Participants.

1.5. Amendments to the Terms of Reference

The Board may amend these Terms of Reference:

- in accordance with the Constitution
- following consultation with the Participants and key consumer organisations, and
- with the approval of the Minister under Section 66 of the Act.

2. FSCL structure

2.1. Appointment of Chief Executive Officer

The Board appoints the Chief Executive Officer. In making appointments, the Board will consider candidates' objectivity, qualifications, experience and personal qualities.

2.2. Chief Executive Officer's powers and duties

The Chief Executive Officer has the power to exercise all powers and discretions conferred on FSCL by these Terms of Reference and to carry out all responsibilities attributed to FSCL by these Terms of Reference. The Chief Executive Officer's powers and duties include:

- making jurisdictional decisions
- resolving complaints by making recommendations and determinations
- delegating any of those powers and discretions (other than the power to make final decisions on jurisdiction, recommendations and determinations) to any employee or contractor engaged by FSCL.

B. ROLE OF FSCL UNDER THESE TERMS OF REFERENCE

3. Principles FSCL must have regard to

3.1. In dealing with a complaint under these Terms of Reference, FSCL must deal with the complaint on its merits and do what, in its opinion, is fair in all the circumstances, having regard to each of the following:

- any applicable legal rule or judicial authority

- general principles of good industry practice and any applicable code of practice
- resolving complaints in a cooperative, efficient and timely way
- keeping Complainants and Participants informed of progress, and
- assisting Complainants and Participants to reach informed and voluntary agreements to resolve complaints.

4. Procedures offered by FSCL

4.1. A complaint may be lodged with FSCL by:

- delivery to the postal address
- facsimile
- email to info@fscl.org.nz
- completing the website's on-line complaint form
- telephone (0800 347 257).

4.2. FSCL offers two main types of procedure:

- a conciliation process in which a FSCL case manager uses his or her reasonable endeavours to resolve the complaint by communicating with the Complainant and the Participant involved, or by referring the complaint for a conciliation conference, and
- if conciliation fails or is unlikely in the opinion of the Chief Executive Officer to resolve the complaint, a recommendation by the Chief Executive Officer on the complaint.

4.3. These procedures are free of charge to the Complainant.

5. What conditions have to be met before using these procedures?

5.1. Before FSCL can consider (or continue to consider) a complaint made, it must be satisfied that:

- the complaint is made by or on behalf of:
 - a person or group of persons to whom or for whom or for whose benefit the financial service was provided; or a partnership comprising of persons – if the partnership carries on a business, the business must be a Small Business

- a person who has provided a guarantee or security for the financial service
- a Small Business (whether a sole trader or constituted as a company, partnership, trust or otherwise)
- a club or incorporated association – if the club or association carries on as a business, the business must be a Small Business, or
- a body corporate of a strata title or company title building which is wholly occupied for residential or Small Business purposes, and
- either, the complaint has been referred to the Participant’s internal complaints handling service and has reached “deadlock”, that is one of the following:
 - the complaint was made to the Participant more than 20 working days previously and the Participant has not notified the Complainant in writing that it has good reason to extend the time for resolving the complaint and what that good reason is, and
 - in any case, the complaint has taken longer to resolve than 40 working days, or
 - if the Complainant does not accept a final proposal for resolution of the complaint made by a Participant at any time, or
- the Participant concerned has informed the Complainant that deadlock has been reached and the Complainant makes the complaint to FSCL within two months of being informed:
 - that deadlock has been reached
 - of the right to refer the complaint to FSCL (with the full contact details for FSCL)
 - that if the complaint is not referred to FSCL within two months, FSCL will not be able to consider the complaint, and
- the act or omission giving rise to the complaint first occurred on or after 1 April 2010.

5.2. Participants must:

- have a documented internal complaints process appropriate to the nature of their services and scale of their operations, including providing and keeping up to date information as to the position and title or positions and titles of staff responsible for complaint handling

- provide information about their internal complaints process to their customers or clients
- if required by their insurer, notify their insurer of complaints they receive within the time limit prescribed by their policy
- when advising Complainants of the outcome of complaints dealt with by the Participant's internal complaints handling system, also advise Complainants that they may complain to FSCL, if they are not satisfied with that outcome, and
- provide FSCL's contact details to Complainants both at the time that the Complainant first makes a complaint to the Participant, and when advising the Complainant of the outcome of the complaint dealt with by the Participant's internal complaints handling system.

5.3. If FSCL has concerns about the performance of a Participant's internal complaints process, FSCL may, upon giving the Participant 20 working days' notice, undertake an audit of the Participant's internal complaints process and provide advice to the Participant on appropriate remedial action.

5.4. Participants must not in any circumstances charge the Complainant any fee, or seek to be reimbursed for any fee payable by the Participant to FSCL, in connection with a complaint made to FSCL.

6. Assistance in making a complaint to FSCL

6.1. To provide fair and effective resolution of complaints, and to facilitate the clear identification of the matters in dispute, FSCL may assist Complainants to draft and lodge complaints. This includes assistance:

- to clarify the nature of the complaint including the issues raised and the matters which might be relevant to those issues, and
- to reduce the complaint to writing,

but does not extend to advocating for the Complainant. A person wishing to make a complaint can contact FSCL for assistance in making a complaint in writing.

C. JURISDICTION OF FSCL

7. Types of complaints that can be considered by FSCL

7.1. Subject to these Terms of Reference, FSCL has the power to conciliate and determine complaints about any act or omission by a Participant, in relation to a financial service including:

- breaches of contract by the Participant
- breaches of statutory obligations
- breaches of industry codes and/or non-compliance with relevant industry practice by the Participant
- complaints relating to repossessions of motor vehicles or other goods
- any other matters provided for by FSCL.

7.2. Notwithstanding any other paragraph of these Terms of Reference, FSCL may consider a complaint where all parties to the complaint and FSCL agree. If so, the procedures set out in Section E will apply to the resolution of that complaint.

7.3. FSCL may determine a complaint where:

- the act or omission giving rise to the complaint first occurred on or after 1 April 2010, and
- the amount which the Complainant has claimed or could claim in respect of the subject matter of the complaint does not exceed the Financial Limit.

7.4. The Financial Limit does not apply to any amounts in relation to:

- interest that may be claimed or awarded, and
- compensation for inconvenience that may be claimed or awarded under paragraph 15.2.

8. Exclusions from FSCL's jurisdiction

8.1. FSCL cannot consider a complaint:

- a) against an entity which is not a FSCL Participant at the time the complaint is made;
- b) about the level of a standard industry fee, premium or charge, or interest rate, except a complaint concerning non-disclosure or misrepresentation or incorrect application of the standard industry fee, premium or charge, or interest rate;
- c) about the investment performance of a product, except a complaint concerning non-disclosure or misrepresentation, or misleading conduct;
- d) relating to the management of a fund or scheme as a whole;

- e) relating to a Participant's commercial judgment in decisions about lending or security or insurance, but this does not prevent FSCL from considering complaints:
- claiming maladministration in lending, loan management, security or insurance matters
 - about an alleged breach of a Participant's compliance with lender responsibilities under the Credit Contracts and Consumer Finance Amendment Act 2014 and Responsible Lending Code, or
 - about the variation of a credit contract as a result of a Complainant being in financial hardship;
- f) about underwriting or actuarial factors leading to an offer of a life insurance contract on non-standard terms;
- g) the subject matter of which has already been dealt with in a previous complaint to FSCL by the same Complainant against the same Participant, and there are insufficient additional events and facts raised in the new complaint to warrant FSCL's consideration of the new complaint;
- h) the subject matter of which has already been dealt with by a court, tribunal or arbitrator, or any other independent or statutory complaints or conciliation body, or any investigation by a statutory Ombudsman;
- i) where more than six years have passed from the date the Complainant first became aware or should reasonably have become aware of the act or omission giving rise to the complaint;
- j) where the Complainant, and any other person to whom the Participant owes a duty of confidence, has not waived the duty of confidence owed to the Complainant and any other person in respect of any information which FSCL may request a Participant to produce for the purpose of its consideration of a complaint;
- k) where the value of the Complainant's claim exceeds \$200,000.

8.2. Discretion to exclude complaints

FSCL may refuse to consider, or continue to consider, a complaint, if FSCL considers this course of action appropriate, for example, because:

- a) there is a more appropriate place to deal with the complaint, such as a court, tribunal, or another dispute resolution scheme or the Privacy Commissioner;

- b) the complaint relates to a Participant's practice or policy and does not involve any allegation of:
- maladministration
 - inappropriate application of the practice or policy, or
 - breach of the law or any relevant code of practice;
- c) where it appears to the Chief Executive Officer, on the basis of the facts presented by the Complainant, the relevant Participant has made a reasonable settlement offer in settlement of the complaint;
- d) the complaint being made is frivolous or vexatious or not being pursued in a reasonable manner;
- e) after lodging the complaint with FSCL, the Complainant commences legal proceedings against the Participant in respect of the subject matter of the complaint;
- f) the Complainant is not a retail client as defined by the Act.

9. Decisions on jurisdiction

- 9.1. The Chief Executive Officer shall decide whether a complaint falls within the Terms of Reference. In reaching this decision he or she shall request and consider representations from both the Complainant and the Participant concerned.
- 9.2. The Chief Executive Officer will advise the Complainant in writing if a complaint is excluded, and give his or her reasons for excluding the complaint.
- 9.3. If, within 10 days of receipt of this advice, the Complainant objects to a decision made by the Chief Executive Officer in accordance with paragraph 9.1, the Chief Executive Officer will review the matter if the Chief Executive Officer is satisfied that the Complainant's objection may have substance. If so:
- the Chief Executive Officer will inform the other parties involved in the complaint
 - all parties will be given an opportunity to provide submissions, if appropriate
 - all parties will be provided with copies of each other's submissions, and
 - the Chief Executive Officer will review the matter and provide the parties with the Chief Executive Officer's final decision referred to as a jurisdictional decision that will set out the reasons for the decision.

D. INFORMATION RELATING TO COMPLAINTS

10. Provision of information by Participants

10.1. The Chief Executive Officer may require any Participant named in a complaint to provide any information that, in the view of the Chief Executive Officer, relates to that complaint.

10.2. Participants must, as soon as is reasonably required, disclose the information requested by the Chief Executive Officer. However, a Participant is exempt from disclosing such information if the Participant certifies to the Chief Executive Officer:

- that the disclosure of the information would place the Participant in breach of its duty of confidentiality to a third party who has not consented to disclosure, despite the Participant using its best endeavours to obtain such consent, or
- the Participant does not have the information requested, or
- to provide the information would breach a Court order or prejudice a current investigation by the police or another law enforcement agency.

11. Disclosure of information to parties

11.1. If any party to a complaint:

- a) supplies information to the Chief Executive Officer and requests that he or she treat it as confidential, the Chief Executive Officer 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, the Participant shall first notify the Chief Executive Officer of the request for confidentiality and the reasons for such confidentiality;
- b) requests access to any information on the Chief Executive Officer's file, the Chief Executive Officer must, subject to these Terms of Reference, legal requirements and any procedural standard developed by the Chief Executive Officer, make the information available.

12. Responding to general enquiries

12.1. FSCL may respond to general enquiries, provide general information and give advice on the procedure for referring a complaint to FSCL. It is not FSCL's function to provide information about individual Participants or their financial services or products.

E. COMPLAINT RESOLUTION PROCESS

13. When a complaint is received

13.1. FSCL is not bound by any legal rule of evidence. FSCL's decisions do not create precedents.

13.2. After receiving a complaint, FSCL must:

- use its reasonable endeavours to resolve the complaint in a timely manner
- comply with the requirements of natural justice and procedural fairness, and
- regularly inform the parties of progress towards resolving the complaint.

13.3. In resolving the complaint, FSCL may:

- assist the Complainant with drafting and lodging a complaint, and
- investigate the complaint in the manner set out in these Terms of Reference and consistent with the rules of natural justice.

13.4. At any time that FSCL is considering a complaint it may seek to promote a settlement or withdrawal of the complaint by one or more of the following methods:

- negotiation
- conciliation
- deciding the complaint in accordance with the process set out in paragraph 14.

13.5. When deciding a complaint, FSCL may consult with industry and consumer advisers as FSCL thinks appropriate.

14. Recommendations

14.1. If the Complaint is not resolved by agreement and/or conciliation, the Chief Executive Officer, at the request of the Complainant or the Participant concerned, may make a recommendation for settlement or withdrawal of the complaint. Before doing so, he or she must:

- a) ensure that the parties to the complaint are provided with access to the documentation, information and material upon which FSCL proposes to rely in its recommendation or determination;

- b) first give the Complainant and the Participant 20 working days notice of his or her intention to make such recommendation;
- c) during the period of notice (or such longer period as the Chief Executive Officer may agree) allow the Complainant or the Participant to make further representations to the Chief Executive Officer in respect of the complaint; and
- d) if no agreement has been reached at the end of the period of notice make a recommendation.

14.2. A recommendation must:

- state the name of the Participant concerned in relation to the complaint
- be in writing, and
- include a summary of the reasons for making the recommendation.

14.3. If, in making a recommendation:

- a) the Chief Executive Officer is minded to:
 - propose that a complaint be settled or withdrawn on terms which appear to him or her to be acceptable to both the Complainant and the Participant concerned, or
 - make a recommendation for the settlement or withdrawal of the complaint, and
- b) that settlement or withdrawal would involve the provision by the Participant of any service or require an action to be taken by the provision of valuable consideration (whether in the form of a money payment or otherwise),

the recommendation must, unless the Participant has agreed otherwise, state that it is open for acceptance by the Complainant only if he or she accepts it in full and final settlement of the subject matter of the complaint.

15. Power of the Chief Executive Officer to order compensation or other forms of redress

15.1. The Chief Executive Officer may award compensation for any financial or economic loss which is a direct result of any act or omission in respect of which a complaint is upheld, and direct a refund of fees or commission, up to the amount of \$200,000. However, where the parties have agreed under paragraph 7.2 that FSCL can deal with a complaint, there shall be no maximum limit on the compensation the Chief Executive Officer can award under this provision.

- 15.2. The Chief Executive Officer may also award compensation not exceeding \$2,000 to compensate the Complainant for non-financial loss, including stress, humiliation and inconvenience suffered by him or her as a result of the acts or omissions of the Participant concerned.
- 15.3. The Chief Executive Officer may direct the Participant to carry out or refrain from specific actions to the extent that this is necessary to provide redress for any matter in respect of which a complaint has been upheld, including:
- the forgiveness or variation of a debt
 - the release of security for a debt
 - the repayment, waiver or variation of a fee or other amount owing to the Participant or its representative or agent including the variation in the applicable interest rate on a loan
 - the reinstatement or rectification of a contract
 - variation of the terms of the credit contract in cases of financial hardship, and
 - the meeting of a claim under an insurance policy by, for example repairing, reinstating or replacing items of property.
- 15.4. The Chief Executive Officer cannot award:
- monetary compensation in the nature of punitive damages, or
 - compensation for financial or economic loss or damage that is not a direct result of any act or omission in respect of which a complaint is upheld.
- 15.5. The Chief Executive Officer may decide that the Participant pay interest on a payment to be made by the Participant to the Complainant. The Chief Executive Officer will calculate interest from the date of the cause of action or matter giving rise to the claim. The Chief Executive Officer may have regard to any factors it considers relevant, including the extent to which either party's conduct contributed to delay in the resolution of the matter.
- 16. Complainant's acceptance of recommendations or determinations**
- 16.1. A Complainant must elect whether or not to accept a recommendation of the Chief Executive Officer by informing FSCL in writing within one calendar month of the date the decision is sent to the Complainant.
- 16.2. Where a Complainant elects to accept the recommendation of the Chief Executive Officer, the Complainant is bound by all aspects of that decision.

16.3. If a Complainant does not inform FSCL within the specified time, the Complainant shall be taken to have elected not to accept the decision.

17. Participants bound to abide by recommendations and determinations

17.1. Where the Complainant accepts the Chief Executive Officer's recommendation, the Participant must implement the decision as soon as practicable after being informed the Complainant has accepted it.

18. Termination

18.1. Where a Participant or former Participant fails to meet its obligations under these Terms of Reference and/or fails to comply with the Chief Executive Officer's recommendation, FSCL may take any action it considers appropriate, including:

- terminating the Participant's membership; and/or
- referring the matter to the Financial Markets Authority.

19. No liability

19.1. FSCL, the Chief Executive Officer, Board members and/or FSCL employees are not liable for any loss, damage or liability that arises from anything done or omitted to be done in the course of his or her duties, unless the person has acted in bad faith.

19.2. No FSCL decision is able to be reviewed or appealed in any form, to any other person, court, tribunal, statutory complaints authority, or other approved dispute resolution scheme or body, except as contemplated by the Act.

F. INDUSTRY PROBLEMS

20. Reporting systemic issues

20.1. The Board must ensure that FSCL has procedures in place for dealing with systemic issues.

20.2. A systemic issue is an issue that will have an effect on other persons beyond the parties to the complaint. FSCL must identify systemic issues and refer these to the relevant Participant for remedial action. In each case, FSCL must obtain a report from the Participant as to the remedial action undertaken and continue to monitor the matter until a resolution has been achieved that is acceptable to FSCL.

20.3. FSCL must report systemic issues to the relevant licensing authority.

G. COLLECTION AND SHARING OF INFORMATION BY FSCL

21. Data collection

21.1. FSCL must collect and record comprehensive information relating to its complaints resolution, for example:

- the number of complaints and enquiries
- demographics of the Complainants (where practicable)
- details of complaints which were not considered by FSCL and why
- the outcome of complaints that were resolved by FSCL
- the current caseload including the age and status of open cases
- the time taken to resolve complaints
- a profile of complaints that identifies:
 - the cause of the complaint
 - any systemic issues or trends.

22. Referrals by FSCL to other dispute resolution schemes

22.1. FSCL will ensure that FSCL staff has information, mechanisms and procedures in place:

- for referring relevant complaints to other more appropriate forums, including other approved external dispute resolution schemes, and
- to share prescribed information with other approved schemes, the Reserve Scheme and the Registrar of Financial Service Providers.

H. LEGAL PROCEEDINGS

23. Debt recovery or other proceedings

23.1. Subject to paragraph 23.2, where a Complainant lodges a complaint with FSCL, the Participant must not:

- instigate legal proceedings against the Complainant relating to any aspect of the subject matter of the complaint

- pursue legal proceedings instituted prior to the lodging of the complaint with FSCL, save to the minimum extent necessary to preserve the Participant’s legal rights and, in particular, must not seek judgment in the proceedings, and
 - without the Chief Executive Officer’s consent, take any action to recover a debt the subject of the complaint, to protect any assets securing that debt, or to assign any right to recover that debt while FSCL is dealing with the complaint.
- 23.2. Notwithstanding subparagraph 23.1, with FSCL’s agreement and on such terms as FSCL may require, the Participant may:
- issue proceedings where the relevant limitation period for such proceedings will shortly expire – but those proceedings may not be pursued beyond the minimum necessary to preserve the Participant’s legal rights, or
 - exercise any powers it might have to freeze or otherwise preserve assets the subject of the complaint.
- 23.3. If the complaint is subsequently decided by FSCL and becomes binding upon the Participant, the Participant will abandon any aspect of proceedings against the Complainant that are inconsistent with that decision.
- 23.4. Settled proceedings

Where a complaint had been lodged with FSCL and is subsequently resolved by agreement between the parties, the Participant will not instigate or continue legal proceedings to the extent that those proceedings are inconsistent with that agreement.

I. ADMINISTRATIVE RESPONSIBILITIES

24. Responsibilities and requirements

- 24.1. The Chief Executive Officer is responsible for:
- a) FSCL’s and the Scheme’s day to day management, administration and conduct. He or she shall have power to incur expenditure on behalf of the Board in accordance with the current financial budget approved by the Board;
 - b) appointing and dismissing employees, consultants, independent contractors and agents, and determining their terms of employment or engagements;
 - c) attending, in a non-voting capacity, Board meetings;
 - d) promoting FSCL and its complaints handling procedures;

- e) reviewing these Terms of Reference and making recommendations to the Board on any amendments he or she considers are required;
- f) preparing an annual report containing, in relation to the preceding FSCL financial year, a general review of his or her activities and FSCL's finances during that year and, at least 21 days before FSCL's annual general meeting, sending that report to each Board member;
- g) at his or her discretion, making:
 - ad hoc confidential reports to the Board on matters coming to his or her attention concerning Participants' general compliance with FSCL, and
 - general observations about the purpose and operation of FSCL in any general forum.

24.2. The Chief Executive Officer must not exercise any power which the Constitution of FSCL expressly gives to the Chairperson, the Board or any other person.

25. Definitions

In these Terms of Reference, the following expressions have the following meanings:

<u>Act</u>	the Financial Service Providers (Registration and Disputes Resolution) Act 2008
<u>Board</u>	is the FSCL Board of Directors as defined in the <u>Constitution</u>
<u>Chief Executive Officer</u>	means a person appointed to that position by the Board under the Constitution
<u>Complainant</u>	means a person who has a Complaint that has been lodged with FSCL and who, under paragraph 5 is eligible to use the Scheme.
<u>Complaint</u>	means an expression of dissatisfaction made to a Participant related to its products or services where a response or a resolution is explicitly or implicitly expected
<u>Constitution</u>	means the Constitution of Financial Services Complaints Ltd
<u>Consumer representative</u>	means a person appointed to that position by the Board under paragraph 2.3
<u>Financial limit</u>	means \$200,000 as at 1 April 2010

<u>Financial Service</u>	means any financial service provided by a financial services provider registered under the Act
<u>Financial Services Industry</u>	means the provision of all forms of services, advice or products in connection with insurances, superannuation, retirement savings accounts, funds management, financial advice, investment advice and sales of financial or investment products, investment, securities and derivatives, the provision of loans and mortgages and any other areas that the Board determines should fall within these Terms of Reference.
<u>Financial services provider</u>	means a provider of a Financial Service that is a Participant. A reference to a Financial Services Provider includes any employee, agent or contractor of the Financial Services Provider including any person who has actual, ostensible, apparent or usual authority to act on behalf of the Financial Services Provider or authority and to act by necessity in relation to a financial service.
<u>FSCL</u>	Financial Services Complaints Limited
<u>Industry problem</u>	means a systemic fault including a consistently recurring problem, fault or defect that may be confined to a particular product, a particular company or that may be relevant to the whole or part of the Financial Services Industry, which related to a Participant's dealings with its clients.
<u>Industry representative</u>	means a person appointed to that position by the Board under paragraph 2.3
<u>Jurisdictional Decision</u>	means a decision under paragraph 9.1 as to whether, under these Terms of Reference, FSCL is able to consider a complaint or whether FSCL should exercise its discretion to exclude a complaint
<u>Minister</u>	means the Minister of Consumer Affairs
<u>Participant</u>	means any FSCL member in respect of which these Terms of Reference are applicable
<u>Recommendation</u>	means an assessment by the Chief Executive Officer about a complaint in accordance with paragraph 14 of the Terms of Reference
<u>Scheme</u>	means the dispute resolution scheme operated by FSCL

<u>Service</u>	means the complaint resolution scheme described in these Terms of Reference
<u>Small Business</u>	means a business that, at the time of the act or omission by the Participant that gave rise to the Complaint is a business with less than 19 employees
<u>Terms of Reference</u>	means these Terms of Reference as amended from time to time in accordance with the Constitution