



A Financial Ombudsman Service

**FSCL** FINANCIAL SERVICES COMPLAINTS LTD  
RATONGA PŪTEA PUNA MANAAKI

# TERMS OF REFERENCE

MARCH 2022

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Terms of reference for the  
Financial Services Complaints  
Limited Scheme

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## INTRODUCTION

1. The Financial Services Complaints Limited Scheme (the scheme) is operated by Financial Services Complaints Limited (FSCL). The scheme is an independent external dispute resolution scheme that aims to resolve complaints between complainants and participants. The scheme is free of charge for complainants. The scheme's costs are met by the participants.
2. The scheme's main objectives are to:
  - > provide complainants with an accessible alternative to legal proceedings to resolve their complaints against FSCL's participants
  - > act as an approved external financial dispute resolution scheme for the financial services industry
  - > actively support the resolution of complaints about financial services.
3. These terms of reference set out:
  - > who can make a complaint
  - > the types of complaint the scheme can and cannot consider
  - > how the scheme resolves complaints
  - > the types of remedies the scheme can provide
  - > other related matters.
4. These terms of reference apply from 1 March 2022.
5. Occasionally in these terms of reference, we've needed to use words or expressions that have a special meaning. You'll find 'Definitions of words and expressions with special meaning' at the back of the document.
6. In dealing with a complaint, FSCL must:
  - > act to resolve complaints in a cooperative, efficient, timely, and fair manner
  - > work with minimum formality and technicality
  - > be as transparent as possible, while following our confidentiality and privacy obligations
  - > comply with the principles of accessibility, independence, fairness, accountability, effectiveness, and efficiency.
7. FSCL staff have information, mechanisms, and procedures in place to:
  - > refer relevant complaints to other more appropriate forums, including other approved external dispute resolution schemes
  - > share prescribed information with other approved schemes, the Registrar of Financial Service Providers, and the regulators.
8. FSCL's Board may change these terms of reference:
  - > according to FSCL's constitution
  - > after consulting with participants and key consumer organisations
  - > with the approval of the Minister under Section 66 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the Act).
9. You can make a complaint with us by:
  - > sending your complaint to our postal address PO Box 5967, Wellington 6140
  - > emailing us at [complaints@fscl.org.nz](mailto:complaints@fscl.org.nz)
  - > completing the on-line complaint form on our website [www.fscl.org.nz](http://www.fscl.org.nz)
  - > telephoning us on 0800 347 257.

## THE SCHEME'S POWERS

10. FSCL's Chief Executive Officer has the authority to exercise all powers, duties, and discretions set out in these terms of reference, which include:
- > making final decisions on whether a complaint falls within these terms of reference
  - > resolving complaints by making final decisions
  - > delegating any of those powers, duties, and discretions (other than the power to make final decisions) to any employee or contractor engaged by FSCL.

### **Types of complaints we can consider**

11. FSCL has the power to conciliate and decide complaints about any act or omission by a participant about a financial service including:
- > breaches of contract
  - > breaches of trust
  - > breaches of statutory obligations
  - > breaches of industry codes or non-compliance with relevant industry practice
  - > complaints about the repossession of motor vehicles or other goods
  - > any other matters provided for by FSCL.
12. FSCL may also consider a complaint where all parties to the complaint and FSCL agree. If so, the procedures set out in paragraphs 34 to 56 will apply in resolving that complaint.
13. FSCL may determine a complaint where:
- > the act or omission that led to the complaint first occurred on or after 1 April 2010
  - > the amount the complainant could reasonably claim for the subject matter of the complaint does not exceed the financial limit.
14. The financial limit does not apply to any amounts for:
- > interest that may be claimed or awarded
  - > compensation for inconvenience that may be claimed or awarded.

### **Types of complaints we cannot consider**

15. There are some time restrictions on referring a complaint to FSCL. We cannot consider a complaint:
- > about an entity that is not a FSCL participant at the time the complaint is made
  - > if the act or omission that led to the complaint first occurred before 1 April 2010
  - > 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 that led to the complaint
  - > where the complainant has not referred their complaint to FSCL within three months (or six months in exceptional circumstances\*) of being told by the participant:
    - that deadlock has been reached

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\*Exceptional circumstances may include the recent death of a family member, serious health issues, or significant incapacity.

- of the complainant's right to refer the complaint to FSCL (with the full contact details for FSCL)
  - that if the complaint is not referred to FSCL within three months, FSCL will not be able to consider the complaint.
16. We cannot consider a complaint where the amount in dispute or that could reasonably be in dispute exceeds the financial limit, unless the participant has agreed to waive the financial limit.
17. We cannot consider a complaint about the way a participant operates their business, in the following ways:
- > the level of a standard industry fee, premium or charge, or interest rate, except a complaint concerning non-disclosure, misrepresentation, or incorrect application of the standard industry fee, premium or charge, or interest rate
  - > the investment performance of a product, except a complaint concerning non-disclosure or misrepresentation, or misleading conduct
  - > the management of a fund or scheme as a whole
  - > a participant's commercial judgement 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 Act 2003, the Credit Contracts and Consumer Finance Act Regulations 2004, and the Responsible Lending Code
    - about the variation of a credit contract as a result of a complainant being in financial hardship
  - > the underwriting or actuarial factors leading to an offer of a life insurance contract on non-standard terms.
18. We cannot consider a complaint where the subject matter has already been dealt with:
- > in a previous complaint to FSCL by the same complainant against the same participant, and not enough additional events or facts are raised in the complaint to warrant FSCL considering the new complaint
  - > by a court, tribunal, or arbitrator, or any other independent or statutory complaints or conciliation body, or any investigation by a statutory ombudsman.
19. We cannot consider a complaint where the complainant, and any other person the participant owes a duty of confidence to, has not waived the duty of confidence owed to the complainant and any other person over any information that we may ask a participant to produce for us to consider a complaint.

20. We may refuse to consider, or continue to consider, a complaint if we consider this course of action appropriate, for example, because:
- > there is a more appropriate place to deal with the complaint such as a court, tribunal, another dispute resolution scheme, or the Privacy Commissioner
  - > 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
    - breach of the law or any relevant code of practice
  - > 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 to settle the complaint
  - > the complaint is frivolous or vexatious or not being pursued in a reasonable manner
  - > after lodging the complaint with FSCL, the complainant starts legal proceedings against the participant relating to the subject matter of the complaint
  - > the complainant is not a retail client as defined by the Act.

## PRECONDITIONS TO THE SCHEME CONSIDERING A COMPLAINT

21. Before FSCL can consider (or continue to consider) a complaint, we must be satisfied that the complaint is made by or on behalf of:
- > an individual or group of individuals that the financial service was provided for (including beneficiaries under an estate) or a partnership comprising individuals – if the partnership operates as a business, the business must be a small business
  - > an individual who has provided a guarantee or security for the financial service
  - > a small business (whether a sole trader, company, partnership, trust, or otherwise)
  - > a club or incorporated association – if the club or association operates as a business, the business must be a small business
  - > a body corporate of a strata title or company title building wholly occupied for residential or small-business purposes.
22. We must also be satisfied that the complaint has been referred to the participant's internal complaints process and has reached deadlock in one of the following ways:
- > the complaint was made to the participant more than 20 working days previously and the participant has not notified the complainant in writing that they have good reason to extend the time for resolving the complaint and what that good reason is
  - > the complaint has taken longer than 40 working days to resolve
  - > the complainant does not accept a final proposal for resolving the complaint made by the participant
  - > the participant has informed the complainant that deadlock has been reached.
23. Participants must:
- > have a documented internal complaints process appropriate to the nature of their services and the scale of their operations, including providing and keeping up-to-date information on the position(s) and title(s) of staff responsible for handling complaints

- > 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 set out in their policy
  - > when advising complainants of the outcome of complaints dealt with by the participant's internal complaints process, also advise complainants that they may make a complaint to FSCL if they are not satisfied with that outcome
  - > provide FSCL's contact details to complainants both at the time 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 process.
24. Participants must not charge the complainant any fee, or seek to be reimbursed for any fee payable by the participant to FSCL for a complaint made to FSCL.
25. If FSCL has concerns about the performance of a participant's internal complaints process, we may, by giving the participant 20 working days' notice, audit the participant's internal complaints process and advise the participant on appropriate remedial action.

## **DECIDING WHETHER A COMPLAINT MEETS THE TERMS OF REFERENCE**

26. The Chief Executive Officer decides whether a complaint falls within the terms of reference. In reaching this decision, they must ask for and consider representations from both the complainant and the participant.
27. The Chief Executive Officer will advise the complainant in writing if a complaint is excluded and give the reasons for excluding the complaint.
28. If, within 10 working days of receiving this advice, the complainant objects to the Chief Executive Officer's decision, the Chief Executive Officer will review the matter if they are 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
  - > the Chief Executive Officer will review the matter and provide the parties with the final decision that will set out the reasons for the decision.

## **DEALING WITH INFORMATION ABOUT COMPLAINTS**

29. 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.

### **Participants must provide certain information**

30. Participants must, as soon as is reasonably required, provide the information requested by the Chief Executive Officer. However, a participant is exempt from providing such information if they certify to the Chief Executive Officer that:
- > providing the information would place the participant in breach of their duty of confidentiality to a third party who has not consented to disclosure, despite the participant doing their best to obtain such consent, or
  - > the participant does not have the information requested, or
  - > providing the information would breach a Court order or prejudice a current investigation by the police or another law enforcement agency.

### **Asking for information to be treated as confidential**

31. If any party to a complaint supplies information to the Chief Executive Officer and asks that it be treated 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, a participant must first notify the Chief Executive Officer of the request and the reasons for the confidentiality.
32. If any party to a complaint asks for access to any information on the Chief Executive Officer's file, the Chief Executive Officer must make the information available, subject to these terms of reference, legal requirements, and any procedural standard the Chief Executive Officer has developed.

### **Responding to general enquiries**

33. FSCL may respond to general enquiries, provide general information, and give advice on the procedure for referring a complaint to FSCL. We do not provide information about individual participants or their financial services or products.

## **THE PROCESS FOR RESOLVING COMPLAINTS**

34. FSCL must deal with a complaint on its merits and do what is fair in all the circumstances.
- We must:
- > have regard to the law, any relevant code of practice, and the principles of good industry practice
  - > resolve complaints in a cooperative, efficient, and timely way
  - > keep complainants and participants informed of progress
  - > help complainants and participants to reach informed and voluntary agreements to resolve complaints.
35. No FSCL decision can 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.
36. FSCL is not bound by any legal rule of evidence. Our decisions do not create precedents.



37. A complainant can contact FSCL if they need help to make a complaint in writing. To fairly and effectively resolve a complaint, and to help clearly identify the matters in dispute, FSCL may help complainants to draft and lodge complaints. This may include help:
- > to clarify the nature of the complaint including the issues raised and the matters that may be relevant to those issues
  - > to reduce the complaint to writing
  - > from third-party agencies including translation services or help for people with a disability.
38. FSCL's help to make a complaint in writing does not extend to advocating for the complainant.

### **Dealing with a complaint**

39. After receiving a complaint, we must:
- > work to resolve the complaint in a timely manner
  - > comply with the requirements of natural justice and procedural fairness
  - > regularly inform the parties of progress towards resolving the complaint.
40. In resolving the complaint, we may:
- > help the complainant to draft and lodge a complaint
  - > investigate the complaint in the manner set out in these terms of reference and consistent with the rules of natural justice
  - > consult with industry and consumer advisers as we consider appropriate.
41. At any time that we are considering a complaint, we may seek to promote a settlement or withdrawal of the complaint by one or more of the following methods:
- > negotiation
  - > conciliation
  - > making a decision on the complaint.

### **Settling or withdrawing a complaint**

42. If the complaint is not resolved by agreement or conciliation, the Chief Executive Officer, at the request of the complainant or the participant, may make a final decision for settlement or withdrawal of the complaint. Before doing so, the Chief Executive Officer must:
- > make sure that the parties to the complaint are provided with access to the documents, information, and material on which FSCL proposes to rely in the final decision
  - > first give the complainant and the participant 20 working days' notice of the intention to make a final decision, unless either party has advised before the end of the 20-working-day period that they have provided all the information about the complaint they want considered
  - > during the period of notice (or any longer period the Chief Executive Officer may agree), allow the complainant or the participant to make further representations to the Chief Executive Officer about the complaint
  - > if no agreement has been reached at the end of the period of notice, make a final decision.

43. A final decision must:
- > state the name of the participant involved in the complaint
  - > be in writing
  - > include a summary of the reasons for making the final decision.
44. If, in making a final decision, the Chief Executive Officer decides that the complaint should be settled, the final decision must state that it is open for acceptance by the complainant only if they accept it in final settlement of the complaint.

**Power to order compensation**

45. The Chief Executive Officer may award compensation for any financial or economic loss that is a result of any act or omission by the participant that led to a complaint being upheld, and direct a refund of fees or commission, up to the financial limit. However, where the participant has agreed to waive the financial limit, there will be no maximum limit on the compensation the Chief Executive Officer can award.
46. The Chief Executive Officer may also award compensation up to \$5,000 to compensate the complainant for non-financial loss, including stress, humiliation, inconvenience, and lost opportunity that they've suffered as a result of any act or omission by the participant.
47. The Chief Executive Officer may direct the participant to carry out or refrain from specific actions to the extent that is necessary to provide a remedy for any matter related to a complaint that has been upheld, including the:
- > forgiveness or variation of a debt
  - > release of security for a debt
  - > repayment, waiver, or variation of a fee or other amount owing to the participant or their representative or agent including the variation in the applicable interest rate on a loan
  - > reinstatement or correction of a contract
  - > variation of the terms of the credit contract in cases of financial hardship
  - > settling of a claim under an insurance policy by, for example, repairing, reinstating, or replacing items of property.
48. The Chief Executive Officer cannot award:
- > monetary compensation in the nature of punitive damages
  - > compensation for financial or economic loss or damage that is not a result of any act or omission by the participant that led to a complaint being upheld.
49. The Chief Executive Officer may decide that the participant must 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 action or matter that led to the claim. The Chief Executive Officer may take into account any factors they consider relevant, including the extent to which either party's conduct contributed to a delay in resolving the matter.

### **Complainants must choose whether to accept a final decision**

50. A complainant must choose whether to accept a final decision of the Chief Executive Officer by informing FSCL in writing within one month of the date the decision is sent to the complainant.
51. Where a complainant chooses to accept the final decision of the Chief Executive Officer, the complainant is bound by all aspects of that decision.
52. If a complainant does not inform FSCL within the specified time, we will conclude that the complainant has chosen not to accept the decision.

### **Participants must meet their obligations under these terms of reference**

53. These terms of reference are binding on participants.
54. Where the complainant accepts the Chief Executive Officer's final decision, the participant must implement the decision as soon as practicable after being informed that the complainant has accepted it.
55. Where a participant or former participant does not meet their obligations or does not comply with the Chief Executive Officer's final decision, FSCL may take any action it considers appropriate, including:
  - > terminating the participant's membership
  - > referring the matter to the relevant regulator
  - > asking the Registrar of Financial Service Providers to deregister the participant.

### **No liability**

56. FSCL, the Chief Executive Officer, the Board, and FSCL employees are not liable for any loss, damage, or liability that arises from any act or omission in the course of their duties, unless the person has acted in bad faith.

## **LEGAL PROCEEDINGS AND DEBT RECOVERY**

57. Subject to paragraph 58, where a complainant makes a complaint to FSCL, the participant must not:
  - > start legal proceedings against the complainant relating to any aspect of the subject matter of the complaint
  - > pursue legal proceedings that started before the complaint was lodged with FSCL, except to the minimum extent necessary to preserve the participant's legal rights and, in particular, must not seek judgment in the proceedings
  - > without the Chief Executive Officer's consent, take any action to recover a debt that is 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.
58. 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 (those proceedings may not be pursued beyond the minimum necessary to preserve the participant's legal rights)
  - > exercise any powers it might have to freeze or otherwise preserve assets that are the subject of the complaint.

59. If the complaint is subsequently decided by FSCL and becomes binding on the participant, the participant will abandon any aspect of proceedings against the complainant that are inconsistent with that decision.
60. Where a complaint had been lodged with FSCL and is subsequently resolved by agreement between the parties, the participant will not start or continue legal proceedings to the extent that those proceedings are inconsistent with that agreement.

## **MEETING OUR ADMINISTRATIVE RESPONSIBILITIES AND REQUIREMENTS**

61. FSCL must meet certain administrative and reporting requirements.

### **Responsibilities and limitations of the Chief Executive Officer**

62. FSCL's Chief Executive Officer is responsible for:
  - > FSCL's and the scheme's day-to-day management, administration, and conduct. The Chief Executive Officer has the power to incur expenditure on behalf of the Board, according to the current financial budget approved by the Board
  - > appointing and dismissing employees, consultants, and independent contractors and agents, and determining their terms of employment or engagements
  - > attending board meetings in a non-voting capacity
  - > promoting FSCL and its complaints-handling procedures
  - > reviewing these terms of reference and making recommendations to the Board on any changes the Chief Executive Officer considers necessary
  - > preparing an annual report containing a general review of FSCL's finances and activities during the preceding financial year and, at least 21 days before FSCL's annual general meeting, sending that report to each Board member
  - > at their discretion, making:
    - confidential reports to the Board on matters coming to their attention about participants' general compliance with FSCL
    - general observations about the purpose and operation of FSCL in any forum.
63. FSCL's Chief Executive Officer must not exercise any power that the constitution expressly gives to the Chair, the Board, or any other person.

### **Information FSCL must record about complaints resolution**

64. FSCL must collect and record comprehensive information about our complaints resolution, for example:
  - > the number of complaints and enquiries
  - > demographics of the complainants (where practicable)
  - > details of complaints that 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.

**Dealing with and reporting systemic issues**

65. The Board must ensure that FSCL has procedures in place for dealing with systemic issues.
66. A systemic issue is an issue that will have an effect on other people 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 on the remedial action undertaken and continue to monitor the matter until a resolution that is acceptable to FSCL has been achieved.
67. FSCL has a duty to report material breaches of legislation to the relevant regulator under sections 67 and 67A of the Act.

## DEFINITIONS OF WORDS AND EXPRESSIONS WITH SPECIAL MEANING

In these terms of reference, the following words and expressions have the following meaning.

Act	The Financial Service Providers (Registration and Dispute Resolution) Act 2008
Board	The FSCL Board of Directors as defined in the constitution
Chief Executive Officer	The person appointed to that position by the Board under the Constitution
Complainant	A person who has lodged a complaint with FSCL and who is eligible to use the scheme
Complaint	An expression of dissatisfaction made to a participant about their products or services, or the participant's internal complaints process itself, where a response or a resolution is explicitly or implicitly expected
Constitution	The Constitution of Financial Services Complaints Limited
Final decision	An assessment by the Chief Executive Officer about a complaint under these terms of reference
Financial limit	\$350,000 (plus GST, if any)
Financial service	Any financial service provided by a financial services provider registered under the Act
Financial services industry	The providers of all forms of services, advice, or products related to 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
FSCL	Financial Services Complaints Limited
Minister	The Minister of Consumer Affairs

Participant	A FSCL scheme member
Scheme	The dispute resolution scheme operated by FSCL
Small business	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
Terms of reference	These terms of reference as amended from time to time under the constitution