



# Financial Dispute Resolution Service (FDRS)

DATE: 1 November 2021

## Rules

### 1. Title

1. These Rules are the Financial Dispute Resolution Scheme Rules 2021 (Rules).

### 2. Commencement

1. These Rules come into force in 1 November 2021. These Rules will apply for any formal complaint made to the Scheme Member following this commencement date.

### 3. Interpretation

1. In these Rules, unless the context otherwise requires:

**Act means:**

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (as amended from time to time).

**Advisory Council means:**

The Advisory Council, appointed by the Governing Body, to oversee the operation of the Scheme.

**Alternate Dispute Resolution means:**

A mediation or conciliation process.

**Complaints body means:**

An approved dispute resolution scheme or any other person or body to which formal complaints may be made that:

- a) is established or approved under legislation; or
- b) has terms of reference or a constitutive document that states that the complaints resolution scheme is established or operated in accordance with the Australian Benchmarks for Industry-Based Customer Dispute Resolution Schemes.

**FairWay means:**

FairWay Resolution Limited.

**Final decision means:**

A final decision made under rules 24 to 26, within an adjudication process.

**Governing Body means:**

The Governing Body is the Board of FairWay.

**Member means:**

A member of the Scheme.

**Minister means:**

The Minister of Consumer Affairs.

**Qualifying group means:**

Has the meaning set out in rule 8(2).

**Remedial action means:**

Any action that a financial service provider is required to take by a binding resolution of a complaint under these Rules or under the rules of an approved dispute resolution scheme.

**Retail Client means:**

Has the meaning given by section 49 of the Act.

**Registrar means:**

Registrar of the Financial Service Providers Register.

**Reserve Scheme means:**

Has the meaning given by section 71 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008, prior to the definition being repealed on 1 July 2014.

**Scheme means:**

Financial Dispute Resolution Service (FDRS), an approved dispute resolution scheme under the Act.

**Scheme Adjudicator means:**

The person employed or engaged by the Scheme under rule 40 to carry out the functions of the Scheme Adjudicator, and shall include any alternate Scheme Adjudicator appointed by the Scheme under rule 40.

**Scheme Officer** means:

A person delegated by the Scheme Adjudicator to, amongst other things, make decisions regarding the acceptance of complaints into the Scheme in accordance with these Rules.

**Serious misconduct** means:

Has the meaning set out in rule 57(2).

**Systemic issue** means:

Has the meaning set out in rule 56(2).

## Part 1 – Core features of the Scheme

### 4. Purpose of the Scheme

1. The purpose of the Scheme is to promote the long-term interests of consumers and financial service providers in New Zealand, by providing a complaints resolution scheme:
  - a) To which complaints may be made, free of charge, about financial services provided by any member to a consumer in New Zealand, and that is readily accessible to consumers; and
  - b) That has decision-making systems and processes that are independent from members; and
  - c) That operates in a timely, cost-effective, and fair manner; and
  - d) That operates on a confidential and without prejudice basis; and
  - e) That is otherwise established and operated under these Rules:
    - i. in accordance with the principles of accessibility, independence, fairness, accountability, efficiency, and effectiveness set out in section 52(2) of the Act;
    - ii. in accordance with the Australian Benchmarks for Industry-Based Customer Dispute Resolution Schemes; and
    - iii. in a manner which is user focused and inquisitorial.

### 5. Functions of the Scheme

1. The main functions of the Scheme are:
  - a) to provide a complaints resolution scheme of which any type of financial service provider may be a member.
  - b) to require all members to have their own complaints procedures for dealing with complaints about the financial services provided by the member (see rule 50).
  - c) if complaints are not resolved under the member's own internal complaint procedures, to provide an independent scheme for resolving those complaints from individuals and qualifying groups about financial services provided by members to consumers in New Zealand.
  - d) to operate the complaints resolution scheme in accordance with the Scheme's purpose and these Rules.
  - e) to resolve, or assist in resolving, those complaints under the Scheme by agreement between the parties or, if appropriate, by a final decision that is binding if accepted by the complainant under these rules.

- f) to co-operate with, and communicate information to, other approved dispute resolution schemes, the Registrar, relevant licensing authorities, the Commerce Commission, the Reserve Bank and the Financial Markets Authority as required by section 67 of the Act.

2. The Scheme also has the following functions:

- a) to promote and publicise the Scheme as required by these Rules.
- b) to give general advice to members on the development and maintenance of good complaints resolution procedures and practices of their own.
- c) to monitor compliance with the Rules and, if appropriate, to enforce compliance with the Rules and with binding resolutions of complaints.
- d) to monitor and report on the effectiveness of the Scheme for consumers and members.
- e) to carry out any other functions of the Scheme under these Rules.

3. For the purposes of these Rules, the making of a determination that a complaint is not covered by the Scheme, or the exercising of any other discretion as to the jurisdiction of the Scheme, under Part 2, must be exercised or performed by the Scheme Adjudicator or by the Scheme Officer, in either case on behalf of the Scheme.

4. For the purposes of these Rules, the following powers and functions must be exercised or performed by the Scheme Adjudicator on behalf of the Scheme:

- a) adjudicating a complaint, and making a proposed or final decision on a complaint, under Part 3.
- b) delegating a particular complaint to another adjudicator for the purposes of proceeding to issue a proposed and final decision.
- c) any other functions or powers specifically conferred on the Scheme Adjudicator by these Rules.

## Part 2 – Jurisdiction of the Scheme

### 6. What sort of complaints are covered?

1. The Scheme may consider a complaint only if it is covered under this rule.
2. A complaint is covered by the Scheme if:
  - a) the complainant is a person or group referred to in rule 8(1).
  - b) it is about any conduct of a financial service provider in relation to providing a financial service in New Zealand.
  - c) the financial service provider complained about:

- i. was, at the time the conduct occurred, a member of the Scheme in respect of the relevant financial service (even if it is no longer a member when the complaint is made); or
- ii. was, at the time the conduct occurred, a member of the Reserve Scheme in respect of the relevant financial service (even if it is no longer a member when the complaint is made); or
- iii. if another approved dispute resolution scheme has had its approval withdrawn, and the financial service provider was a member of that scheme at the time the conduct occurred in respect of the relevant financial service, and is now a member of the Scheme.

d) Rules 9 to 12 do not exclude the complaint from coverage or, despite being excluded, it is accepted by a Scheme Adjudicator under rule 13.

3. A complaint may relate to an alleged breach of a contract, a statutory obligation, an industry code, or any other legal obligation or to an unfair practice (but need not be stated in this way in the complaint).

## 7. Definition of a complaint

1. A complaint is defined by the Scheme as an expression of dissatisfaction made to a member, related to its products, or the member's complaints handling process itself, where a response or resolution is explicitly or implicitly expected, or legally required.

## 8. Who may complain?

1. The Scheme may consider a complaint only from:
  - a) an individual or a qualifying group that:
    - i. has received, or has been refused access to, the financial service complained about; and
    - ii. is (or would be if the financial service was received) a Retail Client.
  - b) any person who is making a complaint on behalf of, and with the consent of, an individual or qualifying group described in paragraph (a) (other than as a professional adviser).
2. A qualifying group is a business or another organisation that:
  - a) at the time that the events relating to the dispute occurred, had no more than 19 full-time (or equivalent) employees; or
  - b) the Scheme Adjudicator determines (despite the business or other organisation having more than that number of employees) should have the benefit of free access to the Scheme because of its size or nature.
3. A person who has received, or been refused, an entitlement, benefit, or legal or beneficial interest arising from the provision of a financial service to any other

person (for example, a beneficiary under a life insurance policy) is treated as receiving, or being refused access to, the financial service for the purposes of these rules.

**9. Complaint must be made to member first (and referred to the Scheme within time limit)**

1. A complaint is not covered by the Scheme unless:
  - a) the complainant has first made that complaint (or substantially the same complaint) to the member concerned; and
  - b) one of the following things has occurred:
    - i. the member has given the complainant written notice of its decision (a "decision notice"); or
    - ii. the member has given the complainant written notice that it has reached the view that the parties are unlikely to resolve the complaint under the member's complaints procedures (a "unresolved notice"); or
    - iii. at least two months has passed after the complainant first made that complaint to the member; and
  - c) the complainant then refers the complaint to the Scheme within the following applicable time limits:
    - i. within three months after receiving a decision notice or unresolved notice under paragraph (b) if that notice complies with sub clause (d).
    - ii. within two years after first making that complaint to the member in any other case; and
    - iii. in all cases, within six years of the act or omission on which the complaint is based.
  - d) a decision notice or unresolved notice must advise the complainant of the right to refer the complaint to the Scheme, free of charge, and the time limit for doing so.

**10. Compensation claimed must not be more than \$200,000**

1. A complaint is not covered by the Scheme if (subject to sub clause (2)) the amount claimed as compensation:
  - a) exceeds \$200,000; or
  - b) would exceed \$200,000 if consolidated with the amount claimed in any other complaint or complaints brought by the same complainant that concern the same, or substantially the same, events or facts; or

- c) if the complaint is for payment or more than \$1,500 (plus GST if any) per week, where the claim relates to a product that provides regular payment (as distinct from a lump sum payment).
- 2. However, a complaint claiming more than that maximum amount is covered by the Scheme if the complainant gives, on or shortly after making the complaint, a written waiver of any rights to the excess portion of the claim if the complaint is resolved under the Scheme.
- 3. If the complainant waives any rights to the excess, then the relevant member is not liable for the excess amount if there is a binding resolution of the complaint under these Rules.
- 4. Compensation may be awarded to the complainant up to an amount not exceeding \$3,000 for special inconvenience or expenses in making or pursuing the complaint.
- 5. The maximum level of compensation awarded by the Scheme (as set out in rule 10(1)), may be increased to a level agreed by all approved dispute resolution schemes (as defined under the Act), following approval of the Governing Body.
  - a) any increased level of compensation available through the Scheme cannot be greater than the extent of the applicable jurisdictional limit for claims in the District Court;
  - b) the date on which any increased level of compensation is to apply, is to be the date approved by the Governing Body;
  - c) Scheme members must be given a minimum 60 days' notice of any increase in compensation limit applying; and
  - d) compensation on any complaint can only be awarded at the increased level if the subject of the complaint occurred after the date approved by the Governing Body for increased compensation levels to apply.

## **11. Complaint must not relate to member's general policies and practices or commercial judgements or investment performance**

1. A complaint is not covered by the Scheme if the Scheme Officer or Scheme Adjudicator determines that:
  - a) it relates to a member's general policies and practices unless:
    - i. it is about how a policy or practice has been applied or administered in a particular case.
    - ii. it concerns a particular fee or charge made by the member (and, in this case, regard must be had to any scale of fees or charges generally applied by the member).
  - b) it is about a member's assessment of risk, of financial or commercial criteria, or of character, in deciding:

- i. whether to provide a financial service; or
- ii. the terms on which it provides a financial service.

c) it is about the investment performance of a financial product.

2. However, the complaint is not excluded by sub clause (1) if the Scheme Officer or Scheme Adjudicator determines that it may involve a breach of a legal obligation.

## 12. What other complaints are not covered by the Scheme?

1. A complaint is not covered by the Scheme if the Scheme Officer or Scheme Adjudicator determines that:

### Complaint also made in another forum

- a) the complaint involves the same, or substantially the same, events or facts and the same complainant as a matter already dealt with, or being dealt with, by any court or tribunal, any arbitration, or any other complaints body, unless:
  - i. the proceedings were, or arbitration or complaint was, commenced by the relevant member only after the complaint was made by the complainant to the member; or
  - ii. in the case of court or tribunal proceedings, the proceedings have been discontinued; or
  - iii. Rule 33(4) applies; or
- b) the matter would be more appropriately dealt with by a court, a tribunal, arbitration, or another complaints body (for example, the Privacy Commissioner); or

### Complaint previously considered

- c) the complaint involves the same, or substantially the same, events or facts as a complaint previously made by the complainant to the Scheme (unless the Scheme Officer or Scheme Adjudicator considers that there is sufficient new information to warrant a new consideration of the complaint); or

### Reasonable settlement offer already made

- d) on the basis of the facts presented by the complainant, the member has made a reasonable offer to settle the complaint; or

**Frivolous or vexatious complaint**

- e) the complaint is frivolous or vexatious; or

**Complaint too old**

- f) the complaint involves events that occurred more than six years before the complainant made the complaint to the member; or

**No prospect of success**

- g) the Scheme Officer or Scheme Adjudicator concludes that there is no reasonable prospect of the complaint succeeding if it were to proceed through the Scheme; or

**Insufficient interest**

- h) the complainant has not suffered and is unlikely to suffer any direct loss or significant inconvenience in relation to the subject of the complaint.

**13. Additional discretions relating to jurisdiction of the Scheme**

1. The Scheme Adjudicator may, at his or her discretion, accept a complaint for consideration under the Scheme that is excluded from coverage by any of rules 9, 10, 11, and 12 if the relevant member and the complainant agree it should be considered under the Scheme.
2. The Scheme Adjudicator may, at his or her discretion, consolidate two or more complaints from the same complainant into one complaint (even if the relief claimed is not the same) if they deal with the same, or substantially the same, events or facts.

**14. Process for determining complaint covered by the Scheme**

1. A Scheme Officer may determine that the Complaint is or is not within the jurisdiction of the Scheme prior to the Complaint being accepted into the Scheme.
2. The Scheme Adjudicator may determine that a Complaint is or is not (or is no longer) within the jurisdiction of the Scheme before the Complaint is accepted or at any subsequent time. The Scheme Adjudicator's determination shall prevail over any determination by the Scheme Officer under rule 14(1) (if any).
3. If a Scheme Officer or Scheme Adjudicator (as the case may be) determines the Complaint is or is not covered, he or she must give written notice to the complainant and the Member concerned of the determination and the reasons for the determination.
4. The complainant or Member may challenge a determination of a Scheme Officer accepting or declining to accept a complaint into the Scheme, within ten working days of the jurisdiction determination being issued.
5. If the complainant or Member challenges a determination of a Scheme Officer regarding acceptance of the Complaint into the Scheme, under rule 14(4), the

Scheme Adjudicator must reconsider that jurisdiction determination again, and issue an updated jurisdiction determination.

6. There is no ability to challenge a jurisdiction determination issued under rule 14(2) or 14(5).

## Part 3 – Complaints resolution process

### Making complaints to the scheme

#### 15. How to complain

1. A complaint may be made to the Scheme, free of charge, either orally or in writing, and need not use the word complaint, but must set out:
  - a) the names of the parties;
  - b) the nature of the complaint;
  - c) the date a complaint was first made to the scheme member; and
  - d) the outcome the complainant is seeking from the scheme.
2. A complaint made orally must be put in writing as soon as practicable. The complaint is not considered to have been lodged with the Scheme, until the complainant confirms that the written record of the complaint is correct.
3. The Scheme must give the assistance that is reasonable in the circumstances to enable a complainant to put a complaint in writing (see also rule 53(f)).

#### 16. What the Scheme must do on receipt of complaint

1. The Scheme must give written notice to the complainant and the member concerned:
  - a) of the receipt of a complaint and its nature as soon as is reasonably practicable after receiving the complaint; and
  - b) either at the same time as the notice of receipt or as soon as is reasonably practicable afterwards:
    - i. that the complaint is accepted; or
    - ii. if a Scheme Officer or Scheme Adjudicator determines that the complaint is not covered by the Scheme under part 2, of that determination and the reasons for that determination.

### General approach and methods for resolving complaints

#### 17. General approach to resolving complaints

1. A complaint must be investigated, dealt with, and considered under the Scheme in a timely, cost-effective, and fair manner and, in particular, in a way that:

- a) is consultative with the parties;
- b) encourages the parties, where possible, to work together on matters that are agreed;
- c) maximises the use of informal means to resolve the complaint;
- d) endeavours to resolve the complaint through agreement between the parties;
- e) minimises the involvement of lawyers or other professional advisers as representatives; and
- f) is consistent with the principles of natural justice.

## **18. How complaints may be resolved**

- 1. The Scheme may decide to use any one or more of the following methods to resolve a complaint:
  - a) facilitation;
  - b) negotiation;
  - c) conciliation or mediation; and
  - d) if rule 24 applies, adjudication.
- 2. The Scheme may decide the procedures to be followed under the relevant method (for example, whether to use email, telephone, meetings, or other methods of contact with the parties) consistently with these rules.

## **Provisions on information supplied in, and conduct of, complaints resolution process**

## **19. The Scheme may receive information and make inquiries**

- 1. Any information may be considered in relation to a complaint under the Scheme, and any inquiry made, that is fair and reasonable in the circumstances.

## **20. The Scheme must operate on without prejudice basis**

- 1. The Scheme must operate on a without prejudice basis, and all parties must participate in the Scheme on a without prejudice basis.
- 2. Accordingly, no person may be required to disclose any information to which this rule applies in any court proceeding except:
  - a) in accordance with an order of a court; or
  - b) if all the parties to the complaints resolution process consent.
- 3. This rule applies to all information generated for the purposes of, or disclosed in the course of, considering or resolving the complaint under the Scheme.
- 4. However, this rule does not apply to information that exists independently of the complaints resolution process.

## 21. Obligation of parties to supply information requested to resolve complaints

1. A party to a complaint must supply to the Scheme any information requested by a Scheme Adjudicator to assist in resolving the complaint unless the party satisfies the Scheme Adjudicator that:
  - a) supply would breach an obligation of confidence owed to a third person who has refused to consent to the supply (despite the party's best endeavours to obtain that consent); or
  - b) the information is subject to legal professional privilege; or
  - c) the party does not have the information, or it is not within the party's control.
2. As soon as practicable after receiving a request under sub clause (1) (and in any case within the time limit set by the Scheme Adjudicator), the party must:
  - a) supply the information to the Scheme; or
  - b) give its reasons for withholding the information (identifying the information being withheld).
3. If a party to a complaint fails (without satisfying a Scheme Adjudicator that sub clause (1)(a), (b), or (c) applies) to supply the information within the time limit set by the Scheme Adjudicator, the Scheme may:
  - a) proceed to resolve the complaint on the basis that an adverse inference may be drawn from that party's failure to comply with the information request.
  - b) if the complainant fails to comply with a request, refuse to continue consideration of the complaint, after providing notice that the complaint may be dismissed for failing to provide the requested information.

## 22. The Scheme must keep parties informed

1. The Scheme must, in relation to a complaint:
  - a) keep the parties informed of the progress of a complaint; and
  - b) ensure that each party to a complaint has a reasonable opportunity to be informed of, and respond to, the arguments or submissions of the other party.
2. If one party (party A) supplies information to the Scheme that the Scheme then wishes to supply to any other party to the complaint (party B):
  - a) the Scheme is entitled to assume that party A consents to the supplying of the information in its entirety to party B (unless there is a clear statement to the contrary); but
  - b) if party A clearly refuses consent to the supply of the information to party B, the Scheme must not supply that information to party B; but

- c) if paragraph (b) applies, the Scheme Adjudicator must not use that information to reach a decision adverse to party B unless:
  - i. Party B has consented to the use of the information on the basis of non-disclosure of the information to party B; or
  - ii. a Scheme Adjudicator determines that exceptional circumstances apply that justify a departure from the usual application of the principles of natural justice.

### **23. Representation of parties**

- 1. A party to a complaint may act through a representative that the Scheme considers appropriate if that person is a corporation, a minor, or under a disability, or if the Scheme is satisfied that the person is unable to present his or her case adequately in person for any other reason.

### **Final decisions on complaints**

### **24. When the Scheme may proceed to adjudicate the complaint and make a final decision on the matter.**

- 1. If the Scheme Adjudicator determines that it is no longer appropriate for the Scheme to assist the parties to reach an agreed settlement, the Scheme Adjudicator may proceed to adjudicate the complaint and make a final decision on the matter.

### **25. Process for adjudicating complaints**

- 1. The Scheme Adjudicator must follow the following process in adjudicating a complaint:
  - a) a proposed decision must be issued to the parties, applying the following process:
    - i. the parties must be invited to provide submissions on the complaint, normally in writing, providing at least 14 days for any response.
    - ii. after reviewing any submissions, if necessary, the Scheme Adjudicator may request further information or submissions from the parties. The Scheme Adjudicator may also request advice on a particular complaint from a member of the Advisory Council, or other suitably qualified person.
    - iii. a proposed decision must be issued in writing to the parties, including the following minimum information:
      - a. summary of the complaint and relevant background.
      - b. the relevant law or obligations.
      - c. the proposed decision.
      - d. the reasons for the proposed decision.

- e. confirmation the parties are able to provide any concluding submissions, within no less than 14 days, prior to a final decision being issued.
- iv. a final decision is then issued by the Scheme Adjudicator, taking into consideration any concluding submissions provided by the parties. The complainant must be advised that the final decision will only become binding on both parties, if the complainant gives notice to the Scheme within 14 days of the final decision (the "acceptance period"), stating that it accepts the final decision as full and final settlement of the dispute.

2. A final decision becomes binding on the member if, within the acceptance period, the complainant gives written notice to the Scheme stating that the complainant accepts the decision in full and final settlement of the complaint.

## 26. Basis for final decisions under the Scheme

1. The Scheme Adjudicator must make any final decision on a complaint in light of what is fair and reasonable in all the circumstances and having regard to:
  - a) the Law;
  - b) relevant industry codes of practice; and
  - c) good industry practice.
2. However, the Scheme Adjudicator is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities.
3. Any final decision may take into account fairness considerations, for example:
  - a) the complainant's educational and personal circumstances if relevant to the subject of the complaint;
  - b) how the member has approached the complainant and complaint;
  - c) the extent to which the member was in control of the systems or decision making that resulted in the subject of the complaint; and
  - d) any other matters the Scheme Adjudicator considers relevant.
4. Without limiting sub clause (1) or (2), the Scheme Adjudicator may, in relation to any agreement or document that is directly or indirectly relevant to the complaint, disregard any provision in that agreement or document that excludes or limits:
  - a) any condition, warranty, or undertaking; or
  - b) any right, duty, liability, or remedy that would arise or accrue in the circumstances of the complaint if there were no such exclusion or limitation.
5. The Scheme Adjudicator is not bound by rules of evidence or previous decisions.

## 27. What kinds of remedies are possible under final decision

1. The Scheme Adjudicator may direct, as part of a final decision, any, or a combination, of the following remedies on a complaint:
  - a) that the member pay to any person, by way of compensation, a sum of up to \$200,000 for one complaint or, in aggregate, for related complaints that the Scheme Adjudicator has treated as one consolidated complaint. Interest may also be awarded on the sum as if it were a monetary judgment in accordance with the Interest on Money Claims Act 2016;
  - b) that the member take any other action directed by the Scheme Adjudicator to do any or all of the following things:
    - i. remedy the matter complained about;
    - ii. provide redress for any loss or damage suffered;
  - c) that the member concerned cease, or not continue or repeat, the conduct that has caused the matter complained about or conduct of the same or a similar kind (as specified by the Scheme Adjudicator); or
  - d) that the member makes a public or private apology as directed by the Scheme Adjudicator.

## 28. Delegation by Scheme Adjudicator

1. Where the Scheme Adjudicator has delegated a particular complaint to another adjudicator under rule 5(4) or rule 41(1) for the purposes of proceeding to issue a proposed and final decision, references to the Scheme Adjudicator in rules 24 – 27 shall include, in that case, that adjudicator to whom the particular complaint has been delegated.

## 29. No appeal against final decision of the Scheme

1. There is no appeal to a court against a final decision that has become binding under these Rules.

## End of complaints resolution process

## 30. What constitutes binding resolution of complaint

1. There is a binding resolution of a complaint under these rules if:
  - a) the parties to the complaint enter into an agreed settlement via the Scheme;
  - b) a final decision becomes binding on the parties to the complaint in accordance with rule 25; or
  - c) if the parties to a complaint enter into an agreed settlement, and the parties notify the Scheme in writing of that fact, including that the complaint is withdrawn.

### 31. When complaint process ceases if no binding resolution

1. The Scheme may cease considering a complaint (even if there is no binding resolution) if:
  - a) the complainant withdraws the complaint by written notice to the Scheme;
  - b) the Scheme Adjudicator determines that the complaint is not, or is no longer, covered by the Scheme (and, in this case, rule 14 applies);
  - c) the Scheme decides to refuse, under rule 21(3) (failure to comply with request to supply information), to continue considering a complaint;
  - d) Rule 33(2) applies (bringing of proceedings by complainant); or
  - e) the acceptance period for a final decision under rule 25 expires.

#### Other matters relating to consideration of complaint

### 32. Confidentiality obligations for the Scheme

1. The Scheme must keep confidential all information relating to a complaint that is provided to it except:
  - a) to the extent reasonably necessary to carry out the functions of the Scheme (or any incidental matter);
  - b) as required or permitted by law;
  - c) if the disclosure of the information is with the consent of the parties to the complaint; and
  - d) where disclosure is made to an appropriate person or body in the event that a threat is made against the other party, or an officer of the Scheme, or the Scheme Adjudicator has concerns as to the health and safety of any person.

### 33. When parties may bring alternative court action

1. Nothing in these rules prevents a complainant from bringing proceedings in a court or tribunal on the same, or substantially the same, events or facts as a complaint while the complaint is being considered under the Scheme.
2. However, if a complainant does bring proceedings of that kind, the Scheme must cease considering, and resolving, the complaint on becoming aware of that fact (unless the proceedings are permitted under sub clause (4)).
3. A member must not bring proceedings against a complainant in any court or tribunal on the same, or substantially the same, events or facts as the complaint (unless the proceedings are permitted under sub clause (4)).
4. Proceedings by either party are permitted to preserve a party's legal rights if a limitation period is about to expire and, in this case:

- a) while the complaint is being considered under the Scheme, the party must pursue the legal proceedings to the minimum extent necessary to preserve its rights; and
- b) on resolution of the complaint, the party must discontinue any aspect of the legal proceedings that is inconsistent with any binding resolution of the complaint.

## Part 4 – Structure and miscellaneous powers of the Scheme

### 34. Ownership and Governing Body of the Scheme

1. The Scheme is owned and operated by FairWay, as approved by the Minister.
2. The Governing Body is the board of directors of FairWay, taking advice from the Advisory Council.
3. The Governing Body's functions and responsibilities are defined in the Terms of Reference of the Governing Body and Advisory Council and include responsibility for the operation of the Scheme according to the Scheme Rules.

### 35. Advisory Council

1. The Advisory Council is appointed by the Governing Body to provide advice to the Governing Body and the Scheme from time to time on the functions and operations of the Scheme.
2. The Advisory Council's functions and responsibilities are defined in the Terms of Reference of the Governing Body and Advisory Council.
3. The Advisory Council Members are appointed as defined in the Terms of Reference of the Governing Body and Advisory Council.

### 36. Power to delegate other functions or powers

1. The Scheme may delegate any of its functions or powers to any person employed or engaged by it to perform the functions of the Scheme (other than this power of delegation).
2. No delegation in accordance with this section:
  - a) affects or prevents the performance of any function or the exercise of any power by the Scheme;
  - b) affects the responsibility of the Scheme for the actions of any delegate acting under the delegation; or
  - c) is affected by any change in the person appointed as the Scheme or any employee.
3. This rule is subject to rules 5(3) and 5(4), which specify which functions may be performed only by a Scheme Adjudicator (and/or a Scheme Officer) under these rules.

### **37. Powers of delegate**

1. A delegate to whom any functions or powers of the Scheme are delegated may:
  - a) perform the function or exercise the power in the same manner, subject to the same restrictions, and with the same effect as if the delegate were the Scheme (unless the delegation provides otherwise); and
  - b) may delegate the function or power only with the prior written consent of the Scheme and subject to the same restrictions, and with the same effect, as if the sub delegate were the delegate.
2. A delegate who purports to perform a function or exercise a power under a delegation:
  - a) is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation.
  - b) must produce evidence of his or her authority to do so if reasonably requested to do so.

### **38. Funding of the Scheme**

1. The Governing Body must ensure the Scheme has adequate funding to operate a viable Scheme in accordance with these rules.
2. Funding is primarily from membership fees which are set by the Governing Body considering the advice of the Advisory Council
3. A budget will be prepared by the Governing Body annually for the operation of the Scheme according to rule 35(1) under the advice of the Advisory Council. The budget will be presented at the Scheme's annual general meeting.

### **39. Amending the Scheme Rules**

1. Any changes that the Scheme wishes to make to the Scheme rules are to be notified to the Minister.
2. The Minister may approve a change to the Scheme Rules if the Minister considers the proposed change complies with the principles listed in section 52(2) of the Act and the requirements set out in section 63 of the Act.

### **40. Appointing Scheme Adjudicator**

1. The Scheme must employ or engage a Scheme Adjudicator under these Rules.
2. In employing or engaging a Scheme Adjudicator, the Scheme must:
  - a) consider candidates' objectivity, qualifications, experience, and personal qualities; and
  - b) only employ or engage a person who is capable of performing the functions of a Scheme Adjudicator.

3. The Scheme may appoint from time to time another person to be an alternate Scheme Adjudicator, for the purpose of exercising the powers and functions of the Scheme Adjudicator in circumstances where the Scheme Adjudicator is incapacitated, unavailable or otherwise unable to do so. The appointment of an alternate Scheme Adjudicator may be revoked at any time by the Scheme.

#### **41. Adjudicator**

1. The functions of the Scheme Adjudicator are to do the following things on behalf of the Scheme:
  - a) make determinations that a complaint is not covered by the Scheme, or to exercise any other discretion as to the jurisdiction of the Scheme, under part 2. This function may also be exercised by a Scheme Officer under rule 5(3).
  - b) adjudicate complaints and make proposed or final decisions on a complaint under part 3, or delegate that function to another suitably qualified adjudicator.
  - c) perform any other functions or exercise any other powers specifically conferred on a Scheme Adjudicator by these rules.
  - d) perform any other functions or exercise any other powers delegated to the Scheme Adjudicator by the Scheme.

#### **42. Appointing persons to provide Alternate Dispute Resolution services**

1. The Scheme may employ or engage persons to provide Alternate Dispute Resolution services (mediation or conciliation services) to assist persons to resolve complaints, promptly and effectively, under the Scheme.
2. For the avoidance of doubt, a person acting in an Alternate Dispute Resolution capacity is able to undertake that process confidentially between the parties, with the agreement of the parties, meaning any matters discussed in that process are not disclosed to the Scheme or the Scheme Adjudicator.

#### **43. Independence of Scheme personnel**

1. The Scheme must ensure that any person employed or engaged as an [adjudicator] or to provide Alternate Dispute Resolution services:
  - a) is, in deciding how to deal with any particular complaint or aspect of it, able to act independently; and
  - b) is independent of any of the parties to the complaint.
2. However, the Scheme, in managing the overall provision of the complaints resolution scheme, may give general instructions about the manner in which, and the times and places at which, services are to be provided (including as to particular types of matters or particular types of situations, or both).

#### **44. Particular requirements for independence of Scheme Adjudicator**

1. The Scheme Adjudicator must not consider a complaint for the purpose of making a final decision if the Scheme Adjudicator has taken part in any investigation, negotiation or Alternate Dispute Resolution process in relation to that complaint.
2. This rule does not limit rule 43.

**45. The Scheme may extend complaint time frames**

1. The Scheme may, if it thinks fit, extend any time frame set under these Rules that relates to considering or resolving a complaint.

**46. The Scheme is responsible for actions of personnel**

1. The Scheme is responsible for all actions of the Scheme Adjudicator, and of other persons employed or engaged by the Scheme to fulfil the functions of the Scheme, in those capacities.

## Part 5 – Membership of the Scheme

**47. Who is eligible to be a member of the Scheme?**

1. A financial service provider of any type is eligible to be a member of the Scheme:
  - a) in respect of all its financial services provided in New Zealand (if it is not a member of any approved dispute resolution scheme); or
  - b) in respect of those of its financial services that are not covered by an approved dispute resolution scheme of which it is a member.
2. A financial service provider is or becomes disqualified from membership of the Scheme if it has not taken any remedial action required under any approved dispute resolution scheme within the period allowed for that action or, if no period was specified, within a reasonable time (as determined by the Scheme).
3. Sub clause (2) does not prevent a financial service provider from being registered as a member if the period allowed for the action or the reasonable time has not yet expired (but see rule 52(1)(e)).

**48. Conferal of membership of Reserve Scheme members**

1. Any members who were previously members of the Financial Dispute Resolution Service acting as the Governments Reserve Scheme were, at the time of disestablishment of the Reserve Scheme, deemed members of the current Scheme in respect of all financial services previously covered by the Reserve Scheme.

**49. Applications for membership**

1. The Scheme must register a financial service provider as a member if the financial service provider:

- a) applies for membership in the form required by the Scheme and pays the prescribed fee for membership; and
- b) has entered into, and provides a copy of, a deed of undertaking, enforceable by the Scheme and by any complainant, to:
  - i. comply with these Rules; and
  - ii. comply with any binding resolution of a complaint under the Scheme (whether or not it is still a member of the Scheme); and
- c) is not disqualified from membership under rule 47(2); and
- d) is recorded on the Financial Service Providers Register, or will be recorded on that register within ten working days of applying for membership of the Scheme.

## 50. Duties on members to have own complaints resolution procedures

- 1. A member must:
  - a) establish (either itself or through membership or arrangement with another body) proper procedures for dealing with complaints about the provision of financial services by the member;
  - b) publicise to customers those procedures for making a complaint, that the service is free of charge;
  - c) receive and consider complaints under those procedures; and
  - d) use its best endeavours to resolve complaints under those procedures.
- 2. At a minimum, the procedures must ensure that:
  - a) the receipt and nature of a complaint are documented, the complainant receives an acknowledgement that the complaint has been received, and the steps taken to resolve the complaint are documented;
  - b) the complainant is informed, at the time of acknowledging receipt of a complaint, that if a complaint is not resolved through these procedures that the complainant may take the complaint, free of charge, to the Scheme;
  - c) the complaint, and any information provided or created in relation to the complaint, is kept confidential to the parties except with the consent of the complainant;
  - d) the member gives written notice (with reasons) to the complainant:
    - i. of any decision it reaches on the complaint under those procedures (a "decision notice"); or
    - ii. if it reaches the view that the parties are unlikely to resolve the complaint under those procedures (a "unresolved notice"); and

- e) any decision or unresolved notice also states that the complainant may take the complaint, free of charge, to the Scheme and the time limits within which the complainant must do so under rule 9.
3. The Scheme may undertake an audit of a member's internal complaints resolution procedures, if the Scheme has concerns about compliance of that internal complaints process with the requirements under these Rules, or any other legal requirement. The Scheme may undertake an audit with a minimum of 20 working days' notice to the member, and subsequently provide advice to the member on remedial actions necessary to ensure compliance.

## 51. How to terminate membership voluntarily

1. A member may terminate its membership of the Scheme by giving the Scheme at least three months' written notice of the voluntary termination date.
2. The terminating member must carry out all outstanding remedial action within 20 working days after the voluntary termination date or within any longer period agreed by the Scheme.
3. The Scheme must notify the Registrar in writing of the termination in accordance with section 17 of the Act.
4. If the terminating member does not comply with sub clause (2), the Scheme may report the terminating member to the relevant licensing authority and the Registrar.

## 52. How membership may be terminated compulsorily

1. The Scheme may compulsorily terminate a member's membership of the Scheme under sub clause (2) if it considers (and the Advisory Council concurs) that termination is justified because the member:
  - a) has committed a material breach of any of these Rules;
  - b) has failed to comply with a requirement of an agreed settlement or of a final decision that has become binding on the member;
  - c) has persistently breached these Rules;
  - d) has failed to pay a prescribed fee or charge in respect of membership or complaints within three months of its due date; or
  - e) has become disqualified under rule 47(2).
2. If sub clause (1) applies, the Scheme may:
  - a) give the member written notice:
    - i. of that fact and what action must be taken to remedy the situation (specifying a period of at least ten working days for completing that action); and
    - ii. that the member's membership will be terminated at the end of that notice period if that action is not taken; and

- b) if the member does not comply with the notice within the notice period.
  - i. terminate the member's membership; and
  - ii. notify the member, the Registrar (under section 17 of the Act), and the relevant licensing authority of the termination; and
  - iii. report the member to the Advisory Council.

## Part 6 – Reporting by and accountability of the Scheme

### Accessibility requirements

#### 53. How the Scheme must ensure its accessibility

1. The Scheme:
  - a) must maintain, or ensure there is maintained, at all reasonable times a separate internet site for the Scheme on which it promotes the Scheme and through which complaints may be made by the public.
  - b) must ensure its internet site is publicly accessible at all reasonable times.
  - c) must maintain a list of the Scheme's current members and must publish this list on its internet site.
  - d) must maintain a free phone number and a freepost service.
  - e) may promote the Scheme's availability in any other way it thinks fit (for example, newspapers, Community Law Centres, Citizens Advice Bureaus, and public libraries).
  - f) must provide additional support (for example, an interpreter) that is reasonable in the circumstances:
    - i. to assist complainants to put complaints into writing.
    - ii. if there are special circumstances (for example, disability or language differences) that make it difficult for a complainant to make a complaint to the Scheme.
  - g) must promote the availability of its additional support services.
  - h) may take other action to promote the Scheme to specific groups that may not otherwise know of the scheme because of special socio-economic, cultural, linguistic, geographical, or physical circumstances (for example, advertise in non-English newspapers).

#### 54. The Scheme may disseminate information

2. The Scheme may collect case studies of complaints and may (without any information identifying the parties involved) disseminate these to members and publish them on its internet site for the purpose of:
  - a) educating members and consumers.

- b) educating other groups that have an interest in the case studies or in complaints resolution processes (for example, Community Law Centres or Citizens Advice Bureaus).
- c) demonstrating the process of decision making under the Scheme.

#### Monitoring and reporting by the Scheme

### 55. What monitoring the Scheme must carry out?

- 1. The Scheme must monitor members' compliance with these rules.
- 2. The Scheme must regularly report the results of that monitoring to the Advisory Council, with advice on what actions the Scheme has taken, or proposes to take, in the case of breaches by members.

### 56. What the Scheme must do about systemic issues

- 1. The Scheme must report any systemic issue that it identifies, in the course of considering a complaint, to the Advisory Council, the member concerned, and other members (as the Scheme considers appropriate).
- 2. In these Rules, a systemic issue is an issue that has material implications, beyond the parties to the particular complaint, relating to either:
  - a) the systems or conduct of the member complained about; or
  - b) the systems or conduct of other members, or classes of members.
- 3. Examples of systemic issues include poor disclosure or communication processes, information technology problems, administrative or technical errors, flaws in the design of financial products or other financial services, or inaccurate interpretation by a member or members of standard terms and conditions.

### 57. What the Scheme must do about Serious Misconduct

- 1. The Scheme must report all Serious Misconduct of a member to the relevant licensing authority or any other relevant regulator.
- 2. In these Rules, Serious Misconduct is conduct that the Scheme considers, on reasonable grounds, is fraudulent or grossly negligent, or involves wilful breaches of any applicable law or code of practice.

#### Monitoring of the Scheme

### 58. Advisory Council to monitor the Scheme

- 1. The Governing Body appoints the Advisory Council to oversee the operation of the Scheme on its behalf and to provide it with advice from time to time.

### 59. What must happen to complaints about the Scheme

- 1. The Scheme must consider any complaints about the Scheme within the internal complaints process of the Governing Body. The Scheme must provide

the Advisory Council a summary of any complaints addressed and concluded within the internal complaints process of the Governing body.

2. Serious complaints about the Scheme must be referred to the Advisory Council.
3. The Scheme must if the Advisory Council makes any recommendations on the complaint to the Scheme:
  - a) have due regard to the recommendation or recommendations.
  - b) report to the Advisory Council on the following matters:
    - i. whether or not it has implemented the recommendation or recommendations;
    - ii. to the extent it has implemented, or proposes to implement, the recommendation or recommendations, what actions it has taken or proposes to take;
    - iii. to the extent it does not propose to implement any of the recommendations, why not and what actions it proposes to take instead (if any) in relation to the complainant or the Scheme's systems or procedures (or both); and
    - iv. the time frames for any actions it proposes to take.
4. The Scheme must make its response under sub clause (3) within the time specified by the Advisory Council in its recommendations.
5. The Scheme must notify the complainant of the Advisory Council's recommendations and of its response under sub clause (3).

## 60. Annual report by the Scheme

1. The Scheme must submit, by 30 September in each year an annual report on the Scheme to the Minister.
2. The annual report must include at least the following information relating to the previous reporting year:
  - a) statistics on caseload, resolved cases, cases rejected on coverage grounds, and the amount of time taken to resolve complaints.
  - b) the results of feedback surveys.
  - c) some examples of typical cases (without any information identifying the parties involved).
  - d) information on compliance with the principles set out in section 52(2) of the Act.
  - e) a list of members.
  - f) information on performance standards.

- g) the results of any independent review under rule 61 completed within the previous 12 months.
- h) financial statements prepared in accordance with generally accepted accounting practice that demonstrate how funding is being used.
- i) list of scheme members who committed substantial, material or persistent breaches of their membership obligations (and who have not remedied the breach).
- j) any systemic issues arising from complaints and how these have been dealt with (without any information identifying the parties involved).
- k) information about new developments in key areas of policy that are relevant to the Scheme.

3. The Scheme must make copies of the Scheme's annual report available for inspection by the public, free of charge:

- a) at its head office (during ordinary office hours).
- b) on its internet site.

4. In this rule, reporting year means a year ending on 30 June.

## 61. Independent review of the Scheme

- 1. The Scheme must commission an independent review of the Scheme at least once every 5 years after the date of the Scheme's approval.
- 2. The independent reviewer must be appointed following consultation with the Ministry of Consumer Affairs.
- 3. The Scheme must provide a copy of the review to the Minister within three months of completion.
- 4. The Scheme must co-operate with any person appointed by the Governing Body under advice and monitoring by the Advisory Council to carry out an independent review of the Scheme.
- 5. The Scheme must make available to the person appointed by the Governing Body to carry out the review information on the following matters:
  - a) the timeliness of the complaint's resolution process.
  - b) whether the Scheme is meeting the principles set out in section 52(2) of the Act and complying with its obligations set out in these Rules.
  - c) the results of any review by the Scheme of its operations.

## 62. Winding up the Scheme

- 1. The Minister must withdraw the approval of the Scheme upon the Scheme's request.
- 2. The removal of approval takes effect from any future date requested by the Scheme.

3. The Scheme will give its members three months' notice to make arrangements to join another approved scheme.

## Explanatory note

*This note is not part of the rules but is intended to indicate their general effect.*

These rules, which come into force in 1 November 2021, are about the functions of the Scheme appointed under section 51 of Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the Act).

The Scheme is designed to provide an independent consumer complaints resolution service for complaints about financial services provided by members. The key provisions of the Rules are as follows:

Complaints may be made, free of charge, by retail clients who are individuals or businesses or other organisations with no more than 19 full-time equivalent employees. There are some limits on the types of complaints that are covered by the Scheme. The main limits are that complaints must first have been made to the member concerned (and referred to the Scheme within the applicable time limit) and the compensation claimed must not exceed \$200,000. The rules also set out how to make a complaint.

The Scheme works by assisting the parties to reach an agreed settlement. However, final decisions may be made that become binding on both parties if accepted by the complainant. There is no appeal possible from a final decision. There is a range of remedies possible under the scheme, but compensation is capped at \$200,000, plus interest and damages. How information must be dealt with and other requirements for the processes of the Scheme are set out in the Rules.

- the Rules also provide for how financial service providers become members and how membership may be terminated. Any type of financial service provider may be a member.
- the Rules provide a number of accountability mechanisms for the Scheme, including an annual report and requirements to co-operate with an independent review of the Scheme.