

**TERMS OF REFERENCE
OF THE INSURANCE & SAVINGS OMBUDSMAN
9 APRIL 2009**

1 Definitions and Interpretation

1.1 In these Terms of Reference, unless the context otherwise requires, the following expressions have the following meanings:-

“*Code/s*” means any code of practice or guidelines promulgated by Nominated Industry Groups;

“*Commission*” means the Insurance & Savings Ombudsman Commission established by Rule 2 of the Rules;

“*Complainant*” means a person or group, jointly or severally, making a complaint to the ISO;

“*ISO*” means the Insurance & Savings Ombudsman appointed in accordance with Rule 16.1 of the Rules;

“*Life Insurance Participant*” means a Participant which is a person or association of persons, whether incorporated or unincorporated which, in the course of business issues, or is liable under, any contract the terms of which are dependent upon the contingencies of human life;

“*Nominated Industry Group(s)*” means the Health Funds Association of New Zealand Inc. (“HFANZ”), the Insurance Council of New Zealand Inc. (“ICNZ”) and the Investment Savings and Insurance Association of New Zealand Inc. (“ISI”);

“*Participant*” means each company or organisation which becomes a Participant in the Scheme in accordance with Rule 9.1 of the Rules;

“*Resolution*” means the withdrawal, dismissal, settlement, compromise, or determination of a complaint, whether by Assessment, Recommendation, Award, or otherwise;

“*Rules*” means the Rules of the Commission (as amended from time to time) and a reference to a particular Rule has a corresponding meaning;

“*Savings Participant*” means a Participant which provides Savings Services and which is not a Life Insurance Participant;

“*Scheme*” means the Insurance & Savings Ombudsman Scheme established by the Rules and these Terms of Reference;

“*Services*” means any of the following services:

- (a) “*Health Insurance Services*”: any services by way of health insurance for personal or domestic purposes or for members of group schemes;
- (b) “*Life Insurance Services*”: insurance provided by a Life Insurance Participant, for personal or domestic purposes, but excluding insurance in respect of an employment related group insurance plan or superannuation scheme;
- (c) “*Miscellaneous Services*”: services provided by a Life Insurance Participant or a Savings Participant for personal or domestic purposes other than those services included in paragraphs (b) or (e) including the provision of credit under a credit

contract, but excluding services in respect of an employment related group insurance plan or superannuation scheme;

- (d) *“Personal Line Insurance Services”*: fire and general insurance provided by a member of ICNZ for personal or domestic purposes, as agreed between the ISO and ICNZ (but excluding policies which are for commercial insurance purposes, other than for Small Business);
- (e) *“Savings Services”*: savings, superannuation, investment, funds management or funds deposit services provided by a Participant for personal or domestic purposes, but excluding the provision of credit under a credit contract and services in respect of an employment related superannuation scheme;

and includes advice and services relating to or incidental to all of those Services;

“Small Business” means:

- (a) an individual, a partnership of natural persons or a corporation whose shareholders are natural persons; and
- (b) who carry on a small business and, at the time the events giving rise to the claim occurred, had:
 - (i) no more than 5 employees (including working proprietors) at any one time; and
 - (ii) an annual turnover (including the turnover of related enterprises or bodies corporate or other associated entities) not exceeding \$400,000;

The following types of insurance cover are included:

Commercial Property Insurance, Business Interruption/Loss of Rents; Electronic Equipment Insurance; Machinery Breakdown; Motor; Business Travel; Personal Accident; Inland Transit in New Zealand that does not form part of an import and/or export; Marine Hull up to and including 8-metres length overall.

The following types of insurance cover are excluded:

Construction Risks, Fidelity Guarantee; Legal Liability (including Public Liability and Products Liability); Professional Indemnity; Directors & Officers; Marine Hull over 8-metres length overall; Import/Export Cargo.

“Subsidiary” has the meaning given in section 5(1) of the Companies Act 1993 as if *“company”* in that definition included any body corporate whenever and wherever incorporated including outside of New Zealand;

“Terms of Reference” means these Terms of Reference as amended from time to time in accordance with the Rules.

1.2 For the purpose of these Terms of Reference:

- (a) Services provided by a Subsidiary of a Participant that is not itself a Participant are deemed to have been provided by the Participant; and
- (b) reference to the provision of Services includes reference to their non-provision.

2 Principal Powers and Duties of the ISO

2.1 The ISO’s principal powers and duties are:

- (a) to consider and investigate in a fair, independent and impartial manner, without charge to the Complainant, complaints arising out of the provision in New Zealand of any of the Services by a Participant; and

(b) to resolve such complaints as effectively and efficiently as possible.

2.2 The ISO may give advice on the procedure for referring a complaint to him/her. It is not a function of the ISO to provide information or advice about Participants, the Services or the business of any Participant.

3 Limitations on the Powers of the ISO

3.1 The ISO shall only consider (or continue to consider) a complaint made or referred to him/her, if he/she is satisfied that:

- (a) the amount which the Complainant has claimed or could claim does not exceed:
 - (i) in the case of a claim relating to a policy of disability insurance which provides for regular payments to the insured (as distinct from a lump sum), the sum of NZ\$1,000 (plus GST, if GST applies) per week; or
 - (ii) in any other case, the sum of NZ\$200,000 (plus GST, if GST applies);
 unless liability for a claim exceeding the monetary limits in (i) and (ii) has been accepted by the Participant and a dispute arises between the Complainant and the Participant about part of the claim, provided that the part of the claim in dispute does not exceed those monetary limits, or the Participant named in the complaint consents to an increased amount;
- (b) it is not more appropriate that the complaint be dealt with by a court, or by another independent or statutory complaints or conciliation procedure, or by mediation or arbitration;
- (c) the complaint is made or referred to him/her by or on behalf of the person to whom, or for whom, or for whose benefit, the Participant's Services in question were provided. The ISO shall have no power to consider a complaint against a Participant from a person who is an uninsured third party in a claim relating to that Participant;
- (d) no more than 6 years have elapsed from the date on which a formal complaint was made by the Complainant to the Participant about the subject matter of the complaint made to the ISO;
- (e) except where relevant new evidence is available, the subject matter of the complaint was not included in a complaint by the same Complainant, or any one or more of them, previously considered by the ISO;
- (f) the subject matter of the complaint made to the ISO, has not been, or is not, the subject of any proceedings in or before any court, tribunal, mediator, arbitrator, ombudsman, or any other body involved in complaints or disputes resolution;
- (g) the complaint is being pursued reasonably by the Complainant and not in a trivial, frivolous or vexatious manner, or in bad faith; and
- (h) the Participant has not given the ISO a notice that the complaint shall become a test case in accordance with Rule 25 of the Rules.

3.2 The ISO shall have no power to consider those parts of a complaint which, in the opinion of the ISO, relate to:

- (a) the Participant's commercial judgement, assessment of risk, underwriting practices, methods or procedures for setting charges or premiums payable for the Services, or commercial decisions relating to its business;

- (b) the Participant's investment strategies or practices, other than to verify the Participant's adherence to the "prudent person" standard appropriate to the nature of the investment portfolio;
- (c) the Participant's funds management performance or declared earning rates, or the returns offered, or practice of setting interest rates, in connection with Life Insurance Services, Savings Services or Miscellaneous Services; or
- (d) the following decisions of the Participant in connection with a contract for the provision of Services to:
 - (i) accept, issue, renew, terminate (except in the case of alleged non-disclosure or mis-statement in relation to a claim) or decline to renew; or
 - (ii) impose any conditions or limitations, or vary premiums or charges provided that the ISO is satisfied the Participant has made its decision in accordance with the terms of the contract or the Participant's rules of operation.

4 Jurisdiction

- 4.1 Subject to the other provisions of these Terms of Reference, the ISO shall decide whether or not a complaint falls within the ISO's jurisdiction and, in reaching this decision, shall consider submissions from the Complainant and the Participant.
- 4.2 Where the Participant disputes the decision of the ISO under paragraph 4.1, the Participant shall require that the relevant Nominated Industry Group determine whether or not the complaint falls within the ISO's jurisdiction. Subject to paragraph 4.3, the decision of the Nominated Industry Group shall be binding on the Participant and the Complainant.
- 4.3 Where the Participant or the Complainant disputes the decision of the Nominated Industry Group under paragraph 4.2, the Participant or the Complainant (as the case may be) may refer the dispute to the High Court for resolution by way of a declaratory judgment. The Participant shall meet the reasonable costs of the Complainant and the ISO in respect of any hearing pursuant to this paragraph.

5 Process

- 5.1 Subject to the other provisions of these Terms of Reference, the ISO shall:
 - (a) decide the procedure to be adopted by him/her in considering complaints; and
 - (b) generally adopt an inquisitorial approach in considering complaints.
- 5.2 The reference of a complaint to the ISO pursuant to these Terms of Reference shall be deemed to be a process of "without prejudice" and confidential negotiation between the Participant and Complainant. In recognition of this, the ISO shall not commence or proceed with consideration of a complaint until the Complainant has confirmed in writing his, her or their acceptance of the confidentiality provisions then in use by the ISO, which shall include the provision that the Complainant shall keep all information relating to the investigation of the complaint by the ISO confidential.
- 5.3 Subject to paragraph 5.10, the ISO shall only consider a complaint on the basis that the Participant has agreed to keep confidential all information and any decision made, in respect of the complaint.

- 5.4 Upon acceptance of a complaint by the ISO, he/she shall provide the Participant with full details of the complaint, including a copy of the complaint documents, together with evidence of the Complainant's compliance with the requirements of paragraph 5.2. On receipt of those details, the Participant shall submit a written response to the ISO, together with any information held by the Participant. Information claimed to be privileged and confidential and not supplied to the ISO shall not form part of the ISO's consideration of the complaint.
- 5.5 While the ISO will not usually hold a hearing, the Participant and the Complainant shall have the right to have their submissions considered, prior to a Resolution of the complaint.
- 5.6 The ISO may consider any information and make such enquiries as he/she thinks fit. The ISO shall not be obliged to consider any information which, in his/her opinion, has not been obtained and/or relied upon by either party in good faith.
- 5.7 In making any decision in the Resolution process, the ISO shall do so by reference to what is, in his/her opinion, fair and reasonable in all the circumstances. In determining what is fair and reasonable, the ISO may consider:
- (a) the educational, cultural and personal circumstances of the Complainant as are relevant to the complaint;
 - (b) the manner in which the Complainant has been dealt with by the Participant;
 - (c) the manner in which the Complainant has dealt with the Participant;
 - (d) the degree to which the Participant was in control of the systems and procedures which are the subject of the complaint; and
 - (e) any other matter the ISO considers relevant.
- 5.8 While the ISO shall not be bound by any previous decision of the ISO, he/she shall have regard to:
- (a) any applicable rule of law;
 - (b) the rules of natural justice, insofar as they apply to the procedure adopted by the ISO;
 - (c) general principles of good insurance and savings practice; and
 - (d) any Codes applicable to the subject matter of the complaint.
- 5.9 No decision of the ISO shall be capable of review or appeal in any form, by any other person, court, tribunal, statutory complaints authority, or other body.
- 5.10 If a Complainant commits a breach of any of the confidentiality provisions, signed in accordance with paragraph 5.2:
- (a) if the breach occurs before the Resolution of the complaint, the ISO shall discontinue consideration of the complaint and make no decision in any form in respect of the complaint; and
 - (b) if the breach occurs before or after Resolution of the complaint, both the ISO and the Participant against which the complaint has been made may respond, as is appropriate in all the circumstances, including disclosing the terms of any Assessment, Recommendation, or Award.
- 5.11 The ISO shall, within 2 months of the Resolution of a complaint, return all material provided by each party in connection with the complaint.

6 Resolution Procedure

6.1 A complaint will only be considered by the ISO in the following circumstances:

Either:

- (a) (i) the Participant has advised the Complainant in writing:
 - (1) that Deadlock has been reached;
 - (2) about the existence of the Scheme; and
 - (3) that the ISO can only consider a complaint if it is referred to the ISO within 2 months of the date on which Deadlock is advised by the Participant to the Complainant; and
- (ii) the complaint was referred to the ISO within 2 months of the date on which Deadlock was advised by the Participant to the Complainant (unless the Participant otherwise agrees).

Or:

- (b) (i) the Complainant has made a written complaint to the Participant;
- (ii) the Participant has not advised the Complainant that Deadlock has been reached, within 2 months of the date on which the complaint was made to it; and
- (iii) the ISO considers that Deadlock has been reached.

[**“Deadlock”** means the Participant has fully considered the complaint through its internal complaints procedure and has decided that the complaint cannot be resolved by that procedure.]

6.2 The complaint will be considered on behalf of the ISO by a Case Manager employed by the Commission, taking into account all of the material provided by the Complainant and the Participant and subject to the provisions of the Terms of Reference.

6.3 At any time a complaint is under consideration, the ISO may resolve the complaint by agreement between the Complainant and the Participant.

6.4 Unless the complaint is resolved, the Case Manager, in consultation with the ISO, shall make an Assessment. A copy of the Assessment shall be provided to the Complainant and the Participant.

[**“Assessment”** means a written summary of the complaint, the issues involved and a decision about whether the complaint has been upheld or not upheld.]

6.5 The ISO shall review the Assessment and make a Recommendation if:

- (a) the Complainant or the Participant requests; and
- (b) the ISO is of the opinion that there is relevant new evidence or proper grounds for doing so; or
- (c) the ISO believes that a Recommendation should be made in respect of the complaint.

Before making a Recommendation, the ISO shall advise the Complainant and the Participant that they may make further submissions within a reasonable time, specified by the ISO.

[**“Recommendation”** means a written decision of the ISO, including:

- (a) whether the complaint has been upheld or not upheld; and

(b) the ISO's reasons for the Recommendation.]

- 6.6 If either an Assessment is prepared by a Case Manager in consultation with the ISO or a Recommendation is issued by the ISO, which partly or wholly upholds a complaint in favour of a Complainant, the ISO may also require the Participant to pay to the Complainant such monetary amount, not exceeding \$1,000, as is in the opinion of the ISO appropriate to reimburse or compensate the Complainant for any incidental expenses incurred by the Complainant in making and pursuing the complaint and for any loss arising from any delay in settling the claim. This discretion is only to be exercised in cases where special inconvenience and extra expense has been incurred.
- 6.7 If, within one month after it is made, a Recommendation upholding the complaint has been accepted by the Complainant but not by the Participant, the ISO may make an Award against the Participant. If within one month after it is made the Complainant agrees to accept the Award, it shall be binding on the Complainant and the Participant against which it is made. A copy of the Award shall be provided to the Complainant and to the Participant.

["Award" means a written decision of the ISO including:

- (a) a direction that the Participant take the action set out in the Award; and
 (b) the ISO's reasons for the Award.]

7. Awards

- 7.1 If the ISO has made a Recommendation which, within one month after it is made, has been accepted by the Complainant but not by the Participant named in the complaint, the ISO may make an Award against the Participant.
- 7.2 An Award may comprise a money sum and/or require the Participant to replace, repair or reinstate the items insured by the Participant to the satisfaction of the Complainant, provided that the aggregate of the money sum and/or the cost to the Participant of replacement, repair or reinstatement of the items it is required to replace, repair or reinstate, shall not exceed:
- (a) in the case of a claim relating to a policy of disability insurance which provides for regular payments to the insured (as distinct from a lump sum), \$1,000 (plus GST, if GST applies) per week; or
 (b) in any other case, \$200,000 (plus GST, if GST applies);
- 7.3 In no event shall an Award be for an amount that is in the opinion of the ISO, in excess of:
- (a) in the case of a complaint concerning the entitlement of the Complainant or the liability of a Participant under a policy or agreement to provide Services, the maximum possible entitlement of the Complainant or liability of the Participant under that policy or agreement; or
 (b) in any other case, the amount appropriate to compensate the Complainant for direct loss or damage suffered by him/her by reason of the acts or omissions of the Participant against whom the Award is made.
- 7.4 If an Award is made by the ISO, the ISO may also require the Participant to pay to the Complainant such monetary amount, not exceeding \$1,000, as is in the opinion of the

ISO appropriate to reimburse or compensate the Complainant for any incidental expenses incurred by the Complainant in making and pursuing the complaint and for any loss arising from any delay in settling the claim.

- 7.5 For the avoidance of doubt, any sums awarded under paragraph 6.6 or paragraph 7.4 may, when aggregated with any monetary award or any costs incurred by the Participant in replacement, repair or reinstatement result in the total amount payable to or on behalf of a Complainant exceeding the amounts in paragraph 3.1(a).
- 7.6 The Award shall state that if, within one month after its issue, the Complainant agrees to accept it in full and final settlement of the subject matter of the complaint and agrees to waive and surrender all rights and causes of action (statutory or otherwise) the Complainant may have against the Participant arising out of the subject matter of the complaint, the Award shall be binding on the Complainant and (in accordance with its undertaking to the Commission) the Participant against which it is made. The ISO shall issue a copy of the Award to the Complainant and the Participant and shall issue to the Complainant a form (addressed to the ISO and the Participant) to be completed by the Complainant whereby he/she may accept the Award in full and final settlement of the subject matter of the complaint.

8 Test Cases

- 8.1 At any time before the ISO has made an Award, the Participant may notify the ISO in writing that it has invoked the Test Case procedure under Rule 25 of the Rules. On notification, the ISO shall cease to consider the complaint.

9 Supply and Retention of Information

- 9.1 Where any party to a complaint requests access to any information on the ISO's files in connection with the complaint, the ISO may make that information available, provided that:
- (a) the information will not be disclosed to any other person or entity without the written consent of the party who originally supplied that information to the ISO; and
 - (b) prior to making such information available in accordance with this paragraph, the ISO obtains from that party a written agreement setting out the basis upon which that information is made available.
- 9.2 In all cases, copies of correspondence to or from the ISO, together with copies of any other relevant documentation, may be retained by the ISO if the ISO believes it is appropriate to do so in all the circumstances.
- 9.3 The ISO shall not identify the Complainant or the Participant named in a complaint or any information relating to a complaint, except as follows:
- (a) as agreed by the parties to the complaint;
 - (b) as required by law; or
 - (c) as required for the proper operation or administration of the Scheme.

10 Other Powers and Duties of the ISO

- 10.1 To inform the community of his/her activities, the ISO shall publish an annual report and may publish other material from time to time.
- 10.2 Where the ISO identifies, in the course of an investigation of a complaint, a breach or possible breach by a Participant of the law, a Code, or an obligation imposed on that Participant under these Terms of Reference or the Rules, the ISO shall:
- (a) advise the Participant; and/or
 - (b) if the ISO considers the matter to be significant, provide details to the Chairperson of the Commission to take appropriate action.