



INSURANCE & FINANCIAL SERVICES  
**OMBUDSMAN**

**TERMS OF REFERENCE**

**INSURANCE & FINANCIAL SERVICES OMBUDSMAN SCHEME  
INCORPORATED**

**1 JULY 2015**

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## 1. Definitions and Interpretation

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

“Act” means the Financial Service Providers (Registration and Dispute Resolution) Act 2008;

“Applicable Monetary Limit” means:

- a) the sum of \$1,500 (plus GST, if GST applies) per week where the claim against a Participant relates to a product that provides regular payments (as distinct from a lump sum); or
- b) the sum of NZ\$200,000 (plus GST, if GST applies), in any other case, for a claim against a Participant;

“Assessment” means a written document prepared on behalf of the Scheme pursuant to paragraph 13.1(a) that summarises the Complaint, analyses the issues and sets out whether the Complaint is upheld and if so what remedy, if any, is appropriate;

“Award” means a written decision, with reasons, made by the Ombudsman on behalf of the Scheme in relation to a Complaint that:

- a) is binding on the Participant in the circumstances set out in paragraph 13.1(d); and
- b) includes a direction that the Participant undertake remedial action permitted by paragraph 14 and set out in the Award;

“Business” has the same meaning as in the Act;

“Complaint” means an expression of dissatisfaction about a Participant, where a response or resolution is explicitly or implicitly expected from the Participant;

“Complainant” means a person or body that, at the time of making the Complaint to the Scheme, is:

- a) a person or group of persons, whether acting jointly or severally;
- b) the trustees of a family trust including a corporate trustee (if the family trust carries on a business it must be a Small Business);
- c) a club or an incorporated society;
- d) a unit title body corporate or a body corporate of a company title building which is occupied for residential or Small Business purposes; or
- e) a Small Business;

“Constitution” means the Constitution of the Scheme;

“*Consumer Credit Contract*” has the same meaning as in the Credit Contracts and Consumer Finance Act 2003;

“*Consumer Goods*” has the same meaning as in the Credit Contracts and Consumer Finance Act 2003;

“*Deadlock*” represents the point in time at which the Participant has fully considered a Complaint through its internal Complaints procedure and has decided that the Complaint cannot be resolved by that procedure or the Scheme considers Deadlock has been reached under paragraph 8.2;

“*Enforcement Action*” has the same meaning as in section 83J of the Credit Contracts and Consumer Finance Act 2003;

“*Final Decision on Jurisdiction*” means a written decision, with reasons, made by the Ombudsman on behalf of the Scheme pursuant to paragraph 7.2 as to whether or not a Complaint is within the Scheme's jurisdiction;

“*Financial Markets Authority*” means the regulatory authority established under the Financial Markets Authority Act 2011;

“*Financial Services*” means any financial services provided in New Zealand by a financial services provider registered under the Act;

“*Minister*” means the Minister of the Crown who is for the time being responsible for Part 3 of the Act;

“*Month*” means calendar month;

“*Nominated Representative*” has the same meaning as in the Financial Advisers Act 2008;

“*Ombudsman*” means the Insurance & Financial Services Ombudsman appointed in accordance with Clause 13.1 of the Constitution;

“*Participant*” means each individual, company or organisation which becomes a Participant in the Scheme in accordance with Clause 9 of the Constitution;

“*Qualifying Financial Entity*” has the same meaning as in the Financial Advisers Act 2008;

“*Recommendation*” means a written decision, with reasons, made by the Ombudsman on behalf of the Scheme pursuant to paragraph 13.1(b) as to whether or not a Complaint has been upheld and, if upheld, what remedial action permitted by paragraph 14 the Participant should undertake;

“*Scheme*” means the Insurance & Savings Ombudsman Scheme Incorporated until 1 November 2015 and the Insurance & Financial Services Ombudsman Scheme Incorporated from that date on;

“*Small Business*” means a Business that has no more than 19 full-time equivalent employees;

“*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 Constitution.

- 1.2 For the purpose of these Terms of Reference:
- a) Financial 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 Financial Services includes reference to their non-provision.
- 1.3 These Terms of Reference will apply to a Complaint made to the Scheme on or after 1 July 2015, where Deadlock was reached in accordance with paragraph 8 on or after 1 July 2015.

## **2. Delegation Powers**

- 2.1 The Scheme:
- a) authorises the Ombudsman to exercise all powers and discretions conferred on the Scheme by these Terms of Reference; and
  - b) permits the Ombudsman to delegate any of those powers and discretions (other than the power to make Final Decisions on Jurisdiction, decisions to include information under paragraph 10.3b), Recommendations and Awards) to any employee or contractor engaged by the Scheme.

## **3. Principal Powers and Duties of the Scheme**

- 3.1 The Scheme’s principal powers and duties are:
- a) to resolve, without charge to the Complainant, Complaints arising out of the provision of Financial Services by a Participant and to do so in a way that is accessible, independent, fair, accountable, efficient and effective; and
  - b) to promote and publicise the Scheme to consumers and Small Businesses and to encourage and provide advice to Participants on the development and maintenance of good complaint-handling practices.

## **4. Making a Complaint to the Scheme**

A Complaint about a Participant may be made to the Scheme by completing the Scheme’s complaint form and providing the information required by that form. The Complaint may be hand delivered to the Scheme or sent by email, fax or post.

## 5. Type of Complaints within the Scheme's jurisdiction

- 5.1 Subject to paragraph 5.2 and any other legal rules relevant to the provision of the services, the Scheme has the power to consider Complaints made by a Complainant about Participants relating to:
- a) breaches of contract by the Participant;
  - b) breaches of statutory obligations by the Participant;
  - c) breaches of industry codes by the Participant; and
  - d) non-compliance with relevant industry practice.
- 5.2 The Scheme will only consider (or continue to consider) a Complaint made to the Scheme where the Scheme is satisfied that:
- a) the claim against the Participant made in the Complaint either:
    - i) represents a monetary amount not more than the Applicable Monetary Limit; or
    - ii) is part of a larger claim (representing whatever monetary amount) that has been accepted by the Participant and that part represents a monetary amount not more than the Applicable Monetary Limit;
  - b) the Complaint is made either:
    - i) by or on behalf of the person to whom, or for whom, or for whose benefit, the Financial Services were provided (the Scheme has 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); or
    - ii) by a person who has provided a guarantee or security for, or repayment of, the Financial Service;
  - c) the subject matter of the Complaint has not previously been considered by the Scheme or, if this has occurred, that relevant new evidence is available;
  - d) prior to the date the Complaint was made to the Scheme:
    - i) proceedings had not been commenced in any court, or tribunal, or before any arbitrator or ombudsman, or any other body involved in dispute resolution to consider and/or determine the subject matter of the Complaint; or
    - ii) the subject matter of the complaint had not been to a mediation in which a resolution had been agreed to by the Complainant; or
    - iii) the Complainant had not agreed to be bound by the terms and conditions of a full and final settlement agreement with the Participant;

- e) there is not a more appropriate forum to deal with the Complaint, for example, another independent or statutory Complaints or conciliation procedure;
- f) the Complaint is not lacking in substance and is being pursued reasonably by the Complainant and not in a trivial, frivolous or vexatious manner, or in bad faith; and
- g) the Participant has not given the Scheme a notice that the Complaint is to become a test case in accordance with paragraph 15.3 of these Terms of Reference.

5.3 Nothing in these Terms of Reference will prevent the Scheme from considering a Complaint, that is otherwise outside the Scheme's jurisdiction, if the Participant consents.

## **6. Exclusions from Jurisdiction**

6.1 Subject only to paragraph 5.3, the Scheme may not consider those parts of a Complaint which, in the opinion of the Scheme, relate to:

- a) the Participant's commercial judgment, assessment and pricing of risk 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; or
- d) a decision by the Participant to:
  - i) accept, issue, renew, terminate (except in the case of alleged non-disclosure or mis-statement in relation to an insurance claim) or decline to renew a contract for the provision of Financial Services; or
  - ii) impose any conditions or limitations, or vary premiums or charges, in relation to a contract for Financial Services,

provided that the Scheme is satisfied the Participant has made its decision in accordance with the terms of the contract or the Participant's rules of operation.

## **7. Jurisdictional Disputes**

7.1 The Scheme will decide whether or not a Complaint (or if relevant all parts of a Complaint) is within its jurisdiction under these Terms of Reference.

7.2 If the Complainant or the Participant objects to a decision as to jurisdiction made by the Scheme pursuant to paragraph 7.1 and the Ombudsman considers that the objection may have substance, the Ombudsman, on behalf of the Scheme, must carry out a review and make a Final Decision on Jurisdiction. The Ombudsman must first give the Complainant and the Participant a reasonable opportunity to make submissions as to jurisdiction.

## 8. Timeframe for Referring a Complaint to the Scheme

- 8.1 A Complaint must be referred to the Scheme within 3 months (or a longer period agreed to by the Participant) of the date the Participant advised the Complainant in writing:
- a) that Deadlock has been reached; and
  - b) about the existence of the Scheme; and
  - c) that the Scheme can only consider a Complaint if it is referred to the Scheme within 3 months.
- 8.2 Notwithstanding paragraph 8.1, the Scheme may consider a Complaint referred to it by a Complainant if the following circumstances apply:
- a) the Complainant has made a written Complaint to the Participant and at least 2 months have elapsed since the date of that Complaint; and
  - b) the Participant has either not advised the Complainant that Deadlock has been reached or has failed to provide the information referred to in paragraph 8.1; and
  - c) the Scheme considers that Deadlock has been reached.
- 8.3 Notwithstanding paragraph 8.1 and having regard to paragraph 8.2, the Scheme may also consider a complaint after 3 months (but no more than 12 months) have elapsed since the date Deadlock has been reached if, in the opinion of the Ombudsman, it would be fair and reasonable to do so having regard to all the circumstances. In determining what is fair and reasonable, the Ombudsman may consider:
- a) The Complainant's health or other significant personal circumstances; and
  - b) Inadequate or incorrect information provided to the Complainant about the time limit.
- 8.4 Even if paragraph 8.1 or paragraph 8.2 applies, the Scheme will not consider a Complaint:
- a) where it is more than 6 years since the matter was first the subject of a formal Complaint by the Complainant to the Participant; or
  - b) for Participants that joined the Scheme on or after 1 July 2010: where the act or omission giving rise to the Complaint first occurred before the Participant first registered on the Financial Service Providers Register; or
  - c) for Participants which are Qualifying Financial Entities and the Complaint is about one of their Nominated Representatives, acting in the capacity of their Nominated Representative: where the act or omission giving rise to the Complaint first occurred before 1 July 2011.



## 9. Confidentiality

- 9.1 The Scheme's dispute resolution service is a confidential negotiation process. Accordingly:
- a) the Scheme will not begin considering a Complaint until the Complainant has confirmed in writing acceptance of confidentiality in the format required by the Scheme; and
  - b) subject to paragraph 9.2, the Participant must keep confidential all information relating to or obtained in the course of the investigation of the Complaint by the Scheme including any decision made, in respect of the Complaint.
- 9.2 If a Complainant breaches the confidentiality undertaking signed in accordance with paragraph 9.1(a), the Scheme and the Participant may take whatever action they consider appropriate in the circumstances including:
- a) discontinuing considering the Complaint; and
  - b) disclosing the terms of any Assessment, Recommendation or Award that has been made in relation to the Complaint.
- 9.3 The Scheme, its officers and employees must not disclose to any person:
- a) any information concerning a Complaint made to the Scheme that would make it possible to identify the Complainant or the Participant; or
  - b) any other information or matter of a confidential nature, except:
    - c) as authorised by the party identified;
    - d) to carry out its responsibilities under the Act or these Terms of Reference;
    - e) as required by law; or
    - f) as properly and reasonably required in connection with any legal proceedings instituted by or against the Scheme or any of its officers or employees.

## 10. Investigation Processes

- 10.1 Where the Scheme accepts a Complaint, the Scheme must 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 9.1(a).
- 10.2 On receipt of Complaint information in accordance with paragraph 10.1, the Participant must provide the Scheme with a written response to the Complaint, together with any relevant information held by the Participant, provided that if:

- a) the Participant provides information that it claims to be privileged and confidential, this may not form part of the Scheme's consideration of the Complaint; and
  - b) in the opinion of the Ombudsman, urgency is required in respect of investigating the complaint, the Ombudsman may decide to require the Participant's full co-operation in providing any relevant information within a shorter than usual timeframe.
- 10.3 Subject to the other provisions of these Terms of Reference, the Scheme may consider any information and, taking an inquisitorial approach, make such enquiries as it thinks are fair and reasonable in the circumstances provided that:
- a) the Scheme is not obliged to consider any information that, in its opinion, has not been obtained and/or relied upon by either party in good faith; and
  - b) the Ombudsman may decide to accept for the Scheme's consideration new information provided to the Scheme by a party to the Complaint that has not previously been provided to the other party, but only if the information was not previously known, or could not have reasonably been expected to be previously known, by the party providing the information. If the Ombudsman decides to allow the information to be considered by the Scheme, the information must be provided to the other party for their response.
- 10.4 The Scheme may obtain expert advice including from a legal expert, industry expert, medical practitioner or building expert appointed by the Scheme. Where this occurs, the Scheme may require the Participant to pay or contribute to the cost provided that the fees of the expert do not deviate significantly from the usual market rate for such advice.
- 10.5 While the Scheme will not usually hold a hearing, the Participant and the Complainant must be given a reasonable opportunity to make written submissions to the Scheme, prior to the Scheme making an Assessment, Recommendation or Award in relation to the Complaint.
- 10.6 The Scheme may take whatever steps it considers reasonable where a party to a Complaint fails without reasonable excuse to provide information or take some other step requested by the Scheme as part of its investigative processes. This may include:
- a) proceeding with the resolution of the Complaint on the basis that an adverse inference may be drawn from the party's failure to comply with the Scheme's request; or
  - b) where the Complainant fails to comply with the Scheme's request, refusing to continue considering the Complaint.

## **11. Resolution Methods**

- 11.1 The Scheme may decide the method and process to be used to resolve the Complaint. This may include:
- a) negotiation;
  - b) conciliation;
  - c) mediation; or
  - d) making a decision about the Complaint in accordance with the process set out in paragraph 13.
- 11.2 At any time a Complaint is under consideration by the Scheme, it may be resolved by agreement between the Complainant and the Participant and the agreement will be binding on both the Complainant and the Participant.

## **12. Decision Making Criteria**

- 12.1 When making a decision about a Complaint, the Scheme will do so by reference to what is, in its opinion, fair and reasonable in all the circumstances. In determining what is fair and reasonable, the Scheme 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 Scheme considers relevant.
- 12.2 While the Scheme is not bound by the legal rules of evidence or by its previous decisions, the Scheme 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 Scheme in relation to the Complaint;
  - c) relevant industry practice; and
  - d) any Codes applicable to the subject matter of the Complaint.

## **13. Decision Making Processes**

- 13.1 The process for the Scheme to make a decision about a Complaint is as follows:
- a) An Assessment is prepared and a copy provided to the Complainant and the Participant. The parties may agree to resolve the Complaint in accordance with the Assessment.

- b) If the Complainant or the Participant requests a review of an Assessment, the Ombudsman, on behalf of the Scheme, may carry out a review. If significant new issues arise, the Ombudsman may decide that a second Assessment is required, or the Ombudsman may make a Recommendation if:
  - i) the Ombudsman is of the opinion that there is relevant new evidence; or
  - ii) the Ombudsman believes that a Recommendation should be made in respect of the Complaint.

The parties may agree to resolve the Complaint in accordance with the Recommendation.

- c) 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 Ombudsman may, on behalf of the Scheme, make an Award against the Participant.
- d) An Award is issued to and is binding on both the Complainant and the Participant against which it is made, even if the Award is made after the Participant leaves the Scheme if, within one month after it is made, the Complainant agrees to accept the Award in full and final settlement of the subject matter of the Complaint. The Scheme will provide the Complainant with a form (addressed to the Scheme and the Participant) to be used by the Complainant to evidence this acceptance.

13.2 If a Participant or former Participant fails to comply with an Award, the Scheme may:

- a) terminate the Participant's membership; and/or
- b) refer the matter to the Financial Markets Authority.

13.3 No decision of the Scheme is capable of review or appeal in any form, to any other person, court, tribunal, statutory complaints authority, or other body, except as contemplated by the Act.

## 14. Remedies

14.1 Subject to paragraph 14.2, where the Scheme upholds a Complaint, it may find that the Participant should undertake remedial action including:

- a) the payment of a sum of money;
- b) the forgiveness or variation of an amount owing to the Participant;
- c) the release of security for debt;
- d) the reinstatement, rectification, variation or termination of a contract; or
- e) the meeting of a claim under an insurance contract by, for example, repairing, reinstating or replacing items of property.

- 14.2 Unless otherwise agreed, the aggregate cost to the Participant of remedies under paragraph 14.1 must not exceed the Applicable Monetary Limit nor represent a cost to the Participant in excess of:
- a) in the case of a Complaint concerning the liability of a Participant under an insurance policy: the maximum possible liability of the Participant under that policy; or
  - b) in any other case: the amount appropriate to compensate the Complainant for direct loss or damage they suffered by reason of the acts or omissions of the Participant.
- 14.3 In addition to any remedy under paragraph 14.1, the Scheme may find that, where there has been undue or unreasonable delay or other such circumstances caused by the Participant, the Participant should pay the Complainant interest at the 90 day bank bill rate on an amount to be paid to the Complainant in accordance with paragraph 14.1: interest may be calculated from the date of the events giving rise to the claim.
- 14.4 In addition to, or as an alternative to any remedy under paragraph 14.1, the Scheme may:
- a) find that the Participant should make a payment to the Complainant of an amount not exceeding \$3,000 where:
    - i) the Complainant has incurred special inconvenience or expense in making and pursuing the Complaint; or
    - ii) in the opinion of the Scheme, it is appropriate to compensate the Complainant for incidental expenses incurred by the Complainant or for any loss arising from any delay in settling the claim; or
    - iii) in the case of a complaint relating to a repossession under Part 3A of the Credit Contracts and Consumer Finance Act 2003, in the opinion of the Scheme; it is appropriate to compensate the Complainant for non-financial loss, stress, humiliation, and inconvenience;
  - b) suggest that the Participant undertakes reasonable steps to improve its processes.

## **15. Rights of parties to institute Court or Debt Recovery Proceedings**

- 15.1 The Complainant may take alternative court action against the Participant at any time, including if the Complainant rejects an Assessment, Recommendation or Award in relation to the Complaint. If the Complainant does this, the Scheme must cease considering the Complaint.
- 15.2 Where a Complaint is made to the Scheme that relates to a debt owed to a Participant, that does not relate to a Consumer Credit Contract, the Participant must not take any action to recover the debt, to seize any assets securing the debt or to assign any right to recover the debt, after the Complaint has been referred to the Scheme.

- 15.3 Neither a Participant nor a Participant's agent may take or continue Enforcement Action in relation to Consumer Goods where Section 83J of the Credit Contracts and Consumer Finance Act 2003 prevents them from doing so.
- 15.4 A Participant may not prevent the Scheme from considering, or continuing to consider, the Complaint by issuing proceedings in court, unless:
- a) the Participant determines that the Complaint involves an issue which has important consequences for the business of the Participant or of Participants generally or an important or novel point of law; and
  - b) the Participant has notified the Scheme, prior to the Scheme making an Award in relation to the Complaint, that it intends to institute High Court proceedings to resolve the issue by way of declaratory judgment and the Participant provides an undertaking that it will:
    - i) within 3 months of the date of the notice, institute proceedings in the registry of the High Court nearest the Complainant's residence;
    - ii) pay the Complainant's costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Participant (including the Complainant's costs and disbursements associated with any cross-appeal instituted by the Complainant in relation to the Participant's appeal proceedings);
    - iii) make interim payments in relation to those costs and disbursements if and to the extent that this is reasonable; and
    - iv) prosecute the Complaint expeditiously.
- 15.5 On receipt of notification pursuant to paragraph 15.3(b), the Scheme must:
- a) cease considering the Complaint for so long as the Participant complies with the undertaking required by that paragraph; and
  - b) tell the Complainant that the Participant is instituting legal proceedings to test the law and the effect of this upon the Complaint.

## **16. Access to Information**

- 16.1 Where any party to a Complaint requests the Scheme to provide access to any information about the Complaint, the Scheme may respond to that request as it considers appropriate subject to the Privacy Act 1993 and any other applicable legal obligations.

## **17. Other Powers and Duties of the Scheme**

- 17.1 To inform the community of its activities, the Scheme must publish an annual report and may publish other material from time to time.
- 17.2 Where the Scheme 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 Constitution, the Scheme may:
- a) advise the Participant;
  - b) notify the Minister, Financial Markets Authority or other regulator; and/or
  - c) take such other action it considers appropriate including to determine whether a broader issue exists that warrants remedial action.