

Insurance Broking Terms of Reference

Effective 1 January 2009

These terms of reference apply to those members of the Financial Ombudsman Service Limited who have been designated as having the Insurance Broking Terms of Reference as the applicable Terms of Reference, whether generally or in relation to a particular dispute.

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A DEFINITIONS

In these Terms of Reference:

"**Act**" means the Corporations Act 2001.

"**ASIC**" means the Australian Securities and Investments Commission.

"**Board**" means the board of Directors of the Financial Ombudsman Service Limited (FOS).

"**Client**" means:

- for Retail General Insurance Policies and Small Business General Insurance Policies the individual or business which at the time the relevant conduct in dispute occurred, employed less than 100 people if a manufacturing business, or in any other case, less than 20 people, that is provided with the service in relation to the product.
- for all other policies – the person(s) or entity (ies) that is/are proposed to be or is/are the insured.

"**CM**" means IBD Case Manager.

"Committee" means the Insurance Broking Advisory Board Committee established by the Board.

"**Excluded Product**" means any product which is not a "financial product" as defined in Division 3 of the Act (for example, reinsurance and workers compensation or other insurance underwritten by a State or Territory).

FOS means the Financial Ombudsman Service Limited.

"**IBD**" means the Insurance Broking Division of FOS.

"**Life Insurance Policies**" means a contract that constitutes a life policy as defined in the Life Insurance Act 1995 which is not an Excluded Product.

"**Member**" means a person who is a member of FOS to whom these Terms of Reference apply.

"**NIBA**" means National Insurance Broking Association of Australia ACN 006 093 849.

"**Referee**" means the persons appointed to act as such under these Terms of Reference in accordance with the FOS Constitution.

"**Retail General Insurance Policies**" means any general insurance policies which:

- contain insurance cover of the type set out in Regulations 7.1.11 to 7.1.17 of the Act or such other regulations made pursuant to section 761G(5)(b)(viii) of the Act; and
- are not an Excluded Product.

Even where there are additional types of covers contained in these retail general insurance policies, the whole policy is caught (e.g package type policies).

Clarification can be sought from IBD, but by way of summary only, the types policies usually caught would be:

- *a motor vehicle insurance product (excluding any omnibus, tram or vehicle the carrying capacity of which exceeds 2 tonnes); or*
- *a residential home building insurance product (excluding builders warranty insurance that is required by law); or*
- *a residential home contents insurance product; or*
- *a sickness and accident insurance product (excluding ones that are guaranteed renewable at the insured's option or where the insurer guarantees not to cancel the policy in response to a change in risk where the policy has been effected for a period in excess of 1 year); or*
- *a consumer credit insurance product; or*
- *a travel insurance product; or*
- *a personal and domestic property insurance product that covers loss or damage to property that is wholly or predominantly used for personal, domestic or household purposes by the insured, the insured's relatives or anyone with whom the insured resides and is ordinarily used for that purpose. "Property" includes valuables, caravan or mobile home or on site mobile home, a trailer, a marine pleasure craft, a horse, a domestic pet or a mobile phone.*
- *packaged policies that contain the above types of insurance within them.*

Excluded from the above are any policies to which the Marine Insurance Act 1909 applies or any workers compensation or compulsory third party compensation (CTP) insurance policies required by law.

"Small Business General Insurance Policies" means any general insurance policies that are not also within the definition of Retail General Insurance Policies and are not an Excluded Product.

B AN OVERVIEW OF INSURANCE BROKING DISPUTES (IBD)

Objectives

IBD is a division of FOS designed to help certain consumers quickly resolve disputes with insurance broker and insurance intermediary members in relation to certain general and life insurance products.

FOS has been approved by the Australian Securities and Investments Commission ("**ASIC**") as an external dispute resolution scheme for the purposes of the Corporations Act 2001 (Cth). It is an independent body and its Board of Directors comprises an independent Chair and equal numbers of directors representing the interests of consumers and members.

IBD aims to resolve disputes unresolved by its members' own internal dispute resolution processes. It aims to avoid consumers having to resort to costly litigation and its use is free of charge to consumers.

These IBD Terms of Reference set out:

- the types of disputes that will be considered by IBD;
- the IBD dispute resolution process;
- the rights and obligations of consumers, members, IBD and its representatives.

Summary of IBD dispute resolution process

In summary, it is a two step process:

- **Step 1** – after the member's own internal dispute resolution procedures have failed to resolve the dispute, the dispute is referred to the IBD Case Manager who attempts to resolve it by conciliation.
- **Step 2** - If the Case Manager fails to resolve the dispute to the satisfaction of the parties, the Case Manager is required to refer the dispute to the Referee for a final determination. This is binding on the member. The Referee may make orders and impose sanctions on the member.

The above process is free of charge to consumers.

Monitoring and review of IBD

IBD will be monitored generally by the FOS Board.

Information concerning IBD

Consumer enquiries may be directed to the IBD by telephone, facsimile, e-mail, mail or in person by appointment.

All participating members are required to make information concerning IBD available to affected consumers. They must also provide such information on IBD to a consumer if a dispute is unresolved to their satisfaction by the member's own internal dispute resolution process.

C IBD TERMS OF REFERENCE

1. WHICH DISPUTES WILL BE RESOLVED BY IBD?

1.1 For a dispute to be resolved by IBD it must:

- (a) arise from a complaint in relation to the conduct of a member of IBD ("**Member**") or its representatives, whether before or after the Member joined IBD; and
- (b) be in relation to:
 - (i) Retail General Insurance Policies or Life Insurance Policies where the dispute concerned does not involve a claim against the Member of more than AUD\$100,000, unless waived in writing by the Member in full or up to a specified amount and the Member's professional indemnity insurer has given its written consent to this;
 - (ii) Small Business General Insurance Policies, where the dispute concerned does not involve a claim against the Member of more than AUD\$100,000 unless:
 - (A) the Client acknowledges that IBD cannot order the Member to make a payment of money or refund money in excess of AUD\$100,000; or
 - (B) the limits are waived in writing by the Member in full or up to a specified amount and the Member's professional indemnity insurer has given its written consent to this;
 - (iii) any other product not covered above which a Member has agreed, by giving notice in writing to IBD to be subject to IBD up to a specified limit, provided the Member's professional indemnity insurer has given its written consent to this; and
- (c) be brought by the relevant Client for the above product; and
- (d) have first been referred to the Member's internal dispute resolution process and:
 - (i) the Client has not agreed with the Member's decision or response; or
 - (ii) the dispute is unresolved after a reasonable period of time (usually 20 working days).

2. HOW DOES A CLIENT REFER A DISPUTE TO IBD?

2.1 Any dispute, which has not been satisfactorily resolved by the Member's internal dispute resolution process, must first be referred to the IBD by the Client in writing.

2.2 Consumer enquiries may be directed to IBD by telephone, facsimile, e-mail, mail or by appointment.

2.3 IBD is available to discuss the content of a dispute and to help the claimant to reduce the dispute to writing if appropriate.

- 2.4 Members are required to make information concerning IBD available to affected consumers and provide them with such information when a dispute is unresolved to the satisfaction of the Client by the Member's internal dispute resolution process.

3. **DISPUTE RESOLUTION PROCEDURE**

STEP 1 - Case Manager

Conciliation of dispute by the Case Manager

- 3.1 The Case Manager will endeavour to resolve disputes by conciliation.
- 3.2 In conciliating a dispute, the Case Manager is to give fair and just advice and assistance to the parties having regard to what is fair in all the circumstances, good insurance practice, the principles of IBD, as well as observe applicable law, relevant judicial authority and any relevant insurance codes of practice.

Discretion of Case Manager to refuse to consider or continue considering a dispute

- 3.3 The Case Manager has a discretion to refuse to consider or continue considering a dispute, which the Case Manager believes in all the circumstances, is inappropriate for IBD. For example where
- (a) the Case Manager does not believe that the dispute is one covered by the IBD Terms of Reference;
 - (b) the substance of the dispute is, or has already been, the subject of consideration by the Case Manager, Referee, a statutory body, or other complaint or dispute resolution process, or adjudication by a court, tribunal or other legal process;
 - (c) insufficient information has been provided by the Client to allow the Case Manager to properly consider the dispute;
 - (d) there are reasonable grounds to believe that the circumstances of the dispute may involve fraud;
 - (e) the Client has or will not suffer any economic loss as a result of the dispute;
 - (f) the dispute raises substantial issues of fact which would not be appropriate for the Case Manager to determine;
 - (g) the dispute raises significant issues of law or public policy which the Case Manager believes should be dealt with by legal process;
 - (h) the dispute is frivolous or vexatious.
- 3.4 Where the Case Manager exercises the discretion referred to above, the Case Manager is required to provide written reasons for his/her decision to the Client and where appropriate, any steps, which the Client must take before the Case Manager will consider or continue to consider the dispute.

Right of appeal against exercise of discretion by Case Manager

- 3.5 If the Client informs the Case Manager that they do not agree with the Case Manager's decision, the Case Manager must provide to the Referee:
- (a) written reasons for the decision;
 - (b) such information and documents which the Case Manager considers will be relevant in assisting the Referee to decide whether the decision was appropriate or not;
 - (c) any submission that the Client makes about why they consider the matter to be within the Terms of Reference and in response to the Case Manager's view that access to IBD be denied; and
 - (d) such other information and documents, which the Referee shall require.
- 3.6 If the Referee decides that the decision was not appropriate, the Case Manager must continue to consider the dispute subject to the Client complying with any steps, which the Referee may require them to take. If the Referee decides that the decision was appropriate, the Case Manager need not consider the dispute, subject to the Client complying with any steps, which the Case Manager may have required them to take.

Request for information by Case Manager

- 3.7 For the purpose of determining whether to consider, or continue considering any dispute, the Case Manager may request from the Member, the Client, or any third party, including another Member or an insurer, documents or other information relevant to the dispute. Any Member or Client must provide all such documents or information promptly.
- 3.8 Provision of any confidential documents or information of the Member's principal relevant to a dispute is subject to the Member receiving the consent of its principal to provide such documents or information.
- 3.9 Any documents identified as privileged or confidential will retain their privileged or confidential status and will not be provided to another person without prior written consent or except as required by law. A document identified as subject to a claim for privilege will not be copied or reproduced in whole or in part by the Case Manager.
- 3.10 Privileged or confidential information will not be relied upon in any decision of the Case Manager unless made available to all parties to the dispute.
- 3.11 Nothing revealed, offered or provided in relation to a matter before the Case Manager by the Member or the Client may be used by the other party in subsequent proceedings or adjudication by a court, tribunal or other legal or complaint or dispute resolution process without the consent of the relevant party.
- 3.12 The Case Manager will notify the Member and the Client as soon as is reasonably possible if any document supplied by them to the Case Manager is subpoenaed by any person or entity, or is otherwise required to be produced to any person or entity.

Time for conciliation of dispute

- 3.13 Conciliation of a dispute must be completed by the Case Manager within such time as the Case Manager decides is reasonable in the circumstances.

Failure of Case Manager to resolve dispute - automatic referral of dispute to Referee by Case Manager

- 3.14 If a dispute is not resolved to the satisfaction of the Client or the Member, the Case Manager will refer the dispute to the Referee within 20 working days. The Case Manager does not have the power to make any decisions, which bind the Member or the Client. In referring a dispute to the Referee the Case Manager will provide the Referee with:
- (a) such information and documents which the Case Manager considers will assist the Referee in making a determination; and
 - (b) such other information and documents, which the Referee shall require.

STEP 2 - Referee

Determination of dispute by Referee

- 3.15 The Referee will determine any dispute referred to them by the Case Manager in accordance with the following paragraphs.
- 3.16 In determining a dispute, the Referee is to give fair and just advice and assistance to the parties having regard to what is fair in all the circumstances, good insurance practice, the principles of IBD, as well as observe the applicable law, relevant judicial authority and any relevant insurance codes and practice.
- 3.17 Both the Member and Client will have a right to present their case to the Referee. The form in which it is to be presented is at the discretion of the Referee.

Discretion of Referee to refuse to consider or continue considering a dispute

- 3.18 The Referee also has a discretion to refuse to consider or continue considering a dispute, which the Referee believes in all the circumstances, is inappropriate for IBD. For example where:
- (a) the Referee does not believe that the dispute is one covered by the IBD Terms of Reference;
 - (b) the substance of the dispute is currently the subject of consideration by the Case Manager and has not been referred to the Referee by the Case Manager in accordance with these Terms of Reference;
 - (c) the substance of the dispute is, or has already been, the subject of consideration by the Referee, a statutory body, or other complaint or dispute resolution process, or adjudication by a court, tribunal or other legal process;
 - (d) insufficient information has been provided by the Client to allow the Referee to properly consider the dispute;
 - (e) there are reasonable grounds to believe that the circumstances of the dispute may involve fraud;
 - (f) the Client will not suffer any economic loss as a result of the dispute;

- (g) the dispute raises substantial issues of fact which would not be appropriate for the Referee to determine;
- (h) the dispute raises significant issues of law or public policy which the Referee believes should be dealt with by a legal process;
- (i) the dispute is frivolous or vexatious.

3.19 Where the Referee refuses to consider or continue considering a dispute, the Referee will inform the Client in writing of the reason for the Referee's decision and where appropriate, any steps which the Client must take before the Referee will consider or continue to consider the dispute. The Client has no right to appeal the Referee's decision.

Request for information by Referee

3.20 For the purpose of determining whether to consider, or continue considering any dispute, the Referee may request from the Member, the Client, or any third party, including another Member or an insurer, documents or other information relevant to the dispute. Any Member or Client must provide all such documents or information promptly.

3.21 Provision of any confidential documents or information of the Member's principal relevant to a dispute is subject to the Member receiving the consent of its principal to provide such documents or information.

3.22 Any documents identified as privileged or confidential will retain their privileged or confidential status and will not be provided to any person without prior written consent except as required by law. A document identified as subject to a claim for privilege will not be copied or reproduced in whole or in part by the Referee.

3.23 Privileged or confidential information will not be relied upon in any decision/determination issued by the Referee unless made available to all parties to the dispute.

3.24 Nothing revealed, offered or provided in relation to a matter before the Referee by the Member or the Client may be used by the other party in subsequent proceedings or adjudication by a court, tribunal or other legal or complaint or dispute resolution process without the consent of the relevant party.

3.25 The Referee will notify the Member and the Client as soon as is reasonably possible if any document supplied by them to the Referee is subpoenaed by any person or entity, or is otherwise required to be produced to any person or entity.

Form of proceedings for determination of dispute by the Referee

3.26 Any proceedings will be at the absolute discretion of the Referee, it being intended that the Referee will have regard at all times to procedural fairness in acting informally with a minimum of legal form and technicality.

3.27 In particular, the Referee will have absolute discretion in determining:

- (a) the time and place of meetings between the relevant parties involved;
- (b) all evidentiary issues including any enquiries or investigations which the Referee may wish to undertake or expert advice or assistance which they may require. If

expert advice is required, the expert's fees must be approved as being reasonable by IBD having regard to the nature of the dispute;

- (c) whether the proceedings should be terminated prematurely for any reason.
- 3.28 The use of lawyers to represent parties will be discouraged but Clients or other persons with language or other difficulties may be assisted by a third party.
- 3.29 Personal hearings will be held only if the Referee believes it is important for a fair and timely resolution of the dispute.
- 3.30 In the case of a personal hearing, each party will normally be required to pay its costs incurred in attending, except where the Referee requests the Client's attendance, in which case, IBD will meet the Client's reasonable costs of attendance, but limited to travel, accommodation and sustenance.

Time for determination, orders, sanctions

- 3.31 The Referee will determine a dispute referred to them and make such orders and impose such sanctions as are appropriate, within a reasonable period of time. In most instances, it should be reasonable for a determination and orders to be made, and sanctions imposed, within 20 working days of the Referee having received all relevant information.
- 3.32 Determinations and orders made, and sanctions imposed, by the Referee will be given in writing along with reasons.
- 3.33 The Referee will inform the Client and Member of any determination and orders made and sanctions imposed as soon as possible.
- 3.34 Any determination, which the Referee believes to be of importance, having regard to the principles of IBD shall be made available and appropriately publicised.

Powers of the Referee - orders/sanctions

- 3.35 The Referee has the power in respect of a dispute to:
 - (a) order the Member to perform a specific service or implement rectification procedures not covered by
 - (b) order the Member to make a payment of money or refund money. This order may not be for more than AUD\$100,000.00 unless the limit has been waived by the Member in full or up to a specified amount and the Member's professional indemnity insurer has given its written consent to this;
 - (c) order the Member to undertake through an independent and appropriately qualified person an audit of its compliance procedures;
 - (d) order the Member to publish corrective advertising;
 - (e) order the Member to undertake, or require its employees or agents to undertake, professional education of a specific type;
 - (f) impose a timetable for compliance with the above orders by the Member;

- (g) name the Member in the annual report of the Referee;
- (h) provide to ASIC information and reports regarding the dispute and any determination and orders made or sanction imposed and the reasons for such determination, orders or sanctions;
- (i) recommend to ASIC that a Member's registration, licence or authority be cancelled or suspended;
- (j) cancel the Member's membership of IBD after obtaining the authority of the Board to do so and first informing ASIC.

Members bound by Referee's determination, orders and sanctions

- 3.36 A Member is bound to accept any determinations of and comply with any orders made and sanctions imposed by the Referee.

Failure to comply with orders or sanctions

- 3.37 Where a Member fails to accept a determination of, or comply with, orders made or sanctions imposed by the Referee, the Referee may make such other of the orders or impose further sanctions, as specified in paragraph 3.35 as are appropriate.
- 3.38 Before making or imposing such further orders or sanctions, the Referee will notify the Member in writing of its intention to do so. The Member will have the opportunity to make written representations to the Referee in respect of its non-compliance with the orders and sanctions and the Referee will not proceed to make or impose any further orders or sanctions before the expiry of 30 working days from the date the above notice being sent to the Member.
- 3.39 FOS may take any necessary action (including legal action) to enforce a determination or order made. This may include seeking specific performance of the Member's agreement to abide by these Terms of Reference.

Acceptance by Client of Referee's determination, orders and sanctions

- 3.40 Whilst it is expected that a Client will accept the determination of and abide by any orders made and sanctions imposed by the Referee in relation to a dispute, non-acceptance will not prejudice the Client's right to legal action.
- 3.41 A Client has 20 working days in which to accept the Referee's determination, orders made and sanctions imposed, in relation to a dispute. Acceptance will be a form satisfactory to the Referee.

No right of appeal

- 3.42 There is no right of appeal under IBD in respect of a determination or orders made, or sanctions imposed, by the Referee.

Review by Referee of Case Manager's decision to refuse to consider or continue considering a dispute which the Case Manager believes is inappropriate for IBD

- 3.43 Where the Case Manager has decided to refuse to consider or continue considering a dispute which the Case Manager believes is inappropriate for IBD, the Referee will decide,

based on information provided by the Case Manager in accordance with these Terms of Reference and any submission that the Client makes about why they consider the matter to be within the Terms of Reference and in response to the Case Manager's view that access to IBD be denied, whether the decision was appropriate or not.

- 3.44 If the Referee decides that the decision was not appropriate, the Referee will refer the dispute back to the Case Manager for conciliation along with written reasons for the Referee's decision and where appropriate, listing any steps which the Referee may require the Client to take.
- 3.45 If the Referee decides that the decision was appropriate, the Referee will inform the Client in writing of the reason for the Referee's decision. The Client has no right of appeal in respect of the Referee's decision.

4. **SYSTEMIC ISSUES OR SERIOUS MISCONDUCT**

Referral of systemic issues or serious misconduct to Referee

- 4.1 All likely systemic issues or serious misconduct will be referred to the Referee by the Case Manager for a decision as to whether the matter is a systemic issue or serious misconduct.
- 4.2 After the Referee confirms that the matter is a systemic issue or serious misconduct, the Referee (or the Case Manager if appointed by the Referee to do so), will counsel the Member in an effort to have the matter rectified and avoid future recurrences.

Rectified systemic breach or serious misconduct

- 4.3 If a systemic breach or serious misconduct is rectified, and in the view of the Referee it is unlikely to recur, then the Referee will include the matter in their general report to the Committee.
- 4.4 Once the Committee has reviewed the general report, a copy will be sent to ASIC on a quarterly basis. Such a report will not identify the Member, but will include the numbers of each type of systemic issue and serious breaches that have been found, investigated and rectified.

Failure to rectify systemic breach or serious misconduct and avoid breach recurring

- 4.5 If the Member does not rectify the systemic issue or serious breach and in the view of the Referee it is likely to recur, the Referee will follow the following procedure:
- (a) The Referee must notify the Member that the Referee believes that they should be identified and referred to the Board for consideration, and if considered appropriate, identified and referred to ASIC.
 - (b) The Referee must allow 30 business days for a response from the Member as to why the matter should not proceed, prior to referring the matter to the Board.
 - (c) If within the 30 day period the Member rectifies the matter or satisfies the Referee it is unlikely to recur, then the procedure outlined in "*Rectified systemic breach or serious misconduct*" above applies and this procedure ceases.

- (d) If within the 30 day period the Member fails to rectify the matter or satisfy the Referee it is unlikely to recur (including where it fails to respond), the Referee will prepare a report to the Committee containing:
 - (i) the identity of the Member;
 - (ii) the details of the systemic issue or serious misconduct involved;
 - (iii) the action taken by the Referee;
 - (iv) the response by the Member; and
 - (v) a recommendation to the Committee that the Member be reported and identified to ASIC.

4.6 The Committee will then in a timely manner review the Referee's decision and based on the information, decide what action to take in the particular circumstances, including providing the report to ASIC.

5. **REPORTING AND MONITORING**

Reporting

5.1 IBD will provide such reports to the Board and the Committee as the Board or Committee may require from time to time.

Monitoring

5.2 IBD will arrange for the development of a monitoring system to ensure the information to be reported on above can be provided.

6. LIABILITY OF CASE MANAGER, REFEREE, COMMITTEE, BOARD AND FINANCIAL OMBUDSMAN SERVICE LIMITED

6.1 The Case Manager, Referees, Board and Financial Ombudsman Service Limited and its representatives, will not be liable to a Client or Member, or any other entity or person, for any loss or damage (including legal costs) arising directly or indirectly from performing their duties, except if done in bad faith.

7. GENERAL OBLIGATIONS OF MEMBERS

7.1 A Member who subscribes to IBD will:

- (a) make available to Clients information on IBD;
- (b) co-operate with the Case Manager and the Referee in the investigation of a dispute involving the Member or any other Member or their representatives; and
- (c) have a fully documented internal process for handling disputes with Clients covered by IBD in accordance with the Corporations Act 2001 (Cth) and ASIC Regulatory Guide 165.

8. REVIEW AND DEVELOPMENT OF IBD

Resolving complaints about the service of IBD

8.1 The Case Manager, Referee and members of the Committee shall deal with any complaints about the service of IBD, from Clients and Members, in accordance with the attached IBD Guidelines on "Resolving Complaints about our Service" as amended from time to time with the approval of the Committee.