



Investments, Life Insurance & Superannuation Terms of Reference

1 July 2008

These Terms of Reference apply to those members of the Financial Ombudsman Service Limited who have been designated as having the Investments, Life Insurance & Superannuation Terms of Reference as the Applicable Terms of Reference, whether generally or in relation to a particular dispute.

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A. Preliminary Matters

1 Definitions

In these Terms of Reference, the following expressions have the following meanings:

Adjudicator

means a person appointed to that position by the Board under Clause 46.

ASIC

means the Australian Securities and Investments Commission.

Board

has the same meaning as in the Constitution

complaint

means a dispute with a member in respect of financial services provided by the member or by the member in association with a third party.

Constitution

means the Constitution of the Service.

consumer representative

means a person appointed to that position by the Board under Clauses 42 and 44.

financial service

means any form of service or advice or any product provided by a person participating in the financial services industry, and includes:

- acting as a responsible entity;
- acting as a trustee, custodian or manager of investments; and
- the provision of general financial advice.

financial services industry

means the provision of all forms of services, advice or products in connection with life insurance, superannuation, retirement savings accounts, funds management, financial advice, investment advice and sales of financial or investment products, investment, securities and derivatives, the provision of mortgages and any other areas that the Board determines should fall into these Terms of Reference.

industry problem

means a systemic fault including a consistently recurring problem, fault or defect that may be confined to a particular product, a particular company or that may be relevant to the whole or part of the financial services industry, which relates to a member's dealings with its clients.

industry representative

means a person appointed to that position by the Board under Clauses 42 and 45.

Investments, Life Insurance & Superannuation Ombudsman

means a person appointed to that position by the Board under the Constitution.

life insurance contract

includes any product or service offered by a life insurance company.

member means any member of the Service in respect of which these Terms of Reference are applicable.

Panel means a body whose composition is determined under Clause 28.2

Panel Chair

is a person appointed to that position by the Board under Clause 43.

Service means the Financial Ombudsman Service Ltd (ABN 67 131 124 448).

Terms of Reference

means the Investments, Life Insurance & Superannuation Terms of Reference

2 Effect of succession

If another body succeeds a body referred to in these Terms of Reference, the Terms of Reference are to be read as if the successor body were referred to in substitution for the original body. The same applies in relation to succession to a successor body.

3 Amendments to these Terms of Reference

The Board may amend these Terms of Reference in accordance with the Constitution.

B. Role of the Service under these Terms of Reference

4 There is no Clause 4.

5 What principles must the Service have regard to?

In dealing with a complaint under these Terms of Reference, the Service must deal with the complaint on its merits and do what, in its opinion, is fair in all the circumstances, having regard to each of the following:

- (a) any applicable legal rule or judicial authority (including one concerning the legal effect of an express or implied term of a contract or other document);
- (b) general principles of good industry practice and any applicable code of practice;
- (c) resolving complaints in a co-operative, efficient and timely way
- (d) keeping complainants and members informed of progress;
- (e) assisting complainants and members to reach informed and voluntary decisions to resolve complaints;
and in doing so
- (f) assist complainants to draft and lodge their complaints;
- (g) discourage complaints which are frivolous or vexatious or lacking in substance.

6 Procedures offered by Service

6.1 The Service offers two main types of procedure:

- (a) a conciliation process in which a case officer of the Service tries to resolve the complaint by communicating with the complainant and the member involved, or by referring the complaint for a conciliation conference.
- (b) if conciliation fails, or is unlikely in the opinion of the case officer to resolve the complaint, an arbitration by an Adjudicator or a Panel leading to a decision on the complaint.

6.2 These procedures are free of charge to complainants.

7 Who is entitled to use these procedures?

7.1 Subject to these Terms of Reference, the procedures are available to any person with respect to any dealings or transactions that person has had directly or indirectly with a member. They are also available to individuals who demonstrate to the Service that they have a legal or beneficial interest or other special interest in such a dealing or transaction. However, this does not include a corporation whose interest arises only out of a security, debt or a lien over property which is involved in the dealing or transaction.

7.2 The Service may also deal with a complaint that is referred to it by a member or ASIC or another industry dispute resolution scheme (provided that scheme has not already dealt with that complaint).

7.3 For the purposes of Clause 7.1, the conduct of a member includes but is not limited to the conduct of any officer employee or agent of the member.

8 What conditions have to be met before using these procedures?

8.1 Before the Service can deal with a complaint, either:

- (a) the complainant must have raised it with the member and the member's response did not resolve the complaint to the complainant's satisfaction; or
- (b) 45 days have elapsed since the complaint was made to the member and it remains unresolved.

For the purposes of paragraph 8.1(b), if the member promptly notifies the complainant that it requires 90 days (rather than 45 days) to respond to the complaint, and advises the reasons why it requires 90 days (rather than 45 days) to respond, then subject to the remainder of this Clause 90 days must have elapsed since the complaint was made before the Service can deal with the complaint. If the complainant does not agree with the member's request for 90 days to respond, they may advise the Service of this. If this occurs, the Investments, Life Insurance & Superannuation Ombudsman will determine whether the member should be allowed 90 days to respond to the complaint before it can be referred to the Service. The member must advise the complainant of this procedure when it notifies the complainant that it requires 90 days to respond to the complaint.

8.2 Members:

- (a) must have an internal complaint handling system to the Australian Standard on complaint handling and in accordance with any relevant ASIC guidelines.
- (b) must, if required by their insurer, notify their insurer of complaints they receive.

- (c) must, when advising complainants of the outcome of complaints dealt with by the members' internal complaint handling system, also advise complainants that they may complain to the Service if they are unhappy with that outcome. The Service's brochures for that type of complaint (if any) must be provided to complainants.

8.3 When a consumer receives any adverse decision in relation to an insurance claim the member must also advise the consumer in writing of the availability of the member's internal complaint handling system, and the availability of the Service where a matter is likely to be within the Service's jurisdiction.

9 Making a complaint to the Service

9.1 A complaint must be in writing. The complaint must:

- (a) set out adequate details to identify the matters in dispute or the nature of the complainant's dissatisfaction with the member, for example any alleged deficiencies or breaches of duty by the member; and
- (b) state any corrective action needed to be taken by the member to resolve the dispute.

9.2 A complainant should also provide at the same time as making the complaint any information and documents relevant to the issues raised by the complaint and which are available to the complainant.

9.3 The complainant will be taken to consent to the material provided to the Service being made available to the member in its entirety, unless the complaint contains a clear statement to the contrary.

10 Assistance in making a complaint

To provide fair and effective resolution of disputes, and to facilitate the clear identification of the matters in dispute, the Service may assist complainants to draft and lodge complaints. This includes assistance to clarify the nature of the complaint, the issues raised and matters which might be relevant to those issues, and to reduce the complaint to writing, but does not extend to advocating for the complainant. A person wishing to make a complaint can telephone the Service for assistance in reducing a complaint to writing.

C. What complaints can the Service deal with?

11 What complaints are covered?

11.1 Subject to these Terms of Reference, the Service is able to conciliate and arbitrate in respect of complaints brought in relation to any act or omission by a member, or any act or omission for which a member may be responsible, in relation to a financial service.

11.2 If a complaint against a current member falls outside the jurisdiction of the Service under the provisions of these Terms of Reference, then notwithstanding this the Service may only deal with the complaint, if all parties to the complaint, and the Service, agree in writing.

11.3 Where the Service deals with a complaint by virtue of Clause 11.2, the parties and the Service are otherwise subject to the provisions of the Terms of Reference in respect of that complaint.

12 What are the monetary limits on complaints to the Service?

12.1 Subject to Clauses 12.4 and 13, the Service may determine a complaint in respect of which the complainant knew or could reasonably have known of all the facts relevant to their claim for compensation before 1 July 2008:

- (a) in respect of a policy of insurance dealing with lump sum risk - unless the amount of the claim exceeds \$250,000 at the date on which the complaint is made to the Service in writing;
- (b) in respect of advice in relation to a policy of insurance dealing with lump sum risk - unless the Service is satisfied the amount of the claim for compensation exceeds \$250,000 at the date on which the complaint is made to the Service in writing;
- (c) in respect of a policy of insurance dealing with income stream risk or advice in relation to an income stream product - unless the Service is satisfied the face value of the product exceeds \$6,000 per month;
- (d) in respect of all other complaints - unless the Service is satisfied the amount of the claim for compensation exceeds \$100,000 at the date on which the complaint is made to the Service in writing.

12.2 Subject to Clauses 12.4 and 13, the Service may determine a complaint in respect of which the complainant did not know and could not reasonably have known of all the facts relevant to their claim for compensation until on or after 1 July 2008:

- (a) in respect of a policy of insurance dealing with lump sum risk - unless the amount of the claim exceeds \$280,000 at the date on which the complaint is made to the Service in writing;
- (b) in respect of advice in relation to a policy of insurance dealing with lump sum risk - unless the Service is satisfied the amount of the claim for compensation exceeds \$280,000 at the date on which the complaint is made to the Service in writing;
- (c) in respect of a policy of insurance dealing with income stream risk or advice in relation to an income stream product - unless the Service is satisfied the face value of the product exceeds \$6,000 per month;
- (d) in respect of all other complaints - unless the Service is satisfied the amount of the claim for compensation exceeds \$150,000 at the date on which the complaint is made to the Service in writing.

12.3 For the purposes of paragraphs 12.1(c) and 12.2(c)–

- (a) the face value of a product is its value as determined at the date on which the complaint is made to the Service in writing.
- (b) if the total amount payable under a policy of insurance dealing with income stream risk can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured and does not exceed \$250,000 and \$280,000 respectively, the Service may determine a complaint concerning the policy even if the face value of the product exceeds \$6,000 per month.

- (c) if the complaint relates to a decision of a member to reduce the monetary amount of insurance cover under a policy of insurance dealing with income stream risk, the Service may determine the complaint if the amount so reduced is within the monetary limit specified in paragraph 12.1(c) or 12.2(c).

12.4 Where a complaint is made against a member of the Service which was previously a member of the Financial Industry Complaints Service (ACN 068 901 904) ("FICS"), and to which the Chief Executive of FICS had granted temporary relief from the amendments to the Rules of FICS made by the FICS Board on 23 November 2007, then the references in clauses 12.1 and 12.2 to "1 July 2008" shall be read to mean references either to the date on which the member's professional indemnity or public liability policy next falls due for renewal after 1 July 2008, or to 31 December 2008, whichever date is the earlier.

13 What are the other conditions in relation to monetary limits?

- 13.1 Where a single claim against a member relates to several products or services they are considered in aggregate as one complaint for the purposes of the monetary limit.
- 13.2 The monetary limits specified in Clause 12 do not apply to any amount in relation to interest that may be claimed or awarded pursuant to Clause 34.

14 What types of complaint are excluded?

- 14.1 The Service cannot deal with the following complaints:
 - (a) a complaint against an entity which is not a member of the Service at the time the complaint is made;
 - (b) a complaint about the level of a fee, premium or charge, except a complaint concerning non-disclosure or misrepresentation;
 - (c) a complaint about the investment performance of a product, except a complaint concerning non-disclosure or misrepresentation;
 - (d) a complaint that is excluded under the procedure set out in Clause 18;
 - (e) a complaint about a transaction or dealing entered into outside Australia in respect of a risk or investment outside Australia;
 - (f) a complaint about underwriting or actuarial factors leading to an offer of insurance on non-standard terms;
 - (g) a complaint about underwriting or actuarial factors leading to the rejection of an insurance proposal for commercial or medical reasons;
 - (h) a complaint about other factors leading to a rejection of an insurance proposal, except where the complaint is that the proposal was rejected maliciously, or on the basis of incorrect information;
 - (i) a complaint about decisions of the trustees (in their capacity as trustees) of approved deposit funds and of regulated superannuation funds.
 - (j) a complaint relating to the management of a fund or scheme as a whole;
 - (k) a complaint, the subject matter of which relates to a decision by a financial services provider as to how to allocate the benefit of a financial product (such as but not limited to life insurance) between the competing claims of potential beneficiaries.

- (l) a complaint, the subject matter of which has already been dealt with in a previous complaint to the Service by the same complainant against the same member.
 - (m) a complaint, the subject matter of which has already been dealt with by a court or tribunal, or by another scheme approved by ASIC.
 - (n) a complaint, in relation to which the complainant commences or has commenced legal proceedings, unless the complainant undertakes in writing not to take any further steps in the proceedings while the Service is dealing with the complaint.
 - (o) a complaint, the subject matter of which is the subject of a complaint which has already been lodged with, and is being dealt with by, another scheme approved by ASIC.
 - (p) where the complainant knew or should reasonably have known of all the relevant facts more than 6 years before first notifying the Service about the complaint.
- 14.2 The Service may at its discretion decide that it will not deal with a complaint by a person who is not a “retail client” as defined under the Corporations Act 2001.

15 Decisions on jurisdiction

- 15.1 The Service will carry out a preliminary assessment of the complaint in a timely manner to determine whether or not the Service can deal with the complaint. The question of whether the Service can deal with a particular complaint will be decided in the first instance by a delegate of the Investments, Life Insurance & Superannuation Ombudsman (“the delegate”).
- 15.2 The delegate will advise the complainant in writing if a complaint is excluded, and give his or her reasons for excluding the complaint.
- 15.3 If a party to the complaint objects to the decision of the delegate, that objection will be considered either by the Investments, Life Insurance & Superannuation Ombudsman or by a different delegate of the Investments, Life Insurance & Superannuation Ombudsman (“the second delegate”) of equal or greater seniority to the original delegate. If the Investments, Life Insurance & Superannuation Ombudsman or the second delegate is satisfied the party’s objection has substance, he or she will refer the decision to a Panel Chair for review, whose decision on the issue will be final.

16 Complaints that are frivolous, vexatious or lacking in substance

- 16.1 If the Investments, Life Insurance & Superannuation Ombudsman or delegate is of the opinion that a complaint should be dismissed as frivolous, vexatious or lacking in substance, he or she must refer the complaint to the Panel Chair and advise the parties.
- 16.2 Before the matter is considered by the Panel Chair, the parties must be given the opportunity to provide submissions on this issue.
- 16.3 If the Panel Chair is satisfied the complaint is frivolous, vexatious or lacking in substance, he or she may dismiss the complaint.

17 Complaints that it would be inappropriate for the Service to deal with

- 17.1 If the Investments, Life Insurance & Superannuation Ombudsman or delegate is satisfied that it would be inappropriate for the Service to deal with a particular complaint, he or she must refer the complaint to the Panel Chair and advise the parties.
- 17.2 Before the matter is considered by the Panel Chair, the parties must be given the opportunity to provide submissions on this issue.
- 17.3 If the Panel Chair is satisfied it would be inappropriate for the Service to deal with a particular complaint, he or she may dismiss the complaint.

18 Significant Matters

- 18.1 A member may submit that a complaint involves a matter of such significance that it should not be dealt with by the Service. Such a submission must contain an undertaking by the member to comply with the provisions of Clause 18.3. Where such a submission is made, then subject to Clause 18.2 the Service shall not deal with the complaint.
- 18.2 If the Panel Chair, the Investments, Life Insurance & Superannuation Ombudsman and the relevant Industry Association agree that the Service should deal with the complaint notwithstanding the member's submission, then the Service shall deal with the complaint.
- 18.3 Where:
- (a) the Service does not deal with a complaint because of Clause 18.1; and
 - (b) either party subsequently institutes legal proceedings in relation to the subject matter of the complaint,
- all reasonable solicitor/ client legal costs incurred by the complainant in relation to proceedings in the court of first instance (and any subsequent appeal by a member), must be paid by the member concerned.

D. Information provided to the Service in connection with a complaint

19 Exchange of information

- 19.1 Where a party provides information to the Service, in the absence of a clear statement to the contrary, it will be assumed that the party consents to this material in its entirety being provided to the other parties to the complaint.
- 19.2 If a party does not want information to be made available to the other parties, written reasons must be provided for this.
- 19.3 If a written statement of reasons is provided to the Service under Clause 19.2, the information sought to be withheld will be referred to a Panel Chair who will determine on what terms and conditions, if any, that information should be supplied to any other party.
- 19.4 If the information is or will not be made available to all parties to the complaint, that information will not be available to the Panel or the Adjudicator appointed to resolve the complaint.

20 Information etc provided on without prejudice basis

All information (including statements and documents) provided by parties to a complaint to the Service (including the Adjudicators and Panels) is provided on a 'without prejudice' basis. This means that the information may not be used in any subsequent court proceedings unless it is required by an appropriate court process. To the extent that such information is subsequently made available by a party or by the Service to a witness, a representative, a legal adviser, or an insurer, it is provided solely for the purpose of resolving the dispute.

21 Disclosure of information to third parties

- 21.1 A party to a complaint must not disclose to any other person information gained from another party during the course of a complaint, other than:
- (a) for the purposes of resolving the dispute;
 - (b) where that information is provided to the party's representative, lawyer, or insurer; or
 - (c) where the party is required by law to disclose that information.
- 21.2 The Service must not disclose to any other person, information gained during the course of a complaint, other than:
- (a) in the circumstances provided for in Clauses 49, 50 and 51;
 - (b) for the purposes of resolving the dispute (for example, to obtain relevant evidence from a witness);
 - (c) where the information is provided to the Service's representative, lawyer, or insurer; or
 - (d) where the Service is required by law to disclose that information.
- 21.3 Where a party or the Service provides information gained during the course of a complaint to a witness, or to the representative, lawyer or insurer of that party or of the Service, then that witness, representative, lawyer or insurer must in turn be required not to provide that information to any other person, unless required to do so by law.

E. Cooperation with the Service's procedures

22 Obligations of members to cooperate

Members are required to comply with these Terms of Reference, and to comply with procedures adopted by the Service for the purposes of resolving complaints.

23 Legal proceedings by members

- 23.1 Where a complaint has been lodged with the Service, then a member shall not instigate legal proceedings (including debt recovery proceedings) relating to any aspect of the subject matter of that complaint while the Service is dealing with the complaint. However, where the relevant limitation period for such proceedings will shortly expire, the member may issue proceedings subject to the following conditions:

- (a) While the complaint is being dealt with by the Service, the member will not pursue those proceedings beyond the minimum necessary to preserve the member's rights.
- (b) If the complaint is subsequently resolved by agreement between the parties, the member will abandon any aspect of those proceedings which is inconsistent with that agreement.
- (c) If the complaint is subsequently determined by a decision of the Panel or Adjudicator, and that decision has not subsequently been set aside under Clause 36, the member will abandon any aspect of those proceedings which is inconsistent with that decision.

23.2 Where a complaint has been accepted by the Service and is subsequently resolved by agreement between the parties, the member will not instigate or continue legal proceedings to the extent that those proceedings are inconsistent with that agreement.

23.3 A member shall not instigate defamation action of any kind against a complainant in respect of allegations made by the complainant about the member:

- (a) to the Service; or
- (b) to a third party in the circumstances permitted in Clause 21.1.

24 Failure by complainant to respond to requests for information or other correspondence

24.1 Where a complainant fails to respond to correspondence or a request for information from the Service within the time allowed for such a response, the Investments, Life Insurance & Superannuation Ombudsman or delegate may write to the complainant requiring a response to that correspondence or request within one calendar month failing which the complaint may be dismissed.

24.2 If the complainant fails to respond within one calendar month after a letter is sent under Clause 24.1, the Investments, Life Insurance & Superannuation Ombudsman or delegate may dismiss the complaint.

24.3 Where the Investments, Life Insurance & Superannuation Ombudsman or delegate dismisses a complaint under this Clause, he or she must notify the complainant of this in writing sent to the complainant's last known address. This notification must set out the complainant's rights to have the complaint reinstated and any time limit for exercising those rights.

24.4 If the complainant requests that the complaint be reinstated within 3 calendar months of having been sent such notification, the complaint will be reinstated as of right.

24.5 If the complainant first requests that the complaint be reinstated more than 3 calendar months after the Service sent him or her such notification, then the complaint will be reinstated if the complainant has reasonable reasons for not seeking reinstatement within the initial 3 calendar month period; and for failing to respond to correspondence or to provide the requested information.

F. How the Service deals with complaints

25 When a complaint is received

- 25.1 After receiving a complaint, the Service must –
- (a) attempt to resolve the complaint in a timely manner;
 - (b) comply with the requirements of procedural fairness; and
 - (c) regularly inform the parties of progress towards resolving the complaint.
- 25.2 In attempting to resolve the complaint, the Service may –
- (a) assist the complainant with drafting and lodging the complaint; and
 - (b) investigate the complaint.
- 25.3 As a preliminary step towards resolving the complaint, the Service may engage a case officer to deal with the complaint.
- 25.4 The case officer–
- (a) must notify the member of the complaint;
 - (b) must send the member the information and documents provided to the Service by the complainant in support of his or her complaint, except information that the complainant has requested the Service not send to the member;
 - (c) must request the member to respond to the complaint within 21 days;
 - (d) may communicate with the parties in an attempt to resolve the dispute; and
 - (e) may, with the consent of the parties, refer the matter to conciliation by the Service.
- 25.5 The member must respond to the complaint within 21 days as requested under clause 25.4(c) by providing the Service with a written response to the complaint and any information and documents relevant to the issues raised by the complaint and which are available to the member.

26 What if the complaint is still not resolved?

If the complaint is not resolved by the conciliation process or other procedures or strategies available to the case officer handling the complaint, or is not likely to be resolved by those procedures or strategies, the complaint will be referred to a Panel or an Adjudicator for arbitration.

G. The Panel and Adjudicators

27 What complaints can be arbitrated by an Adjudicator?

- 27.1 An Adjudicator may deal with complaints involving a claim of no more than \$30,000 or such lower amount as nominated by the Board from time to time.
- 27.2 If an Adjudicator believes a complaint that he or she is dealing with is complex or significant, the Adjudicator may refer the complaint to the Panel–
- (a) on his or her own initiative; or

- (b) at the request of one or both of the parties to the complaint.

28 What complaints can be arbitrated by the Panel?

28.1 A Panel will deal with complaints involving a claim of greater than \$30,000 or such lower amount as nominated by the Board from time to time, and any complaint referred by an Adjudicator to the Panel.

28.2 Each Panel comprises:

- (a) an independent Panel Chair as defined in Clause 43;
- (b) a consumer representative as defined in Clause 44; and
- (c) an industry representative as defined in Clause 45.

29 What procedure is followed in arbitration by the Panel or Adjudicator?

The Panel Chair, or the Adjudicator, when dealing with a complaint, decides what procedure to follow, subject to the following:

- (a) The proceedings are to be as informal as possible, with a minimum of legal formality and technicality.
- (b) The Panel or Adjudicator is not bound by the rules or practice as to evidence, but may inform itself in any manner it thinks fit.
- (c) The Panel or Adjudicator must apply the rules of procedural fairness.

30 How does the Panel or Adjudicator obtain information about the complaint from sources external to the Service?

30.1 The Panel or Adjudicator may consider information received from the parties or any other source external to the Service provided that the parties have been given the opportunity to address such information prior to the determination of the complaint.

30.2 The member must provide the Panel or Adjudicator with any available information that the Panel or Adjudicator reasonably requires.

30.3 A Panel or Adjudicator may accept evidence in any form it thinks appropriate (including oral, written, taped or video evidence). The Panel or Adjudicator may give any evidence it accepts such weight as it thinks appropriate.

30.4 A Panel or Adjudicator may seek an independent report from any expert, legal adviser or other source where it is satisfied that this is necessary to assist the Panel or Adjudicator's determination of an issue in dispute. The Panel or Adjudicator is entitled to select the source of the report provided that the fees of the independent adviser are reasonable, having regard to the complexity of the dispute.

30.5 The Panel or Adjudicator may direct that the costs of any independent report obtained under Clause 30.4 shall be borne by the member. Unless the Panel or Adjudicator make such a direction, the costs of any independent report obtained in this manner shall be borne by the Service.

30.6 The Panel or Adjudicator may direct a member to further investigate a complaint in a particular manner where it is satisfied that this is necessary to assist the Panel or Adjudicator's determination of an issue in dispute.

31 Hearings

- 31.1 A Panel may hold a hearing for the purpose of taking oral evidence or receiving oral submissions if the Panel Chair is satisfied it is appropriate and necessary to do so. The conduct of any such hearing will be at the discretion of the Panel Chair having regard to the provisions of Clause 29.
- 31.2 In the event of such a hearing all parties are expected to attend. The complainant may appoint a person to assist him or her if the complainant cannot represent himself or herself adequately because of age, illness, disability, language difficulties or some similar reason, or a Panel believes it is necessary. Neither party shall be allowed legal representation except at the discretion of the Panel Chair.
- 31.3 If external legal representation is first requested by a member and allowed by the Panel Chair, the member must pay the reasonable costs of legal representation for the complainant. In the event of any dispute as to payment of costs, the amount of those costs will be determined by the Panel Chair.
- 31.4 If legal representation is requested by either party, the Service must notify the other party in writing as soon as practicable. In the case of notification to a complainant, the complainant must be notified of the effect of Clause 31.3.

32 Decisions

- 32.1 A Panel or Adjudicator will try to reach a decision as soon as practicable after the complaint is referred to the Panel or Adjudicator for determination.
- 32.2 Each person on a Panel has one vote. A decision is made by a simple majority.
- 32.3 A Panel or Adjudicator must issue reasons for its decisions in writing, unless it believes that would be inappropriate - as, for example, in the case of suspected fraud. The reasons will not identify the parties.
- 32.4 Decisions of the Panels and Adjudicators do not create binding precedents.

33 Powers of the Panel and Adjudicator to order compensation or other forms of redress

- 33.1 The Panel or Adjudicator may in determining a complaint relating to a claims dispute under a life insurance policy, direct payment of the claim, direct assessment of the claim, or make such other direction as is appropriate under the circumstances. Such a direction may be subject to any conditions which the Panel or Adjudicator considers appropriate.
- 33.2 Where a complaint is subject to the monetary limit in Clause 12.1, the Panel may award compensation for any financial or economic loss or damages which is a direct result of any act or omission in respect of which a complaint is upheld, and direct a refund of fees or commissions, up to the following maximum amounts in respect of the relevant claim for compensation:
- (a) where the complaint is in respect of a policy of insurance dealing with lump sum risk - \$250,000;
 - (b) where the complaint is in respect of advice in relation to a policy of insurance dealing with lump sum risk - \$250,000;
 - (c) where the complaint is in respect of advice in relation to an income stream product - \$6,000 per month;
 - (d) in respect of all other complaints - \$100,000.

However, where the parties and the Service have agreed under Clause 11.2 that the Service can deal with a complaint whose amount would otherwise exceed the monetary limits set out under Clauses 12 and 13, then notwithstanding the above there shall be no maximum limits on the compensation the Panel can award under this provision.

33.2A Where a complaint is subject to the monetary limit in Clause 12.2, the Panel may award compensation for any financial or economic loss or damages which is a direct result of any act or omission in respect of which a complaint is upheld, and direct a refund of fees or commissions, up to the following maximum amounts in respect of the relevant claim for compensation:

- (e) where the complaint is in respect of a policy of insurance dealing with lump sum risk - \$280,000;
- (f) where the complaint is in respect of advice in relation to a policy of insurance dealing with lump sum risk - \$280,000;
- (g) where the complaint is in respect of advice in relation to an income stream product - \$6,000 per month;
- (h) in respect of all other complaints - \$150,000.

However, where the parties and the Service have agreed under Clause 11.2 that the Service can deal with a complaint whose amount would otherwise exceed the monetary limits set out under Clauses 12 and 13, then notwithstanding the above there shall be no maximum limits on the compensation the Panel can award under this provision.

33.3 The Adjudicator may award compensation for any financial or economic loss or damages which is a direct result of any act or omission in respect of which a complaint is upheld, and direct a refund of fees or commissions, up to a maximum of \$30,000.

33.4 The Panel or Adjudicator cannot award:

- (a) monetary compensation in the nature of punitive damages; or
- (b) compensation for financial or economic loss or damages that is not a direct result of any act or omission in respect of which a complaint is upheld; or
- (c) compensation for suffering or distress.

33.5 The Panel or Adjudicator may direct the member to carry out specific actions or refrain from specific actions, to the extent that this is appropriate to provide redress for any matter in respect of which a complaint has been upheld.

34 Interest

34.1 In complaints involving a disputed claim under a life insurance policy, the Panel or Adjudicator may award interest on the claim at a rate not exceeding the rates prescribed under Section 57 of the Insurance Contracts Act 1984 (C'th). The total amount of any interest awarded under this provision may not exceed \$50,000. In the case of a disability income policy the interest awarded may not exceed the lesser of \$50,000 or five times the monthly benefit under the policy.

34.2 In all complaints other than those to which Clause 34.1 applies, the Panel or Adjudicator may award interest on a claim at a rate not exceeding the average of those monthly 10 year Treasury bond yield rates for the months in respect of which interest is to be paid to the extent those rates are available from the Reserve Bank of Australia at the time payment is made. The total amount of any interest awarded under this provision may not exceed \$50,000.

- 34.3 In determining the period over which interest should be awarded and the appropriate rate of interest and methods of calculation, the Panel or Adjudicator may have regard to any factors it considers relevant, including but not limited to the extent to which the conduct of either the complainant or the member has contributed to delay.

35 Costs

The Panel or Adjudicator will not normally award costs. However, in addition to any costs the member is required to pay under Clause 31.3:

- (a) the Panel or Adjudicator may award costs of up to \$2,500 in respect of legal costs and/or the cost incurred in obtaining evidence, if it believes that the complainant was required to incur those costs because of something the member did, or failed to do, or that it should not have done.
- (b) if the Panel or Adjudicator holds a hearing at the request of the member, the member must meet the complainant's reasonable costs of attendance, including reasonable costs for travel and accommodation;

36 Finality of decisions

36.1 For the purposes of this Clause and Clauses 37-40:

- (a) "Decision" includes a Determination;
- (b) "Determination" means the order, direction or ruling and reasons made by the Panel or Adjudicator in relation to an issue or issues in dispute.

36.2 A determination of a Panel or Adjudicator is final, and cannot be reopened except as provided for in Clauses 36.3 to 36.9.

36.3 A Panel or Adjudicator may correct a clerical or arithmetical mistake or an error arising from an accidental slip or omission in a determination.

36.4 A party to a complaint may request a Panel or Adjudicator to amend or set aside a determination based on the grounds mentioned in Clauses 36.6 and 36.7.

36.5 The request must be made to the Service within one calendar month after the day the determination was sent to the parties by the Service, or within such additional time allowed by the Investments, Life Insurance & Superannuation Ombudsman or his or her delegate.

36.6 A Panel or an Adjudicator may at its own discretion, and subject to the rules of procedural fairness, set aside or amend its determination if–

- (a) both parties consent to the decision being set aside or amended;
- (b) the Panel or Adjudicator believes on reasonable grounds that the decision may have been obtained by fraud; or
- (c) after the request of a party, the Panel or Adjudicator believes on reasonable grounds that a party was not given a reasonable opportunity to address a material issue or consider material evidence provided to the Panel or Adjudicator before it made its determination; or
- (d) after the request of a party, the Panel or Adjudicator believes that the order, direction, ruling or reasoning set out in its determination did not correctly convey the meaning or outcome originally intended by the Panel or Adjudicator.

- 36.7 A Panel Chair may set aside a determination if the Panel Chair is of the opinion that a determination by a Panel or an Adjudicator was made as a result of actual bias or a reasonable apprehension of bias.
- 36.8 A Panel or Adjudicator may make a further determination supplemental to the original Determination:
- (a) to enable the original Determination to be implemented; or
 - (b) to deal with any matters in dispute not fully resolved by the original Determination.
- 36.9 If a decision is to be considered under Clause 36.6 or 36.7, or a supplemental decision is to be made under Clause 36.8, the parties must be notified of this and afforded a reasonable opportunity to make submissions on the issues to be considered by the Panel or Adjudicator.

37 Complainants expected to abide by decisions

- 37.1 The Service expects complainants to abide by the decisions of a Panel or Adjudicator. However, it recognises that complainants are not bound by those decisions and may wish to pursue whatever rights they have against the member in another forum.
- 37.2 A complainant must elect whether or not to accept a decision of the Panel or Adjudicator by informing the Service in writing within one calendar month of the date the decision is sent to the complainant.
- 37.3 The Investments, Life Insurance & Superannuation Ombudsman or delegate can extend the time within which the complainant can accept the decision where there are reasonable grounds for doing so.
- 37.4 Where a complainant elects to accept the decision of the Panel or Adjudicator, the complainant is bound by all aspects of that decision.
- 37.5 If a complainant does not inform the Service within the allowed time, the complainant shall be taken to have elected not to accept the decision.

38 Member bound to abide by decisions

- 38.1 Where the complainant accepts the decision of the Panel or Adjudicator, then subject to Clause 36, the member must implement the decision as soon as practicable after being informed the complainant has accepted it.
- 38.2 Before implementing the decision, the member is entitled to ask the complainant to sign a deed of release, provided that:
- (a) the member forwards the proposed deed of release to the complainant within ten business days after being informed the complainant has accepted the decision of the Panel or Adjudicator; and
 - (b) the proposed deed of release is limited to the matters in dispute in the complaint dealt with by the Panel or Adjudicator.

39 Enforcement

The Service may take any necessary action (including legal action) to enforce a decision of a Panel or Adjudicator that the complainant has elected to accept. This may include seeking specific performance of the agreement to abide by these Terms of Reference.

40 Termination

A member who does not comply with a decision of a Panel or Adjudicator that the complainant has elected to accept may have its membership terminated in accordance with the provisions of the Constitution. The Service must consult ASIC prior to the termination process taking place.

41 No liability

The Panel Chair, consumer or industry representative of a Panel, Adjudicator, Investments, Life Insurance & Superannuation Ombudsman or officer of the Service is not liable for any loss, damage or liability that arises from anything done or omitted to be done in the course of his or her duties, except if the person acts in bad faith.

H. Appointment of the Panels and Adjudicators

42 Appointment

42.1 Panel Chairs, consumer and industry representatives of the Panel, and Adjudicators are appointed by the Board. An appointment is for no more than 3 years. An appointee is eligible for re-appointment. The Board may terminate an appointment at any time by giving one calendar month's notice.

42.2 A person will not be appointed as a Panel Chair, consumer or industry representative of the Panel, or Adjudicator unless that person has first declared all material and personal conflicts of interest.

43 Panel Chairs

43.1 The Board appoints a Panel Chair after consultation with industry associations, relevant consumer groups, and other stakeholders as considered appropriate by the Board.

43.2 In appointing a Panel Chair the Board must have regard to the following selection criteria:

- (a) ability to become well informed about, and to make objective, impartial and independent decisions on, the merits of the case;
- (b) ability to exercise sound and fair judgment;
- (c) ability to command the respect of the parties.

44 Consumer representatives on Panels

44.1 The Board will appoint consumer representatives to the Panels following a merit selection process that includes input by relevant consumer groups.

44.2 The consumer representatives must be well informed, impartial and objective. They must be capable of advising the relevant Panel Chair on consumer related issues.

45 Industry representatives on Panels

45.1 The Board will appoint industry representatives to the Panels following a merit selection process that includes input by relevant industry associations (if applicable).

45.2 The industry representatives must be well informed, impartial and objective. They must be capable of advising the relevant Panel Chair on industry sector related issues.

46 Adjudicators

46.1 The Board appoints the Adjudicators after consultation with relevant industry associations and consumer groups, and other stakeholders, as considered appropriate by the Board.

46.2 In appointing the Adjudicators, regard must be had to the following selection criteria:

- (a) ability to become well informed about, and to make objective, impartial and independent decisions on the merits of the case;
- (b) ability to exercise sound and fair judgment;
- (c) ability to command the respect of the parties

I. (Omitted)

47 There is no Clause 47

48 There is no Clause 48

J. Industry problems

49 Reporting systemic issues and serious misconduct

49.1 The Board must ensure that the Service has procedures in place for dealing with systemic issues and serious misconduct.

49.2 The Board must consult with ASIC in relation to changes to the Service procedures for dealing with systemic issues and serious misconduct.

50 Communication with Industry Regulatory Bodies

The Service will also establish appropriate communication arrangements with relevant industry regulatory bodies concerning complaints about their member or participating organisations.

51 Release of Information

51.1 Information about a member, which has been obtained during the investigation of a complaint, may be released by the Service to any industry or professional body, regulated securities exchange or authority having disciplinary or regulatory power over the member. Such information may only be disclosed to the body, exchange or authority for the purpose of disciplinary investigations or proceedings by the body, exchange or authority.

51.2 Except in the case of bad faith or improper purpose, a member agrees not to take legal action, against the Service, its officers and employees or any member of the Board as a result of the release of this information to the other body, and each member indemnifies the Service accordingly.

K. Miscellaneous

52 There is no Clause 52

53 Annual review

The Service must prepare an annual review on the operation of the Service, including the number of complaints received, the type of activity complained of, the regional distribution of complaints, and the length and outcome of dealing with complaints.

54 Publicising the system

The Service and participating members must publicise the Service and its functions adequately and appropriately. Determinations of the Panels and Adjudicators may be published on the Service website. The Service may also publish case studies and statistical data.

55 There is no Clause 55

56 There is no Clause 56

57 There is no Clause 57

58 Indexation

58.1 On 1 July 2010 the amounts specified in the following Rules will be increased in accordance with consumer price index figures (weighted average of 8 capitals) for the 3 year period ending on 31 March 2010:

- Rule 12.2, paragraph (c) – rounded to the nearest \$100
- Rule 33.2A, paragraph (c) – rounded to the nearest \$100

58.2 On every third anniversary of the increase specified in Rule 58.1, the amounts specified in that rule will be increased in accordance with consumer price index figures (weighted average of 8 capitals) for the 3 year period ending on the 31 March immediately prior to the increase and rounded as specified in Rule 58.1.