



General Insurance 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 General Insurance Terms of Reference as the Applicable Terms of Reference, whether generally or in relation to a particular dispute.

Financial Ombudsman Service Limited

ABN 67 131 124 448

Postal Address: GPO Box 3
Melbourne Victoria 3001

Telephone: 1300 78 08 08

Fax: (03) 9613 6399

Email: info@fos.org.au

Website: www.fos.org.au

Contents

Page

	Introduction	3
1.	Application and Definitions	4
2.	Personal and domestic insurance, residential strata title, small business	9
3.	Applicants	9
4.	Type of Dispute	10
5.	Members	11
6.	Procedure for handling disputes	11
7.	Disputes handling by members	12
8.	Referral of a Dispute to the Service	13
9.	Referral of a Dispute to a Referee	17
10.	Powers of a Panel, Medical Indemnity Panel, Referee or Adjudicator	18
11.	Conduct of a Panel, Medical Indemnity Panel, Referee or Adjudicator	20
12.	Effects of a determination	22
13.	Other Duties of a Chair, Referee, Adjudicator and FOS	22
14.	Liability of a Panel, Medical Indemnity Panel, Referee or Adjudicator	23
15.	Disciplinary Powers of the Service	23
16.	The Panel, Medical Indemnity Panel, Referee and Adjudicator	24
17.	Conflicts of Interest	27
19.	Publicising the Service	27

Introduction

The Service

The General Insurance Division has Consumer Consultants at the first tier, who respond to enquiries and encourage resolution of complaints of any nature by promoting conciliation between applicants and members.

If a dispute falling within the scope of the Terms of Reference remains unresolved following a member's Internal Dispute Resolution process (IDR) or review, it can be referred to the second tier. At this tier a Panel, Medical Indemnity Panel, Referee or Adjudicator offers applicants the facility of an impartial and authoritative alternative to litigation. Binding determinations can be made on members by an Adjudicator for amounts not exceeding \$5,000 and by a Panel, Medical Indemnity Panel or Referee for amounts not exceeding \$280,000.

All participating members agree to comply with binding determinations but applicants are not bound by any determination and retain their rights to legal action or other forms of redress in the event of being dissatisfied with a determination.

These dispute handling arrangements have been put into place essentially for the benefit of applicants or insureds and prospective insureds who are natural persons, certain small business but not large corporations. This restriction is intended to exclude large commercial concerns, which could be expected to have the resources to pursue disputes by other means.

The Service also allows access to consumers who are natural persons and who are seeking to make a claim in relation to motor vehicle property damage against an insured or against a person to whom insurance extends. The claim is limited to an amount not exceeding \$3,000.

Financial Ombudsman Service Limited (FOS)

Responsibilities of the Board include:

- Overseeing and monitoring the activity of the Service and ensuring the independence of the dispute resolution process.
- Effecting changes to the Terms of Reference following consultation with its members, ASIC, relevant Board Advisory Committees and appropriate individuals and organisations (including key consumer, community and industry organisations).
- Appointing consumer and industry representatives to the Board of FOS.
- Appointing the Chair(s), the Referee(s) and the Adjudicator(s).

- Appointing consumer and industry representatives to the Panel.
- Appointing medical representatives and medical indemnity insurer representatives to the Medical Indemnity Panel.
- Ensuring that the Panel(s), Medical Indemnity Panel(s), Referee(s) and Adjudicator(s) adhere to the Terms of Reference, but in so doing the Board shall have no power to overturn any of their decisions.
- Analysing statistical information on the Service.
- Analysing an Annual Review of the Service from the Insurance Ombudsman and making its own comments therein as appropriate.
- Satisfying itself that the promotional programmes/projects of the Service are adequately funded.
- Commissioning an independent review of the Service's operations and procedures at least once every three years.
- Consulting with ASIC about the terms of the independent review and the appointment of the independent reviewer.
- Making the results of the independent review publicly available.
- Ensuring that IOS has procedures in place for dealing with systemic issues and serious misconduct.
- Consulting with ASIC in relation to changes to the IOS procedures for dealing with systemic issues and serious misconduct.

1. Application and Definitions

1.1 The Terms of Reference apply to disputes between applicants and members relating to certain insurances.

1.2 Definitions:

For the purposes of the Terms of Reference:

Act means the *Corporations Act 2001 (Cth)*;

adverse finding

means the Medical Indemnity Panel is considering or likely to make a decision which will affect the livelihood of a doctor;

AMA means the Australian Medical Association;

applicant

means:

- (a) in respect of a claim dispute - an insured retail consumer or small business who refers a claim dispute to the Service or an uninsured person who has a claim dispute with a member in relation to motor vehicle property damage; or

- (b) in respect of a non-claim dispute – a retail consumer who is an insured or prospective insured who has a non-claim dispute with a member;

ASIC means the Australian Securities and Investments Commission;

Board means the Board of FOS;

Chair means a Chair of a Panel or Chair of a Medical Indemnity Panel;

claim dispute

means:

- (a) an unresolved complaint between an applicant and a member in relation to a claim or potential claim made under a general insurance product, residential strata title insurance or other contract of insurance provided to a small business and covered under these Terms of Reference; or
- (b) an unresolved complaint between an uninsured person a member in relation to motor vehicle property damage;

complaint

means an expression of dissatisfaction relating to a product service conveyed to a member together with a request that the complaint be remedied by the member;

court includes any court, tribunal, board or other body or person that:

- (a) is empowered by any Act of Australia or any State or Territory of Australia; or
- (b) is empowered or has authority arising from an agreement between the applicant and the member to decide or resolve, whether through arbitration or conciliation or any other means, any issue that is in question;

determination

means an Adjudicator's finding where the amount in dispute does not exceed \$5,000 and a Panel's, Medical Indemnity Panel's or Referee's finding in a dispute for an amount not exceeding \$280,000, in accordance with the Terms of Reference, which is binding on members;

dispute means a claim dispute or a non-claim dispute;

doctor means a medical practitioner within the meaning of the *Medical Indemnity Act 2002 (Cth)*;

financial service

means financial service as defined in the Act;

general insurance product

means a contract of insurance (whether or not the cover is limited or restricted in any way) specified in section 761G(5) the Act which, includes:

- (a) a motor vehicle insurance product (as defined by the Act);
- (b) a home building insurance product (as defined by the Act);
- (c) a home contents insurance product (as defined by the Act);
- (d) a sickness and accident insurance product (as defined by the Act);
- (e) a consumer credit insurance product (as defined by the Act);
- (f) a travel insurance product (as defined by the Act);
- (g) a personal and domestic property insurance product (as defined by the Act);
- (h) a medical indemnity insurance product (as defined by the Act);
and
- (i) a kind of general insurance product prescribed by regulations made for the purpose of section 761G(5) of the Act;

IDR means a member's Internal Dispute Resolution process;

IDR Decision

means a member's Internal Dispute Resolution Decision;

Insurance Council

means the Insurance Council of Australia Limited;

FOS means Financial Ombudsman Service Limited;

Livelihood

means:

- if the matter in dispute has the potential to prevent a doctor from practising in the area of medicine or a specific area of medicine in which he or she had (at the time of the dispute) chosen to practise and been qualified to practise; and
- that such a decision shall reduce or have the potential to reduce the doctor's total gross income by 30% or more;

medical indemnity dispute

means a dispute that relates to a medical indemnity insurance product;

member

means any participating member described in Clause 5.1;

MIIAA means the Medical Indemnity Industry Association of Australia;

motor vehicle property damage

means property damage caused by a motor vehicle;

non-claim dispute

means an unresolved complaint between an applicant and a member in relation to a general insurance product or residential strata title insurance contract (or a prospective general insurance product or residential strata title insurance contract) but that does not relate to a claim or potential claim made under that general insurance product or residential strata title insurance contract;

residential strata title

means insurance insuring the body corporate of a strata title or company title building which is wholly occupied for residential or small business purposes;

The following types of insurance cover are included or excluded:

Included: Strata Building;
Common Contents;
Personal Accident or Sickness for voluntary workers in or about the strata building or common property;

Excluded: Professional Indemnity;
Public Liability;
Workers Compensation;

retail consumer

means:

- (a) a natural person; or
- (b) a business employing less than:
 - if the business is or includes the manufacture of goods – 100 people; or
 - otherwise – 20 people;

Service means FOS;

Services Contract

means the Services Contract between the Health Insurance Commission, and the Commonwealth of Australia represented by the Department of Health and Ageing, and medical indemnity insurers;

small business

means an individual, a partnership of natural persons or a corporation whose shareholders are natural persons; and

- (a) who carry on a small business; and
- (b) at the time the events giving rise to the claim dispute occurred had an annual turnover (including the turnover of related enterprises or bodies corporate or other associated entities) not exceeding \$1,000,000.

The following types of insurance cover are included:

- Accidental Damage;
- Computer and Electronic Breakdown;
- Fire;
- General Property;
- Glass;
- Land Transit;
- Machinery Breakdown;
- Money;
- Theft.

The following types of insurance cover are excluded:

- Contractors All Risks;
- Fidelity Guarantee;
- Legal Liability (including Public Liability and Products Liability);
- Loss of Profits/Business Interruption;
- Professional Indemnity;
- Industrial Special Risks (ISR).

Defined Events

The type of claim dispute under Fire or Accidental Damage insurance which may be referred to the Service is restricted to defined events as follows:

- Fire/Lightning/Explosion;
- Storm/Tempest/Rainwater;
- Flood;
- Water from leaking pipes/water systems;
- Impact;
- Earthquake;
- Riot and Civil Commotion or Industrial Disputes;
- Malicious Damage;
- Fusion;
- Spoilage of refrigerated goods.

All Defined Events are subject to the individual policy wordings, schedules and endorsements.

uninsured

means there is not current comprehensive motor vehicle insurance covering the motor vehicle in respect of which the damage or loss is claimed.

2. Personal and domestic insurance, residential strata title, small business

- 2.1 The insurances covered by the Terms of Reference are:
- (a) general insurance products;
 - (b) contracts of insurance not falling within (a) but which insure residential strata title and small business as defined in Clause 1.2;
 - (c) small business insurance contracts providing cover not falling within the definition of small business in Clause 1.2 to which the member has agreed the Terms of Reference should be extended.
- 2.2 The Terms of Reference do not apply to the following types of insurance cover:
- (a) life insurance or superannuation;
 - (b) compulsory third party motor vehicle insurance;
 - (c) workers compensation insurance;
 - (d) product liability;
 - (e) other classes of insurance not covered by Clause 2.1.

3. Applicants

- 3.1 The Terms of Reference apply to:
- (a) retail consumers or small businesses who are parties to an insurance contract or prospective insurance contract; or
 - (b) retail consumers or small businesses to whom the cover provided by the insurance contract extends; or
 - (c) any other retail consumer or small business to whom a member agrees to extend the Terms of Reference; or
 - (d) parties or prospective insureds to residential strata title insurance contracts; or
 - (e) uninsured natural persons seeking to make a third party claim against an insurer of a party as defined in paragraphs (a) to (d) of this clause in relation to motor vehicle property damage.
- 3.2 Where an applicant is both a retail consumer and small business, then:
- (a) if the complaint is in respect of a general insurance product, that applicant may refer both a claim dispute and non-claim dispute to the Service; or
 - (b) if the complaint is in respect of a contract of insurance provided under these Terms of Reference to a small business that is not a general insurance product, that applicant may only refer a claim dispute to the Service.

- 3.3 The Terms of Reference do not apply to an uninsured person who is seeking to make a third party claim against a member unless:
- (a) a valid claim has been lodged by the insured party and any relevant excess has been paid (unless the claim is being made pursuant to section 51 of the *Insurance Contracts Act 1984*);
 - (b) the claim does not exceed \$3,000; and
 - (c) the claim is for damage or loss in relation to a registered vehicle.

4. Type of Dispute

- 4.1 The Terms of Reference only apply to disputes between applicants and members who were members at the time the complaint arose and:
- (a) if the dispute is a claim dispute, the claim under the insurance contract is for a total amount not exceeding \$280,000; or
 - (b) the claim does not exceed \$3,000 for third party claims; or
 - (c) if the dispute is a non-claim dispute and involves a claim for compensation, the total amount of compensation claimed does not exceed \$280,000.

The financial limits of the Service shall be increased at least every three years as considered appropriate by the Board.

- 4.2 A claim dispute includes but is not limited to:
- (a) the interpretation or application of the insurance contract; or
 - (b) the member's liability to indemnify the applicant; or
 - (c) the amount of any claim; or
 - (d) delay in payment.
- 4.3 A non-claim dispute may relate to but is not limited to:
- (a) a member's sales and marketing conduct in the provision of a financial service; or
 - (b) advice about a general insurance product; or
 - (c) changes to premium and no claim bonus or risk rating assessments having regard to the premiums, rating and usual practices of the insurer excluding disputes about rating factors and weightings the insurer applies to determine an individual's base premium which is commercially sensitive information; or
 - (d) the failure to offer insurance or to only offer insurance on non-standard terms; or
 - (e) the cancellation of an insurance contract that has not been cancelled in accordance with the *Insurance Contracts Act 1984*; or

- (f) disclosure issues; or
 - (g) the service or handling of a complaint by a member; or
 - (h) any other dispute to which the member has agreed to refer to the Service.
- 4.4 Other than in relation to matters which fall within 8.10, the Terms of Reference do not apply to a non-claim dispute that is solely about a member's:
- (a) commercial judgment or policy; or
 - (b) assessment of risk; or
 - (c) the level of premium; or
 - (d) rejection of an insurance proposal, except where the dispute is that the proposal was rejected indiscriminately, maliciously or on the basis of incorrect information.

5. Members

- 5.1 FOS maintains a current list of members, which is made available upon request.
- 5.2 The Terms of Reference do not apply when a member is in provisional liquidation or liquidation.

6. Procedure for handling disputes

- 6.1 A determination will not be made unless the applicant has attempted to resolve a dispute by bringing it to the member's attention.
- 6.2 FOS or a member need not respond to a dispute:
- (a) unless, in the case of a claim dispute:
 - (i) a valid claim or third party claim has been lodged with the member and a reasonable time has elapsed since that date to allow the member to deal with the claim; or
 - (ii) where a member does not require a claim form to be completed, the member's alternative procedure has not been followed within a reasonable time; or
 - (iii) the member has refused the claim; or
 - (b) unless, in the case of any dispute:
 - (i) the member has failed to provide an IDR Decision, within fifteen business days of receiving notification of the dispute; or

- (ii) the member has made a settlement offer to the applicant and the applicant has advised the member the offer is considered unsatisfactory; or
 - (iii) the applicant has raised the complaint with the member and the complaint remains unresolved for a period of fifteen days.
- (c) if court proceedings have been commenced in respect of the same subject matter. However, a Chair, Referee, Adjudicator, or FOS may exercise a discretion to consider a dispute commenced at the Insurance Ombudsman Service Limited; or
- (d) if a previous dispute has been referred to FOS or any court in respect of the same subject matter, unless the applicant is able to show that significant new evidence has become available since the previous dispute was determined; or
- (e) if the insurance contract is issued by a non-participating member.
- 6.3 If a member seeks to rely on any of the grounds specified in Clause 6.2 or that the dispute does not fall within the scope of the Terms of Reference, it shall provide to FOS all information in support of its application and a Chair, Referee, Adjudicator or FOS shall decide if the dispute can be considered.
- 6.4 FOS Consumer Consultants are available to discuss the content of a dispute and to help the applicant to reduce the dispute to writing if appropriate.
- 6.5 An applicant may withdraw a dispute at any time by giving notice to the member or FOS.

7. Disputes handling by members

- 7.1 Where an applicant refers a dispute to a member, the member shall take all reasonable steps to resolve the matter in accordance with its IDR. The parties are encouraged to exchange all documents or information relied upon as part of the IDR.
- 7.2 The member shall consider the dispute, make an IDR Decision and notify the applicant of the IDR Decision within fifteen business days of receiving the notice of dispute.
- 7.3 If the member's IDR Decision is not acceptable to the applicant or if the member's examination of the dispute results in a confirmation of the decision originally complained of, the member shall notify the applicant in writing and advise the applicant of the availability of the Service.
- 7.4 If an applicant is not satisfied with the member's IDR Decision or if the member does not provide an IDR Decision within fifteen business days the applicant may, in accordance with Clause 8, request the Service to determine the dispute.

- 7.5 Members shall nominate one or more staff members in each State and/or head office, to act as their IDR contact person(s) and:
- (a) adequate arrangements must be made to provide a substitute for an IDR contact person in the event of that person's unavailability; and
 - (b) the names of the IDR contact person(s) and substitute(s) shall be widely circulated throughout the relevant State or head office, and staff acquainted with the nominated person's role and responsibilities under the Terms of Reference.
- 7.6 Any person who is authorised to sign IDR Decisions must have the appropriate experience, authority and seniority within the company to represent it in dealing with disputes under the Terms of Reference.

8. Referral of a Dispute to the Service

- 8.1 An applicant who does not accept an IDR Decision may, by giving notice to FOS within three calendar months of receiving notice of the IDR Decision, refer the IDR Decision to the Service for review in accordance with the Terms of Reference. For the purpose of this clause the applicant shall be deemed to have received notice of the IDR Decision five days after the date of posting of the IDR Decision unless the applicant proves to FOS that, through no fault of the applicant, the applicant did not receive the IDR Decision at all or until a later date.
- 8.2 (a) A notice referring a dispute to the Service (Referral Notice) shall be in the form prescribed by FOS and shall be signed by the applicant. The Referral Notice shall specify and include:
- (i) any applicable insurance policy and any applicable claim in relation to the dispute; and
 - (ii) the nature of the dispute and a concise statement of why the IDR Decision is not acceptable to the applicant; and
 - (iii) the documents or information relied upon;
 - (iv) a list of the documents or information for which the applicant asserts that privilege or special circumstances apply and the reasons for that assertion in accordance with Clause 8.5; and
- (b) FOS shall, subject to the protection of documents or information for which it is asserted that privilege or special circumstances apply under Clause 8.5, immediately forward a copy of the Referral Notice and any accompanying documents or information to the member together with a list of the documents or information for which the applicant asserts that privilege or special circumstances apply and the reasons for that assertion.

- 8.3 (a) The member shall within fifteen business days after receipt of the Referral Notice lodge a Notice of Response to the dispute with FOS. The Notice of Response shall be in the form prescribed by FOS and shall be signed by a Notice of Response contact person. The Notice of Response shall specify and include:
- (i) the member's reasons for the IDR Decision; and
 - (ii) the documents or information relied upon; and
 - (iii) a list of documents or information for which the member asserts that privilege or special circumstances apply and the reasons for that assertion in accordance with Clause 8.5.
- The member shall supply a complete copy of the file on request from FOS.
- (b) At the time it submits its Notice of Response to FOS, the member shall provide the applicant with a copy of its Notice of Response and copies of all documents and information that it wishes a Panel, Medical Indemnity Panel, Referee or Adjudicator to take into account in determining the dispute, except documents and information where it asserts privilege or special circumstances apply. It shall also provide to the applicant a list of the documents, for which it asserts privilege or special circumstances apply and its reasons for the assertion, privilege or special circumstances apply.
- 8.4 Members shall nominate one or more staff members or authorised representatives in each State and/or at head office, to act as their Notice of Response contact person(s) and:
- (a) the Notice of Response contact person(s) will be the only one(s) authorised to prepare Notices of Response and must have appropriate experience, authority and seniority within the company to prepare Notices of Response on behalf of the company; and
 - (b) adequate arrangements must be made to provide a substitute for a Notice of Response contact person in the event of that person's unavailability; and
 - (c) the names of the Notice of Response contact person(s) and the substitute(s) shall be widely circulated throughout the relevant State or head office, and staff acquainted with the nominated person's role and responsibilities under the Terms of Reference.
- 8.5 (a) Any document or information supplied by a party in relation to a dispute shall be made available to the other party to the dispute. Any documents or information which are not available to all parties will not be relied upon in the determination of the dispute unless otherwise decided by the Chair, Referee or Adjudicator.
- (b) If any document or information supplied by an applicant or a member is subject to an assertion that privilege or special circumstances apply then the document or information shall be so identified and reasons in support of the assertion provided.

- (c) The Chair, Referee or Adjudicator will decide whether the document or information is to be treated as privileged or if special circumstances apply. If a document or information is found to be privileged but special circumstances do not apply, then the document or information will not be relied upon in the determination of the dispute and FOS shall not provide that document or information to any other person without the prior written consent of the person providing it.
 - (d) If it is decided that special circumstances apply then the document or information may be relied upon in the determination of the dispute subject to any terms and conditions required by the Chair, Referee or Adjudicator and FOS shall not provide that document or information to any other person without the prior written consent of the person providing it.
 - (e) The Chair, Referee or Adjudicator may decide that special circumstances exist where:
 - (i) the document or information may be harmful or embarrassing to a party if released; or
 - (ii) the document or information may endanger a third party; or
 - (iii) the document or information contains commercially sensitive information; or
 - (iv) it is appropriate to delay the release of the document or information; or
 - (v) other special circumstances exist.
 - (f) There is an onus on the party submitting a document or information for which it is claimed that special circumstances exist to suggest a method by which the other party may have the means to rebut the document or information.
- 8.6 A dispute is not eligible for consideration by a Panel, Medical Indemnity Panel, Referee or Adjudicator if the issues are before, or have already been decided by a court, except to the extent that the subject matter of the dispute was not raised in that forum. It is a principle of public policy that any issue once thoroughly canvassed should be laid to rest.
- 8.7 A Chair, Referee or Adjudicator may decide that a dispute referred to the Service shall not be determined on any of the following grounds:
- (a) the applicant has not suffered, or will not suffer, any economic loss or other detriment of any substance as a result of the dispute;
 - (b) there are substantial issues of fact which, given the procedures adopted by the Panel, Medical Indemnity Panel, Referee or Adjudicator, it would not be appropriate for the dispute to be determined;
 - (c) the dispute raises an important issue of law of general application that would not be appropriate for the Panel, Medical Indemnity Panel, Referee or Adjudicator to determine;

- (d) the dispute is frivolous or vexatious;
 - (e) the dispute is, or is likely to be, the subject of proceedings before any court, tribunal, board or other body or person with jurisdiction to hear any criminal proceedings, or to conduct any coronial inquiry, or any other judicial or administrative inquiry.
- 8.8 Where fraud is alleged FOS shall refer the dispute to a Referee for determination except where the dispute falls within clause 8.10.
- 8.9 Where the amount in dispute does not exceed \$5,000 FOS shall refer the dispute to an Adjudicator for determination except where the dispute falls within clause 8.10.
- 8.10 FOS shall refer to the Medical Indemnity Panel disputes, between an applicant and a medical indemnity insurer, relating to the:
- (a) insurer's obligations to comply with any applicable laws, including laws that restrict the insurer's ability to enter into an insurance contract; or
 - (b) imposition of a deductible; or
 - (c) application of a risk surcharge (as defined in the Services Contract); or
 - (d) excluding from cover of certain procedures that in the case of that doctor would impose an unreasonable risk in the circumstances; or
 - (e) request that the doctor undertake additional training, including referring the doctor for risk management; or
 - (f) request for the doctor to be chaperoned or to have qualified supervisory assistance for the performance of certain procedures; or
 - (g) refusal to cover a doctor who has not met his or her information provision obligations to the insurer, so that the insurer is unable to meet its obligations under the Services Contract ;or
 - (h) the insurer exercising its rights in relation to non-payment of premiums; or
 - (i) the insurer exercising its rights and performing its obligations under the *Insurance Contracts Act 1984 (Cth)*, the *Health Care Liability Act 2001 (NSW)*, and other applicable laws including disclosure obligations and fraudulent claims.
- 8.11 FOS shall refer all other medical indemnity disputes not falling within clause 8.10 to a Panel or Adjudicator unless the applicant, the medical indemnity insurer and FOS agree that the dispute should be referred to a Medical Indemnity Panel.
- 8.12 A dispute shall not be eligible for consideration if a Chair, Referee or Adjudicator is satisfied that the subject matter of the dispute, if it had been the subject of legal proceedings commenced on the date the dispute was referred to the Service, would be statute barred or otherwise unable to be decided by the courts (the Chair, Referee or Adjudicator to exercise discretion if special circumstances exist).

- 8.13 A member may request that a Panel, Medical Indemnity Panel, Referee or Adjudicator not determine a dispute referred to the Service on the grounds that the dispute should be referred to a court as a “test case”, and upon the member undertaking to pay the applicant’s legal costs on a party/party basis with respect to the test case, including costs relating to any subsequent appeal instituted by the member, the Chair, Referee or Adjudicator may decide that the dispute shall not be determined.
- 8.14 A member may request that a Panel, Medical Indemnity Panel, Referee or Adjudicator not consider a dispute referred to the Service on any of the grounds specified in Clauses 8.7, 8.12 and 8.13 and the decision of the Chair, Referee or Adjudicator shall be final and binding.
- 8.15 If a Chair, Referee or Adjudicator decides that a dispute referred to the Service should not be determined, the parties to the dispute shall be promptly provided with brief written reasons.
- 8.16 If an applicant refers a dispute to the Service the applicant and member thereby agree that the applicant or member shall not make any claim for any loss or damage or commence any court proceedings in respect of any act or omission of FOS, the Board, Panel, Medical Indemnity Panel, Referee or Adjudicator in relation to the dispute or a determination, or if an applicant or member refuses or fails to comply with any determination.
- 8.17 A Panel, Medical Indemnity Panel, Referee, Adjudicator or FOS may use information provided by a member and an applicant to make enquiries of the other party in respect of the dispute but each shall:
- (a) treat all documents and information provided by a member or applicant as confidential in relation to third parties; and
 - (b) not deliver any document or information, which the Chair, Referee or Adjudicator has decided is privileged or that special circumstances apply under Clause 8.5, to the other party or to any other person without the prior written consent of the party that provided it; and
 - (c) notify a member or the applicant forthwith if any document or information supplied by the member or the applicant to the Panel, Medical Indemnity Panel, Referee, Adjudicator or FOS is subpoenaed by any person or is otherwise required to be produced to any person.
- 8.18 The Terms of Reference do not extinguish an applicant’s rights to take legal action in respect of the dispute if a Panel’s, Medical Indemnity Panel’s, Referee’s or Adjudicator’s determination is unacceptable to the applicant.

9. Referral of a Dispute to a Referee

- 9.1 Where a member alleges fraud in respect of non-disclosure, misrepresentation, a claim or non-claim dispute, FOS shall refer the dispute to a Referee for determination.

- 9.2 Upon review of material submitted by the applicant, the member, and any materials received from independent sources, a Referee may but is not required to:
- (a) discuss the issues raised with the applicant and the member for the purposes of obtaining additional information; or
 - (b) meet with the applicant for the particular purpose of seeking the applicant's responses to the member's concerns; or
 - (c) discuss with the member the applicant's responses.
- 9.3 A Referee may conduct an oral examination of either party and, if such examination is conducted in the presence of the other party or their representative, the other party or their representative shall not be entitled to cross examine the party subject to oral examination. If a party objects to the presence of the other party during an oral examination the Referee may exercise discretion to conduct such oral examination in private without the presence of the other party.
- 9.4 If new evidence is given at the oral hearing in the absence of the other party the absent party will be given the opportunity to respond to the new evidence.
- 9.5 In determining a dispute in which fraud is alleged a Referee may also determine any additional issues which do not involve an allegation of fraud or the Referee may refer the determination of those issues to the Panel.

10. Powers of a Panel, Medical Indemnity Panel, Referee or Adjudicator

- 10.1 The FOS objective is to facilitate the satisfactory settlement or withdrawal of disputes which are referred to it. FOS will make a further attempt to promote conciliation as a means of resolving a dispute to the satisfaction of the parties concerned; but where a conciliated solution is not practicable, a Panel, Medical Indemnity Panel, Referee or Adjudicator may determine the dispute.
- 10.2 A Panel, Medical Indemnity Panel, Referee or Adjudicator may determine a dispute by finding in one or more of the following ways:
- (a) in the case of a claim dispute:
 - (i) an applicant is entitled or not entitled to be indemnified under an insurance contract and the extent of that indemnity; and
 - (ii) a member is liable or not liable to meet a claim and, if so, the extent of that liability; and
 - (iii) a member is liable to repair or replace any items of property; and
 - (iv) the amount, if any, of loss or the value of any property that is damaged or destroyed and which is subject to a claim; and

- (b) in the case of any dispute:
- (i) a member is liable to pay or not to pay an amount of money to or for and on behalf of the applicant; and
 - (ii) a member has or has not charged or calculated the appropriate premium in accordance with its own pricing and underwriting policies; and
 - (iii) a member has or has not applied the relevant risk rating or no claim bonus in accordance with its own ratings and underwriting policies; and
 - (iv) a member should reinstate a policy of insurance as it has not cancelled a policy of insurance in accordance with the *Insurance Contracts Act 1984* and that the cancellation is of no effect; and
 - (v) a member should retain or refund the premium to the applicant if it maintains that it would not have placed the applicant on risk or it has charged the applicant the incorrect premium or where it is determined that the member used forced or unfair practices in the sale of the policy of insurance; and
 - (vi) interest (but at a rate not exceeding the rate prescribed under s57 of the *Insurance Contracts Act 1984* or under a credit contract where appropriate) is payable or not payable by the member; and
 - (vii) any other remedy that may be appropriate in the circumstances.

- 10.3 A Panel, Medical Indemnity Panel, Referee or Adjudicator may not determine that a member is liable to pay any punitive, exemplary, aggravated or unspecified general damages.
- 10.4 A Panel, Medical Indemnity Panel, Referee or Adjudicator may require a member at its cost to further investigate a dispute in a particular manner or to appoint an independent expert to resolve all or some of the issues the subject of the dispute and for the member or independent expert to report back to the Panel, Medical Indemnity Panel, Referee or Adjudicator. The selection of any independent expert appointed under this clause must be approved by the Chair, Referee or Adjudicator.
- 10.5 Determinations shall be in writing with brief reasons given and a copy will be promptly provided to the parties in dispute by FOS.
- 10.6 A notice to an applicant advising of a determination shall refer to the procedure by which the applicant may accept the determination.
- 10.7 A Panel, Medical Indemnity Panel, Referee, Adjudicator, and/or FOS has the discretion to modify any time limits detailed in the Terms of Reference if it is considered that there are valid grounds for doing so, provided neither the applicant nor the member is unduly prejudiced by such modification.

11. Conduct of a Panel, Medical Indemnity Panel, Referee or Adjudicator

- 11.1 A Panel, Medical Indemnity Panel, Referee or Adjudicator shall consider and determine a dispute taken up by it within a reasonable period of time.
- 11.2 A Panel, Medical Indemnity Panel, Referee or Adjudicator may establish procedures and shall sit at such times and places as considered appropriate. However, it is envisaged that a Panel, Medical Indemnity Panel, Referee or Adjudicator will function as informally as possible and with a minimum of legal form and technicality.
- 11.3 Proceedings of a Panel, Medical Indemnity Panel or Adjudicator in individual cases shall be at the discretion of the Chair or Adjudicator. Wherever possible disputes shall be resolved by reference to files, written information and other relevant material.
- 11.4 A Panel, Medical Indemnity Panel, or Referee is not required to give any party notice of any matter raised by any other party but:
- (a) will request a party to provide answers to questions raised or to comment on any matter relating to the dispute;
 - (b) may request a party to attend in private hearing to make an oral presentation of their case or to present such oral evidence as the Panel, Medical Indemnity Panel, or Referee believes may assist in the determination.
- 11.5 A party to a dispute before a Panel or Referee may request that the Panel or Referee hear oral evidence and in that case the Chair or Referee may decide whether to agree to the request or not.
- 11.6 A Chair or Referee may consent to a request for an oral hearing from any party when:
- (a) oral evidence is considered desirable to assist the Panel or Referee to make a proper determination; or
 - (b) other parties to the dispute are also given the opportunity to present oral evidence; or
 - (c) there are issues of disputed facts and the Panel or Referee considers it will receive assistance from oral evidence being given at the hearing.
- 11.7 If a Chair or Referee consents to the hearing of oral evidence:
- (a) the oral evidence may be heard by telephonic or other similar means; or
 - (b) in the case of personal hearings, each party will normally be required to pay its costs incurred in attending, except where the member, Chair or Referee requests the applicant's attendance at a hearing, in which case the member shall meet the applicant's reasonable costs of attendance, including travel and accommodation costs.

- 11.8 Where there is likelihood of an adverse finding then the doctor will have a right of appearance in person before the Medical Indemnity Panel.
- 11.9 Where there is a likelihood of an adverse finding, with the doctor's prior agreement, the Medical Indemnity Panel will seek the expert views of an independent member of the doctor's College or relevant professional association relating to the medical conduct and performance of the doctor.
- 11.10 If an Adjudicator decides that a personal hearing would assist in the determination of a dispute the Adjudicator may refer the dispute to a Panel or Medical Indemnity Panel for resolution and the member will incur additional fees.
- 11.11 A Panel, Medical Indemnity Panel, Referee or Adjudicator may seek independent advice from any expert, legal adviser or other source provided that the person appointed to provide the independent advice has been agreed upon by the parties to the dispute. In the event that the parties cannot reach agreement in this regard, the Panel, Medical Indemnity Panel, Referee or Adjudicator is entitled to make a selection provided that:
- (a) the fees of the independent adviser are reasonable, having regard to the complexity of the dispute; and
 - (b) the fees do not deviate significantly from the usual market rate for such advice; and
 - (c) the person has the necessary expertise.
- Any party may challenge the independence or expertise of a particular person appointed and that challenge shall be referred to the Chair, Referee or Adjudicator for resolution. The costs of any independent advice shall be borne by the member.
- 11.12 If the information provided to a Panel, Medical Indemnity Panel, Referee or Adjudicator by any party to a dispute is considered to be insufficient or incomplete, that party may be required to provide such further information as the Panel, Medical Indemnity Panel, Referee or Adjudicator requests.
- 11.13 If an applicant is a child, seriously ill, mentally handicapped, frail, elderly or non-English speaking then a person duly authorised by the applicant may represent the applicant in respect of a dispute and in the referral of a dispute to a Panel, Medical Indemnity Panel, Referee or Adjudicator.
- 11.14 The use of legal counsel in hearings shall be discouraged and shall only be permitted at the discretion of a Chair, Referee or Adjudicator. However, an applicant may be accompanied or assisted by another person if the Chair, Referee or Adjudicator believes it is necessary and appropriate.
- 11.15 In arriving at a determination a Panel, Medical Indemnity Panel, Referee or Adjudicator shall have regard to what is fair and reasonable in all the circumstances; regard must also be had to good insurance practice, the terms of the policy, and established legal principle.
- 11.16 In making determinations, a Panel, Medical Indemnity Panel, Referee or Adjudicator is not obliged to follow any previous determinations.

- 11.17 An applicant, member, Panel, Medical Indemnity Panel, Referee, Adjudicator or FOS shall not publish or disclose to any third party a determination (other than to ASIC where a dispute is referred to FOS by ASIC) in a form that discloses the identity of the parties without the prior written consent of the parties to the dispute.
- 11.18 A party shall be deemed to have given its consent to publication or disclosure by a Panel, Medical Indemnity Panel, Referee or Adjudicator or the other party if that party publishes or discloses a determination to any member of the public or assists in or permits it to be disclosed to any member of the public.

12. Effects of a determination

- 12.1 A member shall be liable in respect of a dispute in the manner resolved by a Panel, Medical Indemnity Panel, Referee or Adjudicator:
- (a) if a determination of an Adjudicator requires the member to pay or be liable for an amount in dispute of \$5,000 or less; or
 - (b) if a determination of a Panel, Medical Indemnity Panel or Referee requires the member to pay or be liable for an amount of \$280,000 or less.
- 12.2 An applicant may elect to accept a determination by giving written notice to FOS within one calendar month of the date of the determination.
- 12.3 If an applicant does not give the notice prescribed under Clause 12.2 indicating acceptance of a determination it shall be taken to have been rejected. Non-acceptance of a determination does not alter the applicant's legal rights to take action over the dispute through a court or other process.
- 12.4 If an applicant gives the notice prescribed under Clause 12.2 the member shall take all reasonable steps to make full payment to the applicant in compliance with the determination within one calendar month of receipt of the notice. The member may request the applicant to sign a deed of release prior to complying with the determination. If the member is unable to comply with the determination within the specified time the member shall approach FOS and provide details of the steps which it has taken toward complying with the determination. FOS may grant an extension of time in accordance with Clause 10.7, if it considers that there are valid reasons for the delay.

13. Other Duties of a Chair, Referee, Adjudicator and FOS

- 13.1 Each year FOS will compile an Annual Review. The Review shall include a statistical breakdown of the total number of disputes referred to the Service, showing:

- disputes taken up by the Service;
 - disputes referred to but not taken up by the Service;
 - the class of insurance to which the disputes taken up relate;
 - the nature of disputes taken up;
 - the number of disputes decided in favour of the applicant;
 - the number of disputes decided in favour of the member.
- 13.2 Any member not meeting its obligations under the Terms of Reference or under the Agreement conferring the benefits of the Terms of Reference may be the subject of a reference in the Annual Review.
- 13.3 A Chair, Referee, Adjudicator and the Insurance Ombudsman will include in the Annual Review observations or recommendations in connection with the operation of the Service, or insurance issues or trends arising out of disputes referred to the Service.
- 13.4 FOS will make the Review a public document, directing it in the first instance to the Federal Minister responsible for Consumer Affairs, ASIC and the Insurance Council.
- 13.5 FOS may provide to members such information relating to disputes as deemed appropriate by FOS.
- 13.6 FOS may from time to time, publish statistical data provided by members and collected by FOS to reflect member performance.
- 13.7 Any statistical information published by FOS remains the property of FOS and can only be used by members with the express written consent of FOS.

14. Liability of a Panel, Medical Indemnity Panel, Referee or Adjudicator

A Chair, Referee, Adjudicator or Panel member shall not be liable to an applicant or member for any loss or damage arising directly or indirectly in the course of their duties as a Chair, Referee, Adjudicator or Panel member.

15. Disciplinary Powers of the Service

- 15.1 If a member fails to observe the provisions of the Terms of Reference or to comply with a determination with which it is bound to comply then a Chair, Panel, Medical Indemnity Panel, Referee, Adjudicator, or the FOS secretariat may refer the matter to the Insurance Ombudsman, recommending that the matter be referred to the Board for its consideration.

- 15.2 If a matter is referred to the Insurance Ombudsman under Clause 15.1, the member shall be notified and given the opportunity to adduce evidence or reasons as to why the matter should not be referred to the Board.
- 15.3 The member shall lodge its submissions with FOS within twenty business days of the notice referred to in Clause 15.2 being provided by FOS.
- 15.4 At the expiration of the twenty day period referred to in Clause 15.3 the Insurance Ombudsman may take such steps as deemed appropriate.
- 15.5 If a matter is referred to the Insurance Ombudsman under Clause 15.1, the Insurance Ombudsman shall notify the Board and provide such further information to the Board as the Board requests.

16. The Panel, Medical Indemnity Panel, Referee and Adjudicator

- 16.1 A Panel shall consist of a Chair and two other members. Panel members shall be appointed in accordance with Clauses 16.7 and 16.9.
- 16.2 A Medical Indemnity Panel shall consist of a Chair and a medical representative and a medical indemnity insurer representative.
- 16.3 A Chair, Referee or Adjudicator shall be an independent person appointed by the Board for a period not exceeding three years and shall be eligible for re-appointment for further terms each not exceeding three years. Alternates shall be appointed in the same manner.
- 16.4 In selecting a Chair, the Board shall have regard to the following selection criteria:
- (a) the ability to be well informed and make objective decisions based on the merits of the case;
 - (b) the ability to negotiate and conciliate;
 - (c) the ability to exercise sound and fair judgement;
 - (d) the ability to command the respect of the relevant parties;
 - (e) legal qualifications;
 - (f) whether the person has an established public profile;
 - (g) whether the person has an active interest in and understanding of the general insurance industry, or the ability to quickly obtain it.
- 16.5 In selecting a Referee, the Board shall have regard to the following selection criteria:
- (a) the ability to be well informed and make objective decisions on the merits of the case;
 - (b) the ability to negotiate and conciliate;
 - (c) the ability to exercise sound and fair judgement;

- (d) the ability to command the respect of the relevant parties;
 - (e) legal qualifications and a sound knowledge of insurance law;
 - (f) recent experience in handling complex investigations and disputes, preferably in the general insurance industry.
- 16.6 In selecting an Adjudicator the Board shall have regard to the following selection criteria:
- (a) the ability to be well informed and make objective decisions on the merits of the case;
 - (b) the ability to negotiate and conciliate;
 - (c) the ability to exercise sound and fair judgement;
 - (d) the ability to command the respect of the relevant parties;
 - (e) legal qualifications and a sound knowledge of insurance law;
 - (f) recent experience in handling disputes preferably in the general insurance industry.
- 16.7 The Consumer Representative on the Panel shall be appointed by the Board. The appointment shall be for a period not exceeding three years and the Panel member shall be eligible for re-appointment for further terms each not exceeding three years. Alternates shall be appointed in the same manner.
- 16.8 In selecting the Consumer Representative on the Panel the Board shall have regard to the following selection criteria:
- (a) expertise in consumer affairs;
 - (b) the ability to be well informed and make objective decisions on the merits of the case;
 - (c) the ability to negotiate and conciliate;
 - (d) the ability to exercise sound and fair judgement;
 - (e) the ability to command the respect of the relevant parties;
 - (f) recent experience in handling disputes;
 - (g) legal qualifications.
- 16.9 The Industry Representative on the Panel shall be appointed by the Board. The appointment shall be for a period not exceeding three years and the Panel member shall be eligible for re-appointment for further terms each not exceeding three years. Alternates shall be appointed in the same manner.
- 16.10 In selecting the Industry Representative on the Panel the Board shall have regard to the following selection criteria:
- (a) extensive insurance industry experience;
 - (b) the ability to be well informed and make objective decisions on the merits of the case;
 - (c) the ability to negotiate and conciliate;

- (d) the ability to exercise sound and fair judgement;
 - (e) the ability to command the respect of the relevant parties;
 - (f) recent experience in handling disputes.
- 16.11 The Panel members and alternates appointed under Clauses 16.7 and 16.9 shall bring to a Panel expertise in consumer affairs and insurance practice respectively. However their role will not be to act as representatives of consumer or insurance interests and their position on a Panel shall be one of objectivity.
- 16.12 A medical representative to the Medical Indemnity Panel shall be appointed by the Board following a nomination from AMA. The appointment shall be for a period not exceeding three years and the Medical Indemnity Panel member shall be eligible for re-appointment for further terms each not exceeding three years. Alternates shall be appointed in the same manner.
- 16.13 In selecting a medical representative on the Medical Indemnity Panel the Board shall have regard to the following selection criteria:
- (a) the ability to be well informed and make objective decisions on the merits of the case;
 - (b) the ability to negotiate and conciliate;
 - (c) the ability to exercise sound and fair judgement;
 - (d) the ability to command the respect of the relevant parties;
 - (e) medical qualifications;
 - (f) recent experience in handling disputes.
- 16.14 A medical indemnity insurer representative to the Medical Indemnity Panel shall be appointed by the Board following a nomination from MIIAA. The appointment shall be for a period not exceeding three years and the Medical Indemnity Panel member shall be eligible for re-appointment for further terms each not exceeding three years. Alternates shall be appointed in the same manner.
- 16.15 In selecting a medical indemnity insurer representative on the Medical Indemnity Panel the Board shall have regard to the following selection criteria:
- (a) the ability to be well informed and make objective decisions on the merits of the case;
 - (b) the ability to negotiate and conciliate;
 - (c) the ability to exercise sound and fair judgement;
 - (d) the ability to command the respect of the relevant parties;
 - (e) medical indemnity insurance expertise;
 - (f) medical qualifications;
 - (g) recent experience in handling disputes.

- 16.16 The Medical Indemnity Panel members and alternates appointed under Clauses 16.12 and 16.14 shall have medical qualifications and medical indemnity insurance expertise respectively. However their role will not be to act as representatives of consumer or insurance interests and their position on a Panel shall be one of objectivity.
- 16.17 If a Chair, Referee or Adjudicator is unable to attend to his/her duties an alternate may act in his/her stead.
- 16.18 If a Panel or Medical Indemnity Panel member is unable to attend to his/her duties an alternate may act in his/her stead.
- 16.19 A Chair, Referee, Adjudicator, Panel or Medical Indemnity Panel member and any alternate shall immediately cease to hold that office if:
- (a) that person becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health;
 - (b) that person dies;
 - (c) that person's term of office expires.
- 16.20 Each Panel and Medical Indemnity Panel shall comprise three members and each shall have one vote with all determinations being decided by a simple majority.

17. Conflicts of Interest

- 17.1 Any Panel or Medical Indemnity Panel member who declares or has, in the opinion of the Chair, a personal interest in any dispute referred to a Panel or Medical Indemnity Panel, shall step down while the Panel or Medical Indemnity Panel considers that dispute and either that member's alternate may sit, or the Chair may nominate a replacement member for the time during which that dispute is considered by the Panel or Medical Indemnity Panel.
- A Panel member or alternate shall not have a personal interest in any dispute merely because that person holds an office of profit with a member, unless it is with a member who is a party to the dispute.
- 17.2 A Chair, Referee or Adjudicator who declares a personal interest in any dispute referred to him/her for determination shall not participate in making the determination and an alternate shall act in his/her stead.

18. Publicising the Service

The enquiries and dispute handling arrangements, including the availability and operation of the Panel(s), Medical Indemnity Panel(s), Referee(s) and Adjudicator(s) shall be adequately and appropriately publicised.