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INDUSTRY LAPDOG OR CONSUMER CHAMPION?

A REVIEW OF THE INSURANCE & SAVINGS OMBUBDSMAN SCHEME

LLB(HONS) RESEARCH PAPER
INSURANCE LAW (LAWS 515)

LAW FACULTY
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Abstract

In January 1995 the first New Zealand Insurance and Savings Ombudsman took office. This ombudsman scheme is the result of an insurance industry initiative aimed at improving dispute resolution for non-commercial insureds. The purpose of this paper is to examine the context and structure of this scheme, and its place in the framework of alternative dispute resolution and insurance law. A detailed examination of this scheme is undertaken, and it is contrasted with two overseas schemes as well as being assessed against criteria drawn from a number of sources.

The writer finds that though the Insurance and Savings Ombudsman scheme has been an industry initiative, it has the potential to develop into an independent dispute resolution process capable of addressing the power and information imbalances inherent in the insurance relationship. However, the writer identifies a number of issues to be resolved before this potential can be realised.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14820 words.

I INTRODUCTION

Insurance plays an important part in the lives of most people yet, as with a great many commonplace things, the insurance policy is not well understood by many of its purchasers.[1] When an insurance policy is bought, what is obtained from the insurer is a promise to pay, or to put things right, when some loss occurs. Disputes can arise, however, when that promise is not kept and the differences in understanding surface.

There are many methods for resolving disputes between parties, ranging from the formal court proceedings to informal mediation. Recent times have seen a major growth in alternative forms of dispute resolution. A particular concern of those developing these alternative options has been that many individual, non-commercial consumers are unable to gain access to justice because of the costs and delays of the formal court system.

A *Objectives*

A new mechanism for insurance dispute resolution has been introduced to New Zealand this year, the Insurance and Savings Ombudsman Scheme.[2] This ISO Scheme will be discussed in detail in this paper and will be assessed against general criteria that have been developed in the Alternative Dispute Resolution[3] field. In addition, the ISO Scheme will be compared with the equivalent schemes in the United Kingdom and Australia.

The objectives of this paper are to identify and analyse key issues in the processes available for dispute resolution in the insurance industry, and to critically evaluate the ISO Scheme as one such process. The paper will examine in particular the issue of the independence of processes such as the ISO Scheme, and will discuss the possibility that the ISO Scheme may well fail to meet generally accepted ADR criteria.

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[1] Ministry of Consumer Affairs *Study of Insurance Practices* (Ministry of Consumer Affairs, Wellington, 1993) 1. See also the comments of Sir Ronald Davison about the "apparent ignorance of customers" in *Report of the Independent Arbitrator for Year Ending 31 December 1994* (Auckland, 9 February 1995) 5.

[2] The Insurance and Savings Ombudsman Scheme will be referred to as the ISO Scheme from this point on.

[3] The term "Alternative Dispute Resolution" has long been contracted to the more practical form of "ADR" in the literature on the subject, and this form will be adopted in this paper.

B *What is an Insurance Dispute?*

The essence of most insurance disputes is a claim made by a policyholder against an insurer, the claim being that the event insured against has happened and that some resultant loss has occurred. A dispute about a claim is likely to involve either rejection of part or all of the claim by the insurer, or delay in meeting the claim, based most often on a disagreement as to the meaning of the terms of the policy, or on administrative error.[4]

Some examples may serve to illustrate the kinds of issues that become the subject matter of insurance disputes:

Example one:[5]

> A stray cat entered the applicant's home and defecated on the carpet. It subsequently died in the vet's surgery and the applicant sought a new carpet claiming that the stain could not be successfully removed. Liability was repudiated under the 'all risks' extension of the policy by reference to an exclusion in respect of damage caused by domestic animals. The insurer relied on the vet's report that the cat was a 'stray domestic' albeit somewhat neglected. The applicant disagreed, contending that the cat was not 'domestic' at the date of the loss but was displaying 'non domestic tendencies'. Upon representations being made to it by the Bureau, the insurer agreed to revise its decision and treat the claim as valid on the grounds that, strictly speaking, the exclusion referred only to animals owned by the policyholder and those invited onto the premises. It was considered that the exclusion should be made clearer if the insurer wished to exclude loss or damage by any kind of animal which could be associated with domestic premises.

Example two[6]

> A consumer claimed the cost of repairs after his vehicle was damaged in an accident. Insurer denied his claim, alleging that the consumer had not disclosed all material particulars, namely the way in which the vehicle had been modified since manufacture. On the insurance proposal he was asked 'has the vehicle or its engine been modified in any way since manufacture', to which he replied that a new motor had been installed. The claim was declined on the grounds that the car also had mag wheels and a different carburettor.

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[4] For example, the UK Insurance Ombudsman Bureau's 1994 Annual Report showed that of the total of 7182 cases completed during 1994, 2165 concerned policy terms and 1804 concerned administration matters.

[5] Case Ref: 93/1/17328, *The Insurance Ombudsman Bureau Bulletin* Issue Number 2, 1994.

[6] Ministry of Consumer Affairs *Study of Insurance Practices (Wellington, 1993) 25.*

Example three[7]

> Two days after the death of his brother, Mr X submitted to the assurer a request to reinstate a policy on his brother's life, which had lapsed due to non payment of premiums 6 months previously. The assurer reinstated the policy in good faith having received the unpaid premiums and a declaration of good health. Approximately 4 weeks later, Mr X advised the assurer that his brother had died suddenly, two weeks prior to the policy being reinstated. The assurer rejected the claim upon the basis that the policy had originally lapsed due to non payment of premiums and Mr X had not acted in accordance with the continuing obligation of utmost good faith when asking the assurer to reinstate the lapsed policy. Mr X responded by alleging that it was the assurer's negligence in its administration of the policy which had caused the policy to lapse and which had subsequently delayed the issuing of the reinstatement documentation. We decided that it was unnecessary to consider the allegations of maladministration and negligence on the part of the assurer, as Mr X did not come with 'clean hands,' by returning the reinstatement documents in the full knowledge that the life assured was already dead. Therefore, the Ombudsman would not, in accordance with equitable principles, exercise his discretion to assist the complainant.

II ALTERNATIVE DISPUTE RESOLUTION

The strict meaning of the word "alternative" is to indicate a choice between two things. It seems that the use of the word in the ADR context is intended to be in accordance with the strict meaning, that is to say, the choice is between using a court trial and using a process that is not a court trial.

Court trials are the product of lengthy rule-based procedures. They are formal and technical events requiring the use of specialist expertise, and they can impose significant delay and costs onto the parties. It is a commonly held opinion that access to justice is being denied by the very characteristics of the court trial system.[8]

The features of processes that are not court trials are variable and dependent upon the specific process. However, all ADR processes are expected to share the common features of being cheap, quick,

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[7] The Insurance Ombudsman *Annual Report and Case Review* (Insurance Ombudsman Bureau, London, 1994) para 7.28, p49.

[8] Lord Woolf "Access to Justice: The Bentham Club Presidential Address" (1994) 47 Current Legal Problems 341, 344.

disputant-focused, accessible and effective. In other words all the things that the court trial system is perceived not to be.

The opinion about ADR is as varied as the processes encompassed by the term, and there are many differing and competing perspectives driving the debate.[9] Many eminent jurists have made plain their support for ADR.[10] Many academics have raised severe criticisms, questioning what appears to them to be a diversion of legitimate conflict away from the court system and into a second-class system wherein those who have power can even more easily exert it.[11]

A *Principles of ADR*

There are almost as many lists of principles or criteria for ADR as there are articles on the subject. The UK National Consumer Council, in its analysis of ADR, applied its standard framework of "consumer criteria" for assessing goods and services provided by the public and private sectors - access, choice, information, quality and value for money, safety and representation.[12] In New Zealand, the Ministry of Consumer Affairs described an ideal dispute resolution scheme as having the following features:[13]

1. low or no cost;
2. efficiency of complaint handling;
3. independence (fairness and consumer involvement);
4. publicity for the scheme;
5. coverage; and
6. regular review of the scheme.

Other elements are emphasised in various discussions on ADR, often relating to the particular interest group or underlying analysis.[14]

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[9] National Consumer Council *Settling Consumer Disputes: A review of alternative dispute resolution* (NCC, London, 1993) 40.

[10] For example, W Burger "Isn't there a better way?" (1981) 68 ABAJ 274; Sir L Street "The Language of Alternative Dispute Resolution" (1992) 66 Australian LJ 194; Hon Mr Justice D Williams *Accessible Remedies - Access to the Law* (New Zealand Law Conference Papers, Volume 2, Wellington, 1993) 53.

[11] This debate is usefully analysed in R Delgado et al "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] Wis LR 1359.

[12] Above n9, 21.

[13] Ministry of Consumer Affairs *Study of Insurance Practices (Wellington, 1993)*, 42. The definitions of these terms are attached as Appendix 1.

[14] Above n11. Delgado identifies the main strands of the debate in a usefully concise manner.

Perhaps the most important reason for applying principles or criteria to any ADR process is to test the legitimacy of the process, that is the extent to which the process is perceived as fairly serving the interests of those who seek to use it. Just the fact that a process stands outside of the formal court system, doesn't necessarily affect the validity of the process to the disputants. Over the years jurists have sought to describe what characteristics are essential to legitimise a formal legal system.[15] The debate over ADR continues this search by analysing the elements of each process and assessing the relative consequences of the use of the process.

The legitimacy of ADR processes such as those examined in this paper is increasingly being assessed by state and independent consumer services through surveys and detailed investigation. Indeed, the complaints resolution processes of the insurance industry have been subjected to intense scrutiny by such agencies in all three countries that this paper examines.

B *ADR Processes*

The spectrum of ADR processes is wide, and is typically classified under the headings, negotiation, mediation, adjudication and hybrid processes.[16]

1 *Negotiation*

A useful definition for the term "negotiation" is:[17]

> Any form of verbal communication, direct or indirect, whereby parties to a conflict of interest discuss, without resort to arbitration or other judicial processes, the form of any joint action which they might take to manage a dispute between them.

Of particular importance in negotiation is the voluntary nature of the process. Negotiation can only proceed effectively and reach settlement if both parties consent. However, it has to be acknowledged that significant imbalance in the relative bargaining strength of parties can negate the concensual aspect of negotiation.

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15 See particularly, L Fuller *The Morality of Law* (Yale University Press, New Haven, 1964).

16 Above n9, 4.

17 I Morley, G Stephenson *The Social Psychology of Bargaining* (Allen-Unwin, London, 1977) 26.

2 *Mediation*

An essential element of the mediation process is the neutral, non-coercive, non-adversarial third party, the mediator, who co-ordinates and facilitates negotiations between disputants.[18] Mediation is said to be concerned with substantive rather than procedural justice, with the focus being on achieving appropriate outcomes rather than on observing a plethora of technical rules.[19]

That same flexibility allows the parties to fashion their own solution, with the probable added benefits of greater adherence to the settlement due to a sense of ownership of it, and a greater sense of satisfaction in that both sides feel that they have gained something from the process.[20]

Mediation techniques vary considerably, but usually involve the facilitation of negotiation, in which the mediator acts as the communication channel between the parties[21]. Mediation is sometimes described as a non-binding process, but this description has to be treated with some caution as it is possible to characterise a mediated settlement as binding in contract.[22]

3 *Adjudication*

This term means literally, an awarding or settling by judicial decree, a description of the court trial process. In its alternative usage, the term still refers to a formal process in which disputants present evidence and arguments to a third party who has the power to render a binding decision.[23] What differentiates between the two forms of adjudication is that the court trial process is public and not voluntary for all parties, whereas the alternative process is both private and voluntary. Important elements of this voluntariness are the ability of the parties to choose who will be the decision-maker, and the non-reliance on precedent.

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[18] Above n11, 1363.
[19] M Thornton "Mediation Policy and the State" (1993) 4 ADRJ 230.
[20] Above n9, 10.
[21] For example, see R Coulson "Avoiding Litigation with Alternative Dispute Resolution" in *Risk Management* January 1993, 20, 23.
[22] As was held by the Labour Court in *Majestic Horse Floats* v *Goninon* [1993] 1 ERNZ 323.
[23] Above n9, 5.

As with the other forms of ADR, there are many variants on the basic theme of adjudication, with perhaps the most well-known being arbitration. The disputants may resort to arbitration either as a result of a term in a contract or by ad hoc agreement after the dispute has arisen.[24]

In New Zealand, arbitration is generally subject to the Arbitration Act 1908 and the Arbitration Amendment Act 1938. This statutory regime applies to arbitration undertaken with the written agreement of the disputants.[25] The essence of the statutory regime is to make such arbitration subject to the control of the High Court, in that the court can rectify procedural problems,[26] remove an arbitrator,[27] set aside an award,[28] or order the enforcement of an award.[29] These powers of the High Court have been recently demonstrated in *Honeybun* v *Harris*, where an arbitrated dispute between a landlord and tenant was set aside by the Court.[30]

This case is an excellent illustration of the problems attendant on all dispute resolution processes, and emphasises the importance of the human dimension of disputes. It is this dimension which also causes the boundaries between the various forms of ADR, and indeed between the court-based process and ADR, to be blurred, producing what can be best described as "hybrid" dispute resolution processes.

4 *Hybrid processes*

As has been stated, mediation can be described as "facilitated negotiation" and is therefore a hybrid form. Arbitration combines the formality and binding nature of the court trial with the elements of privacy and voluntariness, again a hybrid form. It is well known that the court trial process can involve considerable pre-trial negotiation between the litigants resulting in out of court settlements in most cases.[31]

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[24] Above n9, 5.
[25] Arbitration Act 1908, s2.
[26] Arbitration Act 1938, ss10, 15, 16. Arbitration Act 1908, ss5, 6(2), 10.
[27] Arbitration Act 1908, s12(1).
[28] Arbitration Act 1908, s12(2).
[29] Arbitration Act 1908, s13.
[30] [1995] 1 NZLR 64, 76.
[31] A Beck *Principles of Civil Procedure* (Brooker & Friend, Wellington, 1992) 2.

The court trial system has available a number of options which blur the boundaries between the formal and alternative systems.[32] Indeed, Rule 4 of the New Zealand High Court Rules in requiring that the Rules are to be construed so as secure the just, speedy, and inexpensive determination of any proceeding, is using the language of ADR.

In New Zealand there are many examples of hybrid dispute resolution processes, in which various combinations of ADR methodology are used, sometimes in conjunction with formal system elements. The Ombudsman's office,[33] the Disputes Tribunal[34] and the Employment Tribunal[35] are just a few of the many statutorily based processes available to the public for resolving disputes. In addition, there are many private schemes in operation, as in the maritime,[36] banking[37] and insurance industries, and the panels of arbitrators and mediators maintained by the Arbitrators' Institute.

III INSURANCE INDUSTRY ADR

Arbitration has long been used in resolving insurance disputes.[38] It has been of particular value in resolving commercial insurance disputes and for disputes between insurers, for example, in the 1960s the American Insurance Association established an intercompany arbitration system that is said to have almost abolished litigation for disputes involving the allocation of liability between carriers.[39] In the UK, insurance policies generally contain an arbitration clause providing for the reference to arbitration of disputes arising under the policy.[40] However, in New Zealand and Australia such clauses are, by statute, non-binding on the

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[32] The case management pilot scheme commenced in May 1994 in the Auckland and Napier registries of the High Court is a good example. See A Beck *McGechan on Procedure* (Brooker & Friend, Wellington, 1988) 6-27 - 6-36.

[33] Established under the Ombudsmen Act 1975.

[34] Established under the Disputes Tribunals Act 1988.

[35] Established under the Employment Contracts Act 1991.

[36] For example, the Auckland Maritime Arbitration Forum.

[37] See the inaugural annual report of the Office of the Banking Ombudsman.

[38] See for example, the range of insurance arbitration cases cited in *Halsbury's Laws of England* (4 ed, reissue, Butterworths, London, 1994) vol 25, Insurance, paras 495 - 498.

[39] R Coulson "Avoiding Litigation With Alternative Dispute Resolution" in *Risk Management* January 1993, 20, 26.

[40] Above n38, para 495, p285.

insured,[41] although agreement to submit a dispute to arbitration can be made once a dispute has arisen.[42]

The extent of use of negotiation and mediation techniques for dispute resolution in the insurance industry is not susceptible to measurement, given the emphasis on informality and privacy in these processes. This lack of information was commented on by the Ministry of Consumer Affairs in its recent review of the Disputes Tribunal, with recommendations being made that comprehensive statistics and reporting mechanisms be implemented.[43]

That such methods of dispute resolution are used in insurance is undoubted, but there seems to be much greater evidence of the use of investigative methods in the industry. The common practice of insurance companies is to have a complaints handling procedure as an adjunct to their claims handling systems. Indeed, the industry dispute resolution schemes and codes of practice generally require participant companies to have such procedures. All of the complaints handling procedures examined by the writer showed a common pattern of complaint, investigation, and referral, without any evidence of provision being made for what might be termed interactive consensus between parties.

The Ministry of Consumer Affairs has examined[44] the procedures for consumer redress provided at that time by six insurance industry organisations and assessed them against the ideal disputes resolution scheme. In general the procedures were found wanting, showing the same limitations as company complaints handling procedures,[45] in that they lacked independence, had uncertainty of remedy and were seen to be inflexible.

The Banking Ombudsman[46] is relevant in its own right as a form of insurance ADR, since the definition of "banking services" used in its

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41 In New Zealand, Insurance Law Reform Act 1977, s8(1). In Australia, Insurance Contracts Act 1984 (Cth), s43(1).

42 Insurance Law Reform Act 1977, s8(2). Insurance Contracts Act 1984 (Cth), s43(2).

43 Ministry of Consumer Affairs *Review of the Operation of Disputes Tribunals From a Consumer Perspective* (Wellington, 1994) 116.

44 Ministry of Consumer Affairs *Study of Insurance Practices* (Ministry of Consumer Affairs, Wellington, 1993).

45 Above n44, 46 - 65.

46 The Banking Ombudsman *Terms of Reference* (Wellington, 1992) 4.

Terms of Reference includes advice and services relating to insurance and investments.[47] The main reason for this overlap with the ISO Scheme's jurisdiction is that many banks sell such products as mortgage and loan protection insurance directly. It has been agreed that jurisdiction over any complaint will be in accordance with the industry to which the supplier of the product or service belongs.[48]

There are many examples of dispute resolution schemes being set up in the insurance industry throughout the world. These schemes have been characterised as being of two main types: the ombudsman model, (as in New Zealand and the UK), and the complaints board model (as in Australia and Denmark).[49]

IV THE INSURANCE AND SAVINGS OMBUDSMAN SCHEME

The New Zealand insurance industry has recently embarked on a programme of self-regulation. At the centre of this programme is the ISO Scheme which is intended to provide an independent dispute resolution service for non-commercial insureds.

A *The Development of the ISO Scheme*

The development of consumer protection that has taken place over the last ten years has placed pressure on many enterprises and industries to look closely at their customer relations activities. In the case of the insurance industry, one of the longstanding areas of concern to consumer advocates was the lack of adequate means of redress for consumers in dispute with an insurer.[50]

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[47] Above n46, 2.

[48] Office of the Banking Ombudsman *Annual Report 1992 - 1993* (Wellington, 1993), 10. To date the number of insurance complaints handled by the Banking Ombudsman is very small, 6 out of 313 complaints in 1993/94.

[49] R Drake "Insurance Dispute Resolution: Lessons from Europe" in *Legal Service Bulletin* vol 16, No 3, June 1991, 123.

[50] See Consumers Institute "Insurance against the Insurers" (1992) 309 Consumer 3.

1992 was something of a threshold year in regard to developments affecting insurance consumer redress. It was the year that the Banking Ombudsman took office. During the year the Ministry of Consumer Affairs conducted a survey of consumer awareness which included a question on insurance complaints. The Consumer Guarantees Bill was introduced. The Government released its Task Force Report on Private Provision for Retirement containing a recommendation that a savings ombudsman be established.[51]

These developments, together with changes in company legislation and proposals for fundamental changes to the regulation of the general insurance industry in the form of the introduction of a statutory ratings system,[52] provided the impetus for the insurance industry to make rapid movement to address its provision for dispute resolution. Up to this point the insurance industry had relied on a combination of company-based complaints handling with the industry organisations providing a general enquiries and referral service. Complaints resolution beyond this was effected through either arbitration, the Disputes Tribunal, or the courts.

Initially, the two main industry bodies, the Insurance Council and the Life Office Association, developed ombudsman proposals independently. With the release in June 1993 by the Ministry of Consumer Affairs of its report on insurance practices,[53] the insurance industry was put under some pressure to develop a single ombudsman scheme.[54] After lengthy negotiations, both within the industry and with government and consumer representatives, the ISO Scheme was finalised. The final stage was to seek the necessary approval from the Chief Ombudsman for the ISO Scheme to use the term "ombudsman".[55]

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[51] The Todd report. This was followed by the Retirement Income Act 1993, which established the office of Retirement Commissioner whose functions include the monitoring of the effectiveness of persons appointed to consider complaints about savings and investments (s6(e)). The multi-party Accord on Retirement Income, which forms the First Schedule to the Act, takes the matter further by stating a preference for there being a single Savings Ombudsman and requiring the Retirement Commissioner to review the Banking Ombudsman and the ISO and report on the need for a statutory Savings Ombudsman. An initial review of the ISO is underway at present.

[52] Now in place as the Insurance Companies (Ratings and Inspections) Act 1994.

[53] Above n44.

[54] Reports on consumer issues to the Board of the Insurance Council during this period identify the Minister of Consumer Affairs and the Chief Ombudsman as having firm views on this matter.

[55] The Ombudsmen Act 1975, s28A. See Appendix 2 for the criteria that users of the term are required to meet.

B *The Structure of the ISO Scheme*

The foundation of the ISO Scheme is the document known as the "Rules of the Insurance and Savings Ombudsman Commission" (the Rules)[56] which established two bodies: the ISO Commission (the Commission);[57] and, the industry Board (the Board).[58] Both bodies are unincorporated, have very small and specific memberships, and narrowly defined objects and functions.

The Board has eight members, two from each of the industry organisations involved.[59] The sole object of the Board is to perform a mixture of functions, these being:
(i) one-off functions: - appointment of the first Chairperson and the first Auditor of the Commission, establish regulations (Terms of Reference) for the ISO; and to review the funding mechanism of the Commission, the levy, in the third year of operation;
(ii) occasional functions: - approval of other industry groups or organisations; amendments of the Terms of Reference; appointment of two members of the Commision; consultation with the Commission as to the remuneration of its members; and appointment of the Chairperson and two representatives to the Review Committee of the Commission.
The Board meets infrequently (twice in the last 18 months) and plays no direct part in the operation of the Commission or the office of the ISO.[60]

The Commission consists of two consumer representatives appointed by the Ministry of Consumer Affairs, an independent chairperson, and two Participant representatives appointed by the Board.[61] The Commission sets and collects levies from the industry and determines the general priorities for the expenditure of these levies for the funding of the ISO Scheme.[62]

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[56] See Appendix 3.
[57] Rule 2.
[58] Rule 23.
[59] The Insurance Council, the Life Office Association, the Health Insurance Association and non-bank savings organisations. See Rule 23.2.
[60] Rule 23.1.
[61] Rule 8.
[62] Rule 10.

These levies enable the services of the ISO Scheme to be provided free to consumers. The Commission employs staff to carry out its objects, the principal employee being the ISO, who holds office for a renewable two year term. Though the Rules do not expressly state it, it is presumed that the primary object is to provide a complaints resolution service for non-commercial insureds, and that the means for achieving this are the establishment of the office of the ISO.[63]

The Commission has the duty to monitor the operation of the Rules and Terms of Reference and to make recommendations to the Board on issues arising. The Commission has the power to enter into contracts, make investments[64] and to suspend or remove the ISO at any time in its absolute discretion.[65]

The Commission must conduct periodic public reviews of the operation of the ISO Scheme and the Terms of Reference.[66] The initial review is to be conducted at a time and in a manner that ensures that the report is available to the Retirement Commisioner for consideration in his initial report.[67]

The review committee is to consist of representatives of Participants, consumers and the Minister of Consumer Affairs and expressly excludes involvement by any member or employee of the Commission. The review committee has only recommendatory power, but it is required to consult widely and its reports are to be made public. Recommendations may be made on improvements to the ISO Scheme in such areas as publicity, access, procedures and the Terms of Reference.

To take part in the ISO Scheme an insurance company must first meet the criteria for an "Eligible Body".[68] That is to say, they must be in the business of providing all or any of the insurance services specified in the Rules, and must be a member of the appropriate industry organisation.[69]

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63 Rule 16.
64 Rule 3.2.
65 Rule 3.3.
66 Rule 22.
67 As required by the Retirement Income Act 1993, s22.
68 Rule 9.
69 See above n59.

They must execute what is called the "Register"[70] and pay any entry fee, to become a "Participant" in the Scheme. In other words the insurance company signs a contract with the Commission which binds them to pay the levies, publicise the Scheme, set up their own internal complaints procedures[71] and comply with any Awards made by the ISO.[72]

In return for the consideration given by Participants, they get the prestige of being associated with an ombudsman service and perhaps benefit from a cheaper, quicker and more private dispute resolution system. Participation may be terminated by the Commission if the Participant ceases to be eligible or breaches the terms of the contract. The Participant can resign from the Scheme by giving twelve months notice. Given that some of the industry organisations involved have made participation in the ISO Scheme mandatory for the members of their organisation,[73] termination or resignation from the Scheme may have wide consequences for the insurance company concerned.

The role and status of the complainant, the consumer with a problem, is largely determined by the Terms of Reference.

C *The Terms of Reference of the ISO Scheme*

The powers and duties of the ISO are constituted and governed by the Terms of Reference document.[74] The scheme of these Terms of Reference is as follows:[75]

- Definitions	paragraph 1
- Powers and Duties of ISO	paragraphs 2 & 7
- Limitations on powers of ISO	paragraph 3
- Procedure for complaints	paragraphs 4, 6, & 8
- Outcomes	paragraph 5.

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[70] See Appendix 4.
[71] Rule 7.
[72] Rule 16.3.
[73] Life Office Association *1994 Annual Review* (Wellington, 1995) 6; Insurance Council *Fair Insurance Code* (Wellington, 1994). It is understood that more than 60 insurers have become Participants, with perhaps 10 or so companies not yet involved, one of these being NZI General which has set-up its own independent arbitrator scheme (see above n1). It should be noted that the ISO Scheme does not apply to brokers at this stage.
[74] Rule 16.2. A copy of the Terms of Reference is attached as Appendix 5.
[75] The document uses the term "paragraph" to refer to its sections. The term is used the same way in this paper when referring to the Terms of Reference document.

The definitions in the Terms of Reference are the same as used in the Rules, with the specific addition of paragraphs 1.2 (a), (b), and (c). It is important to note that a Participant cannot be a Complainant and a complaint may only be made about those Services described in paragraph 1. The resolution of a complaint may mean either withdrawal, dismissal, settlement, compromise, acceptance or determination of that complaint, and any reference to provision of services includes references to their non-provision.

The powers and duties of the ISO[76] can be summarised as being:
- to operate a free and confidential complaints resolution service;
- to report on its activities to the Commission and to the public;
- to make recommendations on its Terms of Reference, relevant statutes and Codes of Practice;[77] and,
- to report breaches of Codes of Practice to the Commission.

The limitations prescribed in paragraph 3 actually serve to define the prerequisites for a complaint to be considered:
- the complainant must be the holder of a policy for personal or domestic insurance in New Zealand;
- the insurer complained of must be a participant in the ISO Scheme;
- the complainant must first have taken the complaint to the insurer's internal complaints process without success;
- the act or omission complained of occurred within the time constraints of the provisions of paragraph 3.1(f);
- the complaint is made to the ISO within two months of the failure of the insurer's process;
- the amount claimed is not more than $100,000, although this can be increased with the consent of the insurer;
- the complaint must not relate to:
    - an insurer's assessment of risk;
    - the setting of premiums;
    - investment strategies, practices or policies;
    - the acceptance, renewal or cancellation of a policy;
    - the imposition of conditions or exclusions on the policy's cover.

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[76] Terms of Reference, paragraphs 2 & 7.
[77] That is, the Insurance Council's Fair Insurance Code, the Life Office Association's Code of Business Practice, and Health Insurance Association's Code of Practice.

D The Process of Resolving a Dispute

The ISO's approach to complaints is to be inquisitorial rather than adversarial, although discretion may be exercised as to procedure.[78] A precondition for the use of the procedure is the written acceptance by the complainant of the provisions of paragraphs 8.1 and 8.2 of the Terms of Reference, which mandate a confidential "without prejudice" process and a return of documents requirement.[79]

The ISO is not to be bound by any legal rule of evidence, by any rule or requirement of natural justice or procedural fairness,[80]or by any previous decision of the office of the ISO.[81] However, the ISO, in making any recommendation, is required to have reference to what is "...in his or her opinion, fair and reasonable in all the circumstances ...".[82] The elements that the ISO may take into account in this context are very broad.[83]

The procedure by which a complaint is handled has five possible stages:
1. Has the complaint been taken through the insurer's internal complaints handling procedure? If not, then the complainant is referred back to their insurer. If it has, then the ISO may consider the complaint.

2. Is the complaint within the ISO's jurisdiction? The ISO will rule on this, but the ruling may be challenged in the High Court by the insurer.[84] If the complaint is ruled to be out of jurisdiction, then the complainant will have to seek remedy elsewhere. If it is within jurisdiction, then the ISO will investigate the complaint.

3. Investigation may take any form deemed appropriate by the ISO, but will generally involve collection of information from both parties and some attempt to mediate between them with a view to reaching an agreement. If this is unsuccessful, either party can request the ISO to make a recommendation.[85]

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[78] Terms of Reference, paragraph 4.1.
[79] A copy of the agreement is attached as Appendix 6.
[80] Terms of Reference, paragraph 4.5.
[81] Terms of Reference, paragraph 5.7.
[82] Terms of Reference, paragraph 5.6.
[83] Terms of Reference, paragraph 5.7 (a) - (f).
[84] Terms of Reference, paragraph 4.1.
[85] Terms of Reference, paragraph 5.2.

4. If a recommendation is requested, the ISO must give notice of one month to the parties of his intention to issue a recommendation. Once the recommendation is issued, the parties have one month in which to accept or reject it. If the complainant rejects the recommendation, then the ISO holds the papers for a further two months, returns the papers to the parties and the matter is at an end.

5. If the complainant accepts the recommendation, but the insurer rejects it, then the ISO makes an Award which becomes binding on both parties once the complainant formally accepts it.[86] Such an Award can be enforced in the courts by the complainant against the insurer, if necessary. However, the insurer is strictly bound by the Rules of the Scheme to comply with Awards of the ISO, so it is should be unlikely that the complainant would need to take legal action.

In addition to this procedure, a "test case" option can be exercised by a Participant at any time before an Award is made.[87] If the Participant makes a statement to the ISO that in its opinion the complaint involves or may involve: (i) an issue which may have important consequences for the business of the Participant, or of Participants generally; or, (ii) an important or novel point of law; and the Participant is prepared to give an undertaking to meet the reasonable and actual costs of the complainant in any court proceedings initiated within three months by either party, then the ISO will cease to consider the complaint.

Although the remedy in any given case is subject to the $100,000 limit, incidental expenses incurred by the complainant in making and pursuing the claim are reimburseable in addition. It should be noted that an Award can be compensatory for direct loss or damage suffered by the complainant by reason of the acts or omissions of the Participant.[88] The enforcement of remedies is not dealt with at all by the Terms of Reference.

The provisions of paragraph 5.9 of the Terms of Reference, in denying that any decision, determination, recommendation or Award shall be capable of any form of review, are clearly privative in intent. However,

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[86] Terms of Reference, paragraph 5.4.
[87] Terms of Reference, paragraph 6.
[88] Terms of Reference, paragraph 5.4(b).

paragraph 8.2 of the Terms of Reference acknowledges the possibility of actions arising against the ISO and seeks to minimise the exposure of the ISO Scheme.

E *Results? The First Six Months*

The office of the ISO recorded 515 consumer contacts in the period January - June 1995.[89] This number does not include general queries, such as whether a particular insurer belongs to the Scheme.[90] Of the 515 consumer contacts, 401 are considered to be closed (completed); 327 of these closed contacts were referred to either the applicable insurer or to another appropriate agency;[91] and the remaining 74 of the closed contacts were resolved. Of these 74 resolved contacts, 9 concerned administration complaints; 7 were withdrawn; 21 were held in favour of the complainant; and 37 were held in favour of the insurer.[92]

The administration complaints concern minor matters which don't entail a dispute as such. They include such matters as insurers sending mail to wrong addresses, or other straightforward administrative errors. In such cases the ISO simply phones the insurer and notifies them of the need to correct their records or whatever. The ISO does not categorise these contacts as disputes or complaints and therefore they do not get counted in the tally for either party. However, given that such contacts could include such matters as delay of payment on a claim, it is likely that what

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[89] This information was supplied in confidence, prior to public release, by the ISO. The actual report is therefore not included in this paper.

[90] The ISO defines the consumer contacts as being of three types:
Enquiries: - relate to a particular issue, event, or disagreement; or, relate to specific disagreements which fall or appear to fall outside the Terms of Reference and so are not likely to be considered by the ISO.
Disputes: - relate to specific disagreements where the matter has not or appears not to have been through the participants complaints procedure and so may or may not return to the ISO for consideration.
Complaints: - relate to specific disagreements where the matter falls within the Terms of Reference and are only classified as such where the participant's internal complaints procedure has been exhausted and the matter has gone unresolved. The matter is to be formally considered by the ISO.

[91] Such as the Banking Ombudsman, the Privacy Commissioner, or the trustees of the scheme concerned. The proportions of the two types of referral were approximately equal. 37 of the referrals were to insurance and savings industry bodies which are non-participants in the ISO Scheme; of these referrals, half were to NZI General which has its own independent arbitrator scheme (see above n1).

[92] These results can be compared with the outcome of the eight cases resolved by NZI's arbitrator, (see above n1) where six were held in favour of the insurer, one was out of time, and one was out of jurisdiction.

may start as an administrative niggle could turn into a serious complaint if not rectified.[93]

The following table shows the distribution of the consumer contact type and insurance category:

Category	Enquiries	Disputes	Complaints	Totals	%
Health	8	19	15	41	8
Savings	5	1	2	8	2
Life	13	84	69	166	32
Fire/Gen	57	152	90	199	58
Totals	83	256	176	515	100
%	16	50	34	100	

It is difficult to make proper statistical comparisons between these figures and those kept by the industry organisations prior to the advent of the ISO Scheme, as the criteria and method of recording are significantly different. Also, the relatively short period of time that the ISO has been in operation cannot be said to have yet shown a complete picture of the capacity and effectiveness of the Scheme, nor of the scope of complaints. On the data available to date, it is evident that the content of complaints made, and the distribution shown above, are reasonably consistent with the historical data available from the industry organisations' own complaints processes.

To date, the ISO has only made one formal recommendation and has not been required to make any Awards. In the majority of cases the ISO has been able to resolve matters by mediation as he had hoped he could.[94]

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93 As exemplified in the maladministration cases described in the UK Insurance Ombudsman's Annual Reports.

94 Comment made by T Weir, ISO, in "Ombudsman puts his faith in Mediation" *The Dominion*, Wellington, 21 June 1995, 22.

V SOME INTERNATIONAL COMPARISONS

In developing the ISO Scheme, the insurance industry took considerable notice of the UK Insurance Ombudsman Bureau and the Australian insurance complaints resolution schemes and consulted closely with representatives of both systems. Of the two, the New Zealand scheme most closely resembles the UK scheme in that it is ombudsman based.

A *The UK Insurance Ombudsman Bureau*

The Insurance Ombudsman Bureau (the IOB) was established in 1981 by three of the larger general insurers in the form of an unlimited company, without share capital, to resolve consumer complaints made against its members, the insurance companies. The membership is open to all insurance companies, with weighted voting rights depending on premium income.[95] The membership has increased to more than 330, and is now said to represent 90% of consumer insurance in the UK.[96]

The IOB company has a Board of up to twelve senior insurance company executives, and its main functions are to control the finances of the company, assess and admit new members, and to approve changes to the IOB's Terms of Reference. Though the Board does not have direct input to the daily affairs of the IOB, it nonetheless must exercise considerable influence in the background given its control of the finances and its ability to modify the memorandum and articles of association of the company. The check on this power is to be found in the existence of the IOB Council.

The IOB Council has three Board appointed representatives, and up to eight representatives of consumer, and public interests. The Council is charged with the oversight of the IOB's operations, and with the appointment of the Ombudsman. It also determines the Terms of Reference and budget, subject to the approval of the Board. The Council has been described as being a "buffer" between the Board and the Ombudsman to ensure the independence of the scheme.[97] Indeed, the

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[95] J Birds & C Graham "Complaints against Insurance Companies" [1993] Consum LJ 92, 96.
[96] The Insurance Ombudsman *Annual Report and Case Review 1994* (London, 1995) 55.
[97] National Consumer Council *Ombudsman Services* (London, 1993) 12.

role of the Council is characterised in the IOB's own literature as guaranteeing the independence of the Ombudsman.[98]

The IOB scheme covers all forms of non-commercial insurance and a range of personal investment products, including unit trusts and certain pension schemes. However, this coverage has been narrowed by the introduction of a new Personal Investment Ombudsman in 1994, with the consequent transfer of the unit trust and life insurance-based investment areas.[99]

The IOB will only consider complaints from individuals in a private capacity, unless the insurer agrees otherwise. The Ombudsman's functions specifically include acting as either counsellor or conciliator in order to facilitate the satisfaction, settlement or withdrawal of the complaint, and to act as an investigator or adjudicator in order to determine the complaint by upholding or rejecting it wholly or in part.[100] The Ombudsman's role is broader than just complaints resolution, in that it includes the power to undertake research, and to charge fees when authorised by the Council.[101] The IOB does not charge fees to the complainant, but each insurer member of the scheme is charged an annual fee based on the number of cases taken by the IOB.[102]

To have a complaint heard by the IOB, the complainant must first have been through the insurer's internal complaints handling procedure without satisfaction. The complainant must then make application to the IOB within six months of deadlock with the insurer. The complaint must not involve an amount of more than £100,000, and must be about either a claim, or the marketing or administration of a policy. Other limitations include: the need for the complainant to be the person who either effected the policy, or acquired legal title to it, not for value; the insurer must be a member of the scheme; actuarial judgements of insurers are not to be questioned, except to the extent that there is express provision in the policy; and, disputes between an insured and the liability insurer of a third party are excluded.

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98 The Insurance Ombudsman Bureau *IOB Guide for Members* (London, 1991) 1.

99 In correspondence from the IOB to the New Zealand industry bodies, the IOB Ombudsman estimates the loss of work to the PIA as being possibly as high as 40%.

100 Above n96, 53.

101 Above n96, 54.

102 Above n97.

Once the IOB has received an application from a complainant, the insurer concerned is formally requested to provide the entire, original files to the IOB. The procedure used by the IOB is inquisitorial and may include informal hearings if such are seen as necessary by the Ombudsman. The IOB does not see itself as being involved in bargaining with policyholders on behalf of insurers,[103] though as it is required to act as a conciliator by its Terms of Reference, it will recommend what it considers to be suitable offers of settlement.

If a complaint is to be upheld and conciliation does not achieve an agreement, the Ombudsman may make a formal Decision which is binding up to £100,000 (or £20,000 a year for permanent health insurance) on the insurer. As with other schemes there are no sanctions specified for cases where the insurer fails to comply with the Decision, other than those consequent on being in breach of the Conditions of Membership. The Ombudsman also has the power to make a non-binding Recommendation as to any amount in excess of the monetary limit, or where he feels unable to make a binding award against the insurer but believes that some redress is warranted.

The IOB has its own internal complaints procedure which was introduced in 1994 to deal with complaints as to the manner in which cases are handled by the IOB. This procedure was introduced in recognition of the fact that the users of the IOB should expect, and get, fair, courteous and efficient treatment from the IOB, since that is what the IOB expects insurers to give their policyholders. There is a potential difficulty raised by this procedure, in that it may be used as a de facto appeal. This difficulty may be compounded if the complaint is made against the Ombudsman himself, rather than against one the IOB staff, since it is not practical for the Ombudsman's actions to be subject to appraisal by an IOB staff member. This difficulty is circumvented by such complaints being referred to the Chairperson of the IOB Council.

The issue of the external reviewability of the IOB Ombudsman has recently been tested in the English High Court,[104] where it was held that the IOB is not a body susceptible to judicial review due to the contractual

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[103] Above n98, 3.

[104] *R* v *Insurance Ombudsman, ex parte Aegon Life Assurance Ltd* [1994] *The Times*, Friday 7 January, 32.

source of its power over its members and the arbitrative, private law nature of its decisions. This judgment followed the decision in a case concerning Lloyd's of London[105] wherein the relationship between Lloyd's and its Names was held to be governed by contract and to be of an essentially private nature, therefore Lloyd's was held not to be subject to judicial review.[106]

Though these cases can be seen to be adding to the jurisprudence on self-regulation in the financial sector, they are not without critics. They are seen as a retreat from the extension of the boundaries of judicial review which developed in the mid-1980's.[107] Indeed, one commentator is on record as having expected the IOB Ombudsman to be susceptible to judicial review, and that this was therefore likely to provide some form of control over arbitrary decision-making.[108] The IOB Ombudsman has been criticised for expressing relief at the direction taken by the courts in this matter.[109]

B *The Australian Insurance Industry Complaints System*

Since 1991, the Australian insurance industry has operated a complaints resolution system in which there are two separate schemes, one for life insurance and the other for general insurance. Each scheme is operated by its respective industry body[110] and both schemes are subject to oversight and monitoring by the Insurance Industry Complaints Council, (the IICC).

The IICC came into existence as a result of concerns about the independence and accountability of the complaints resolution within a self-regulatory structure.[111] The IICC is jointly resourced by the industry bodies and is composed of an independent chair (nominated by the two

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105 *R* v *Lloyd's of London, ex parte Briggs* [1993] 1 Lloyd's Rep 176.

106 Above n105, 186.

107 *R* v *Panel on Takeovers and Mergers ex parte Datafin Plc* [1987] QB 815.

108 Above n95, 118 -119.

109 PE Morris "The Insurance Ombudsman Bureau and Judicial Review" [1994] LMCLQ 358, 360.

110 The Insurance Council of Australia operates the General Insurance Enquiries and Complaints Scheme, and the Life Insurance Federation of Australia operates the Life Insurance Complaints Board.

111 Issues Australia Pty *Review of Insurance Industry Complaint Resolution System* (Sydney, 1993) 147.

industry bodies) and two consumer representatives, all appointed by the Federal Minister for Consumer Affairs, plus one representative from each of the two industry bodies.[112]

Although the IICC has no power to overturn any decision of the complaints resolution bodies, it does have the right to:[113]
- effect changes to the Terms of Reference of the complaints resolution bodies, following negotiation and agreement with them and consultation with the Minister;
- appoint the Chairs and Referees of the complaints resolution bodies;
- provide guidance and assistance to the complaints resolution bodies, including approval and negotiation of their budgets, advice on spending priorities, and ensuring adherence to the Terms of Reference;
- receive the annual reports and statistical information of the two complaints resolution bodies and to analyse, comment on, and publish such information.

After one year of operation, the IICC commissioned a major review of the complaints resolution system which, in 1993, produced a report containing more than 200 recommendations.[114] Little significant change in structures or systems appears to have eventuated. The main structural change that resulted was the creation of a separate limited liability company by the Insurance Council, the purpose of which is to provide services to the General Claims Review Panel instead of these services being provided by the Insurance Council itself.

The effect of this move was intended to be to distance the operation of the complaints resolution body from the industry organisation and thereby increase the independence of the service. However, since the Board of Directors of this company is comprised of three representatives of insurers, one representative of the Insurance Council, one representative of consumers, and one representative of the Insurance and Superannuation Commission, it seems likely that the operational independence of the service is somewhat cosmetic.

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[112] Insurance Enquiries and Complaints Limited *The General Insurance Enquiries and Complaints Scheme: Terms of Reference for General Insurance Claims Review Panel and Insurance Industry Complaints Council* (Melbourne, 1994) 23.
[113] Above n112, 24.
[114] Above n111.

The life insurance sector, which had been operating its scheme in a similar fashion to that in the general sector, simply combined the Life Insurance Federation's Inquiries and Complaints service with the Complaints Review Committee, under a new organisational structure known as the Life Insurance Complaints Board (LICB). The LICB has a separate identity, location, staff and budget from the industry body. It operates under wide and flexible terms of reference covering most forms of life insurance and superannuation. The LICB operates a form of "user-pays" funding in that in addition to the base level funding that all participants pay, there is a charge made to insurers for each complaint that has to be referred to the complaints resolution committee of the LICB.[115]

Each of the complaints resolution bodies is comprised of three members, one insurer representative, one consumer representative, and an independent Chairperson. Each scheme has Terms of Reference which define the scope, procedure and remedies.

In all cases, the complainant is required to have first been through the insurer's internal complaints handling system, and then the complaints resolution secretariat, before being eligible to have their case heard by the Panel (general) or Board (life). Both schemes place considerable emphasis on conciliation of disputes, but can issue binding determinations where the amount involved does not exceed A$105,000. Both schemes also have the power to make recommendations where the amount lies between the binding limit and A$260,000, but such recommendations have to be agreed to by the insurer concerned.

The Terms of Reference have some features of particular interest, including:
- small businesses, (which consist of either an individual, a partnership of natural persons or a corporation whose shareholders are natural persons, and which employ less than five people and have an annual turnover of no more than A$350,000), are covered by the general scheme;[116]

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115 "LIFA Active on the Complaints Front" *The Insurance Record of Australia and New Zealand*, January/February 1994, 14.
116 Above n112, 21.

- some specific insurance products are excluded, (for example, public liability), irrespective of the type of policyholder;
- if an insurer fails to observe the industry guidelines or to comply with a determination, then a recommendation may made to the industry body that it take disciplinary action against the insurer.
- the two-tier procedure, involving secretariat-level conciliation activity, followed if necessary by Panel or Board investigation and determination;
- the specifying of time constraints on most steps of the procedure, in particular, the fifteen-day response times placed on insurers at each stage of the formal process in the general scheme and the twenty one day turnaround time aimed at by the LICB.

C *Comparisons with the ISO Scheme*

1 *Structures*

The first and most general comparison to be made between the three schemes concerns their structure. On the surface the UK and New Zealand schemes appear most alike, because of their use of ombudsmen, and their unitary approach to industry coverage. However, beneath the surface there are many practical differences between these two schemes, as well as many similarities between each of them and the Australian scheme. The reasons for the Australian scheme remaining in its "committee" form rather than adopting the ombudsman form, seem to be based in the belief that the ombudsman form is less efficient, more costly, and less controllable by industry.[117]

The use of the term "ombudsman" is, as previously noted, regulated by statute in New Zealand. However, this is not the case in the UK and this issue has been the subject of much debate, particularly amongst the various public and private sector ombudsmen and in the recently established UK Ombudsman Association. This Association (to which the IOB belongs) has defined four key criteria which should be met before the ombudsman name can be used, that is: independent; effective; fair; and, publically accountable.[118] These criteria closely match New Zealand's statutory criteria.

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[117] From correspondence between the Insurance Council of Australia and the Insurance Council of New Zealand, 1992.
[118] Above n97, 2.

2 *Independence*

The question of independence is of paramount importance, as discussed in the ADR literature and by the proponents of the dispute resolution processes discussed in this paper. Of the three schemes, it is apparent that the Australian one has made the least concession to independence in the sense of policy control.[119] On the other hand, the Australian scheme does involve consumer representation in the actual making of binding awards, which neither of the other schemes does. On balance, in the writer's opinion, it is better to have effective consumer control of the process as a whole than hands-on consumer involvement in the small percentage of cases that require adjudication.

3 *Funding*

All three schemes are free to the complainant, but each has its own form of mechanism for deriving funding from scheme members. Of particular interest is the use of what could be called "case fees" by the UK scheme and the Australian LICB, that is the system of charging fees to the insurer for cases which are formally resolved by the scheme. This method of funding raises the question of the legitimacy of creating a direct link between the number of complaints against an insurer and the cost of the dispute resolution scheme to that insurer.

The ISO Scheme is using a mixed approach to funding. In its first two years of operation it will levy insurers a fixed amount plus an additional proportional levy based on gross insurance business value. In succeeding years the Scheme will be funded by a mix of fixed levies and proportional levies based on case numbers, with the bulk of the funding coming from the latter source.

Clearly, there is a strong argument that such a system creates significant incentive for insurers to continuously improve their internal complaints handling processes as well as finding ways to prevent complaints from arising. On the other hand, there is also incentive to find negative ways

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[119] The Victorian State Insurance Office has declined to be a part of the scheme on the grounds that the scheme is not sufficiently independent. It now operates its own internal ombudsman scheme instead.

of minimising the flow of complaints to the scheme, such as protracted internal systems for complaints handling.

4 *Jurisdiction*

All three schemes have broadly similar coverage of insurance products though the structure and regulation of the savings sector is different in each country, leading to differences between the coverage of the schemes. The issue of whether a given case falls within the coverage of a scheme appears to be determined quite differently in each of the schemes. In New Zealand, the ISO has the power to determine whether a case falls within jurisdiction, subject to appeal to the High Court by the insurer. In contrast, neither the UK nor the Australian schemes provide for such an express power.

The UK Ombudsman operates on the understanding that the IOB's Council and Board expect him to resolve such matters.[120] However, this implied discretion was tested in 1993, when an insurer disagreed with a complaint about the mortgage aspect of a "mortgage and endowment" policy arrangement being referred to the IOB.[121] The IOB believed that the complaint was within jurisdiction, but conflicting independent legal advice resulted in the issue being put to arbitration, with the result that the arbitrator ruled that the case was outside of the IOB's jurisdiction because the specific issue complained of was not an insurance matter.

The specific right of the insurer in the ISO Scheme to seek a declaratory judgment in the High Court is said to be justified on the basis that whereas the Scheme is totally voluntary for complainants and involves no surrender of their legal rights, the opposite is true for the insurers.[122] Therefore, it is argued, in view of this commitment, insurers must have the right to challenge the jurisdiction decisions of the ISO.

The possibility that complainants may wish to challenge decisions that deny them jurisdiction because they are keen to have their complaints dealt with by the ISO rather than the courts, clearly did not have

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[120] Above n97, 68.

[121] The Insurance Ombudsman Bureau *Annual Report and Case Review 1993* (London, 1994) 11-12.

[122] This issue was discussed in correspondence between legal advisors and the ISO.

sufficient weight in the process that lead to the present Terms of Reference[123].

It is the writer's opinion that this is an unfair situation for the complainant as it provides the insurer with a means to delay, or even avoid, the investigation of the complaint by the ISO and introduces uncertainty into the process. To give the insurer this option is unnecessary and unwarranted, particularly in view of the range of exclusions and limitations, as well as the "test case" option, provided for in the Terms of Reference.

5 *Exclusions*

Although the three schemes have broadly the same scope of coverage, there are some significant differences between them, particularly with respect to exclusions. All three schemes are intended to provide the individual, non-commercial policyholder with a complaints resolution process covering most of the policy types that such a person may take out or invest in. In Australia and the UK the scope is set by reference to statutes,[124] whereas the ISO Scheme defines the scope in detail within the Terms of Reference.

The inclusion by the Australian general scheme of "small business" insureds, as described previously, is a distinctive and interesting innovation which has not been followed by either of the other schemes. This innovation is clearly a response to the issue of the similarity of the relationship between such insureds and their insurers to that between non-commercial insureds and their insurers. In the writer's opinion this is an appropriate and timely development which should be emulated by the other schemes.

The exclusion of jurisdiction over such matters as actuarial practices, investment strategies, underwriting practices, and the setting of premiums and charges is common to all three schemes. However, the

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123 The difficulties of this negotiation process are referred to frequently by the legal advisors responsible for the drafting of the Terms of Reference in correspondence with the ISO.

124 For example, the Australian general scheme refers to ss 11(2) and 34 of the Insurance Contracts Act 1984 (Cth) and the Insurance Contract Regulations, and the IOB's Articles of Association refer to Schedules 1 and 2 of the Insurance Companies Act 1982 (UK).

ISO Scheme is the most explicit in its delineation of this category of exclusions and has two additional matters under this head, namely:
(i) the exclusion from the ISO's jurisdiction of what is described as the "Commercial Judgment" of an insurer.[125] This term is defined as meaning the assessments of risk, of physical or moral hazard, of character or of financial or commercial criteria. This seems to be an unnecessary repetition of the underwriting exclusion;[126]
(ii) the omission from paragraph 3.2 of the proviso concerning the jurisdiction of the ISO to investigate administration and misrepresentation matters that appears in paragraph 3.3. The effect of this is to exclude investigation of such matters in the general and medical areas from the ISO's jurisdiction. No explanation of this is given, but it is understood that this exclusion was at the insistence of the fire and general insurers.[127]

The Australian schemes contain several specific exclusions that the other two schemes do not address:
(i) in the general scheme, the specific exclusion of cases in which the insurer responds by alleging fraud on the part of the complainant (such cases are referred to an independent Referee for determination as to whether there are reasonable grounds for the insurer to have the view that the claim may be fraudulent);
(ii) in the life scheme, the specific exclusion of cases involving the interpretation of medical evidence, such as in disability insurance.[128]
(iii) in the general scheme, the specific exclusion of claims not involving economic loss from the formal tier of the process (the Panel).

The final area of exclusions to be discussed here is that concerning who may make a complaint. The Australian scheme refers to persons who are parties to or covered by a policy:[129] the ISO Scheme refers to a complaint being made by or on behalf of the person to whom, or for whom or for whose benefit the Participant's Services in question were

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[125] ISO Terms of Reference, paragraphs 3.2(a) and 3.3(a).
[126] ISO Terms of Reference, paragraph 1.1.
[127] Above n123.
[128] This exclusion is reported as being relaxed somewhat in recent months as a result of lengthy negotiations between the LICB and the industry. It appears that the LICB may now conciliate over such matters, but still not make determinations on them. See,"Life Insurance Complaints Scheme Makes Gains" *Insurance Record of Australia and New Zealand* June 1995, 6.
[129] Above 112, 5.

provided:[130] the IOB scheme requires a complaint to be made by the person who effected the policy, or who acquired (not for value) the legal title thereto.[131] Both the IOB and the Australian schemes specifically exclude any third party interests, whereas the ISO Scheme is silent on this matter. This silence is not taken by the writer as inferring that the ISO would consider complaints from third parties, since the wording as to who may bring complaints is quite clear. However, this may be a matter that requires attention when the Terms of Reference are reviewed.

Another matter related to the issue of who may bring complaints was recently highlighted by the IOB Ombudsman.[132] In the context of "group" policies, who is entitled to bring a complaint to the scheme? Is it only the actual policyholder, or can any member of the group take their individual complaint to the scheme? The IOB Ombudsman has found that he can generally work around this, but that where an insurer refuses to accept his conclusion as to proper jurisdiction there is a problem. It is argued that, given the inclusion of persons whom the policy is to benefit as potential complainants in the ISO's Terms of Reference, this issue should not be problem in the New Zealand context.

6 *Deadlock*

There is a difference between the ISO Scheme and the other two schemes on the issue of whether a complaint has reached deadlock within the insurer's internal system. The ISO Scheme provides for a maximum time of three months from formal notification of the complaint to the insurer by the complainant for a settlement offer or some other final response. If this time elapses without a solution acceptable to the complainant, then the complaint can be taken to the ISO. The other two schemes do not provide for anything but a "reasonable time" in this regard.

7 *Fair and reasonable*

The decision-makers in all three schemes are required to have regard to what is fair and reasonable in all the circumstances when proposing a

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130 ISO Terms of Reference, paragraph 3.1(c).
131 IOB Articles of Association, Article 68(b).
132 Above n96, 17 - 18.

solution or issuing a decision.[133] This discretionary power is given some guidance only in the ISO's case,[134] but in all three schemes there is also a need to take into account good insurance practice and legal principles. The standard for good insurance practice is hard to define, but clearly a starting point would be the industry codes of practice.

Of the three schemes, the IOB would appear to have the most prescriptive Terms of Reference in this area. The IOB Ombudsman's requirements are expressed as general duties applicable to all his or her functions, and not only does the Ombudsman need to have regard to the specified matters, but he or she has to act in conformity with them. This binds the Ombudsman to a degree of legal formality which seems at odds with the intended informality of the scheme, though it must be pointed out that the Terms of Reference do expressly state that good insurance practice is to prevail over strict legal principle in the complainant's favour.

By contrast, the Australian and New Zealand schemes limit these requirements to the adjudicative function, with the ISO Scheme being the most permissive and flexible. It is interesting to note that the ISO Terms of Reference do not mention any requirement to have regard to the terms of the insurance contract. It is difficult to see how a complaint can be resolved without reference to the contract, but such reference is at the discretion of the ISO, whereas in the other two schemes regard must be given to the contract terms

8 Confidentiality

There is problem common to all three schemes regarding the sharing of information between the parties. Whereas there is generally no question as to whether the insurer should be advised of the information supplied by the complainant to the scheme, there is no reciprocal right for the complainant in any of the schemes.

This raises the question of procedural fairness in that the complainant may be denied the opportunity of answering any allegations made by the

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[133] New Zealand, ISO Terms of Reference, paragraph 5.6; UK, IOB Terms of Reference, clause C; Australia, Complaints Review Panel Terms of Reference, paragraph 11.12.
[134] Above n83.

insurer, and this can be of particular concern if, for instance, fraud is being alleged. There is provision in all the schemes for waiver of confidentiality, but in the absence of express authority to disclose, information exchange rarely takes place. This increases the importance of the need for the impartiality of the scheme.

9 *Sanctions*

All three schemes are voluntary and none of them have what could be described as a significant disciplinary code, thus the scope for sanction is limited to actions by the industry organisations, the effect of negative publicity, and court action for breach of contract. In addition, it should be remembered that the complainant can still take the original complaint to the courts if the schemes are unable to offer a satisfactory outcome. On the material available, the only evidence of the absence of sanctions creating any problems is in the IOB's case reports where delays in payment of agreed settlements is referred to from time to time. Insurers generally do pay up when an agreement is brokered, or a decision is issued by the scheme. Indeed, the Australian general scheme reports that no insurer has refused to comply with any of the almost one thousand determinations made by the scheme's panels.[135]

10 *Proliferation of fora*

There is a danger of New Zealand following the UK in creating a proliferation of complaints fora, especially with the obligation of the Retirement Commissioner to consider the concept of a statutory Savings Ombudsman. Such proliferation was strongly rejected by the Chief Ombudsman at the time that the two insurance industry organisations were developing their own ombudsman proposals.

It is the writer's belief that, given the high degree of overlap in services between the banking, investment and insurance industries, a single Financial Services Ombudsman would be the preferable development. Such a scheme should be funded by the industry and be subject to the

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135 "Consumers Flock to Insurance Complaints Scheme for Support" *Insurance Record of Australia and New Zealand* June 1995, 4.

criteria described in this paper. There is evidence that such a proposal may receive support from some industry members.[136]

D *Aegon Life and the ISO Scheme*

The relationship between the ISO and the courts is a problematic issue. On the one hand, the ISO's Terms of Reference expressly exclude appeal and review by any external body, but then on the other hand they allow for the insurer's right to seek a declaration from the High Court in the matter of a jurisdiction decision made by the ISO. Clearly the intent is to provide some sense of certainty for the complainant once jurisdiction over the complaint is established. However, the question of whether an award made by the ISO can be reviewed remains uncertain given the ambivalence of the Terms of Reference toward the the role of the courts.

The decision in *Aegon Life*[137] has significance for the ISO Scheme in that it gives support to the provision in paragraph 5.9 of the Terms of Reference excluding judicial review of any decision of the ISO. As a binding term of contract between the insurer and the ISO Scheme, paragraph 5.9 goes further than the contract that applies to members of the IOB.

The Articles of Association of the IOB contain only one reference to disputes between members and the scheme, and that is in Article 82 which requires the parties to go to arbitration when any difference arises as to the construction of the Articles or any other matter arising out of the relationship created by the Articles.

Given that the combined effect of Article 82 and the fact that members of the IOB are contractually bound to abide by the decisions of the Ombudsman did not prevent an application for review being heard in the *Aegon Life* case, the possibility must exist for a member of the ISO Scheme to seek to use this avenue to overcome an unfavourable decision.

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[136] Comment made in a report to the July 1993 meeting of the board of the Insurance Council.
[137] Above n104.

That the New Zealand courts will entertain applications from members of non-statutory bodies has been well evidenced by the cases.[138] However, the current judicial position in New Zealand, as expressed by Fisher J in *Peters* v *Collinge*[139] sees a private body as being subject to non-contractual judicial review only in some special situations. Such situations include the exercise of quasi-public functions,[140] or contemplation of an action of significant direct impact upon the public.[141]

The quasi-public function argument was unsuccessful in *Aegon Life* and in the writer's opinion would fail in the context of an application for review of the ISO Scheme for much the same reasons. The ISO Scheme is not performing a function that Government was otherwise going to undertake

The consumer protection and advice services provided by the Government pre-existed the ISO Scheme and continue to operate alongside the Scheme. The ISO Scheme does not have a comprehensive regulatory role, it regulates only the complaints handling of those insurers who choose to participate. Nor does the ISO Scheme have any disciplinary function or powers and its decisions are not supported by any public law sanction.

The one aspect of the ISO Scheme that may provide a basis for distinguishing it from the IOB in relation to an application for review is that the ISO Scheme can only legally use the name "ombudsman" with the written approval of the Chief Ombudsman.[142] This has the effect of making the ISO Scheme a licencee, that is the holder of a power to do something that they could not do without having obtained due authorisation.

Normally the holder of a licence could not be said to be susceptible to judicial review merely by virtue of their status as a licensee. However, it may be possible to construct an argument in relation to holders of a licence to use the name "ombudsman" that they are acting in the same kind of public capacity as the Chief Ombudsman. If such an argument

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138 See in particular, *Finnigan* v *New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159; *Peters* v *Collinge* [1993] 2 NZLR 554.

139 [1993] 2 NZLR 554, 566.

140 See for example *R* v *Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815.

141 *Finnigan* v *New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159.

142 Above n55.

held up, then it may be possible to succeed in an application for review of a private ombudsman given that there is the precedent of the Chief Ombudsman being the subject of review,[143] despite the privative intent of s25 of the Ombudsmen Act 1975.

VI HOW DOES THE ISO SCHEME MEASURE UP?

As discussed earlier, for dispute resolution processes to be regarded as having legitimacy, they must meet certain criteria. For the purposes of this paper, the criteria by which the legitimacy of the ISO Scheme as ADR will be judged are those stipulated by the Chief Ombudsman[144] and the Ministry of Consumer Affairs.[145]

A ISO Scheme and the Chief Ombudsman's Criteria

1 Independence

The ISO Scheme has been promoted as a totally independent complaints handling process and certainly independence is a highly valued quality in all forms of dispute resolution processes. Yet there is a question mark as to whether the ISO Scheme can be said to be truly independent.

From the examination of the Rules and Terms of Reference in Part IV of this paper, it can be seen that the industry organisations exert a considerable influence over the Scheme as a whole, though not necessarily over the office of the ISO. The complete dependence of the Scheme on voluntary funding by levies must exercise a certain pressure on the operation.

There may be a natural reluctance on the part of the ISO to be seen to criticise the industry by, for example, making recommendations on the industry's codes of practice. Equally, the ISO may be reluctant to assert too much independence in the form of seeking to amend the Terms of Reference. In both cases the ISO may perceive a risk that the industry support for the scheme may drop, both in active participation terms and

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[143] *Commissioner of Police* v *Ombudsman* [1988] 1 NZLR 385 (CA).
[144] See Appendix 2.
[145] Above n13.

in funding. Given the voluntary nature of the scheme, this risk is all too real.

There is also the risk that the industry organisations may begin to feel that the ISO Scheme is competing with them if it takes on a role that is broader than merely one of resolving complaints. The requirement that the ISO make recommendations to the Commission rather than directly making submissions to either the industry bodies on codes of practice matters, or to select committees on legislation, amounts to a restriction on the freedom of the ISO. Such a restriction is an effective way of stifling competition and maintaining control in the hands of the industry organisations.

In foregoing discussion, independence was being viewed from a non-insurer perspective, but the independence of the Scheme must also be an issue for the members of the industry. They will wish to be assured that the office of the ISO is not drawn into acting as a consumer advocate. This is likely to cause some close observation by insurers of the distribution of outcomes from the complaints received by the ISO. In particular, it is expected that the ratio of findings in favour of insurers to findings in favour of complainants will be focused on.

The comments of the former IOB Ombudsman, Dr Julian Farrand, to a parliamentary select committee in 1994 illustrate this issue. Dr Farrand had been asked by a member of the select committee why he was seen as being too independent and therefore unpopular with the industry:[146]

> ... I am supposed to be independent. People are quite happy with independent arbitrators or adjudicators as long as they are not impartial. I am impartial and I do not favour the industry. I also do not favour the consumer. I actually try to decide each case ... on the merits of that individual case. I do get a postbag from consumers who complain that I am the industry's lapdog,...[and] I have the industry complaining that I am the consumer's champion when decisions go the other way.

This suspicion about outcomes makes the role of the ISO a particularly critical one in that not only is the office of the ISO expected to provide independent service, but he or she must be seen to be doing so in a way that overcomes any perception of partiality. The personality and

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[146] Above n96, 61. Dr Farrand was giving evidence to the Treasury and Civil Service Committee on 13 April 1994, on the matter of financial services regulation with particular focus on the proposed Personal Investment Association Ombudsman.

individual style of the person in such a role can influence the way in which the Scheme is perceived as observed above in relation to the former IOB Ombudsman. The independence of the first ISO Commission Chairperson is a vital factor in this matter of perceptions given the key role to be played by the Commission.

2 Charter

As discussed above, the ISO Scheme is based on the Rules and the Terms of Reference, and these documents must therefore be regarded as the charter of the ISO Scheme.These documents are clearly the product of extensive multi-party negotiation and are not "user-friendly". The office of the ISO has produced a "plain language" version of the Terms of Reference which reduces the twenty two pages of the original to nine easily read pages in brochure format. In addition, the ISO has developed a short introductory brochure in English and in Maori, of which some 350,000 copies have been distributed.

The ISO has the right to make recommendations to the Commission on the Terms of Reference and any legislation or codes of practice affecting the operation of the ISO. It would seem therefore that the charter criterion is met by the ISO Scheme. However, there are potential difficulties for the ISO in this matter which relate to the issues of the independence of the ISO from the industry (as discussed above), and a broader role for the ISO.

The writer would argue that although the basic charter requirements are met, a key question still remains unanswered. Should the role of the ISO be limited to that of a mere grievance procedure, or should it have a broader role, such as educational, standards setting, or even as Birds said[147] "to keep the conscience" of the industry? In the writer's opinion, the ISO Scheme is well placed to offer the industry and consumers much more than mere grievance handling.

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[147] Above n95, 113. Birds is quoting the IOB Ombudsman from 1989.

3 *Direct receipt of claims*

Although the complainant has to have exhausted the insurer's internal complaints procedure before the ISO can deal with the case, it is still the complainant who brings the complaint to the ISO. Therefore this criterion appears to be met. However, as was commented by the National Consumer Council in the UK[148] the internal procedures of insurance companies can become a treadmill on which complainants can be worn out, exhausting themselves rather than the procedure. Who decides when deadlock has been reached? The fact that the ISO Scheme does place a maximum time limit on this stage of the process is one the definite strong points of the scheme.

This issue is common in disputes generally and is difficult to resolve since it makes sense to try to get the parties to resolve their differences directly if possible. However, it has to be recognised that there are imbalances in some relationships and that the personal insurance context is such a case. Because of this imbalance in the relationship, it is important to the credibility of any complaints resolution scheme that the decision as to when to seek outside assistance in the dispute should be in the hands of the weaker party. In the present context, that means that it should be the decision of the complainant as to when a complaint is referred to the ISO.

The writer believes that paragraph 3.1(d) of the ISO's Terms of Reference should be amended to make this right explicit for the complainant. Where there is an internal complaints procedure operated in a bona fide manner, the present right only applies either when the insurer advises the complainant that deadlock has been reached, or three months after the complaint was formally made to the insurer, whichever comes first. Where there is no effective internal procedure, it is open to the complainant to take their complaint directly to the ISO, but it would be reasonable to assume that even in this case the complainant will have to have given the insurer an opportunity to respond to the complaint.

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[148] Above n97, 9.

It is interesting to note that the ISO has drafted a model complaints procedure for Participants[149] and is therefore likely to assess any company procedure against this model in the case of a complaint being brought direct to the ISO office. This is a useful approach, but requires a more substantive basis if the standard of internal complaints resolution is to improve.

At the minimum, it is suggested that the three months provision of paragraph 3.1(d) be amended to one month, and the model complaints procedure be incorporated into the Terms of Reference so as to form a minimum standard.

4 *Free of charge*

There are no charges associated with the ISO's procedure for handling complaints. It could be argued that the complainants, as policyholders, are paying for the service through their premiums, but then so do the taxpayers pay for the "free" statutory ombudsman through their taxes. This issue could be researched by the Ministry of Consumer Affairs, or form an element in the ISO Commission's review committee deliberations, though it is difficult to see any effective way to inhibit insurers from passing on the cost of the ISO Scheme to policyholders.

The important point here is that cost should not be allowed to dissuade complainants from seeking redress. Though this Scheme makes no charges to complainants that doesn't mean that the complainants do not stand to incur costs from pursuing the process. There can be costs associated with preparing a claim, getting information to the ISO and perhaps seeking other advice when a settlement is proposed. The ISO does have the power to grant additional amounts to complainants to cover such incidental expenses, but from the wording of paragraph 5.4 of the Terms of Reference this appears to be limited to the cases in which an Award is made. It is to be hoped that the ISO would see his discretion as extending to ensuring that such expenses were allowed for in the less formal settlements. This may need to be clarified in a future review of the Terms of Reference.

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[149] See Appendix 7.

5 *Investigation, decision and remedy*

To satisfy these criteria the ISO must be empowered to investigate impartially the facts, reach an independent conclusion, and achieve a remedy where appropriate.[150] The Terms of Reference explicitly provide for all three of these criteria as previously described. The degree of impartiality, independence and appropriateness achieved will need to be measured in the fullness of time both through the publication of the work of the Scheme and by the regular review process which is mandated for the Scheme by the Commission's Rules.

6 *National coverage*

The ISO Scheme is a national service, though is does have only one office, located in Wellington thus creating potential access limitations. However, such limitations can be overcome by the use of 0800 phone services and travel by the ISO to interview parties. The criterion only states that the scheme has to be "national in character" and although the ISO Scheme meets that requirement, it is the opinion of the writer that this criterion is too narrow to meet the standard expected of a good ADR process.

7 *Public Accountability*

The ISO is required by the Terms of Reference to publish an annual report so as to inform the community of the ISO's activities. The annual reports published by the various Banking Ombudsmen and by the IOB set a very high standard which, with respect, has yet to be matched by the Chief Ombudsman's annual report to Parliament and periodic compendia of cases. It is certain that a high quality report can be very useful means of publicising the scheme and for encouraging public discussion and research about the scheme and the issues that come to its attention. Access to such reports is of critical importance if they are to be of value to the community. The writer would recommend that the ISO Commission ensure that all public and secondary and tertiary education libraries are sent copies as well as all citizens advice bureaux.

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150 S Richards *The Role of the Ombudsman* (Address given to the Insurance Institute of New Zealand National Seminar, 2 June 1994) 3.

The Rules of the ISO Scheme require public reviews to be held periodically, as discussed previously. The degree of actual consultation undertaken by the review committee will determine the validity of this approach. For example, issues such as customer satisfaction with the scheme will require surveys of complainants to be done. This could be problematic in view of the confidentiality requirements of the scheme, not to mention the restrictions imposed by the Privacy Act.[151] The Terms of Reference may need amendment to allow for such survey work to be undertaken, or to require a complainant satisfaction report to be obtained in each case handled by the ISO.

Such public review processes are only meaningful if their recommendations have some effect on the body reviewed. As observed in the Australian case, simply producing a large number of recommendations does not necessarily guarantee change. Unless there is some prior commitment to adopt, or at least negotiate the adoption of, the recommendations of a review then the exercise is reduced to being mere commentary.

The accountability of the Chief Ombudsman to Parliament makes certain that the public interest is taken into account. This cannot be said of the private ombudsmen.

8 *Adequacy of the criteria*

The question of whether the existing criteria for approval of the use of the term "ombudsman" are adequate to the situation of multiple non-statutory ombudsman schemes has to be asked. If private sector ombudsmen are to be a long-term feature of New Zealand's dispute resolution environment, then it is suggested that the criteria used by the Chief Parliamentary Ombudsman [152] should be reviewed with a view to imposing some clarity as to the place of legal rules, natural justice and independent review in such processes.

It is suggested that there could be an amendment made to the Ombudsmen Act 1975, to clarify the power of the Chief Ombudsman as

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[151] See Appendix 7.
[152] See Appendix 2.

regards sanctions against private ombudsmen. As the Act stands, the Chief Ombudsman can give approval and a penalty can be imposed on anyone using the name without approval. However, the Act is silent as to the ability of the Chief Ombudsman to withdraw approval once given and the criteria used for approval are not a part of the statute. The criteria themselves are minimal and contain no indication of standards by which the performance of a private ombudsman will be measured.

B *The ISO Scheme and the Ministry of Consumer Affairs Criteria*

There are some elements in the Ministry's criteria which require comment with regard to the ISO Scheme.

1 *Timeliness*

The Ministry believes that any complaint should be dealt with reasonably speedily and that there should be indicative guidelines as to timeframes for resolution of the dispute. The ISO Scheme does not yet have such guidelines, which is perhaps understandable given the short time that the Scheme has been in operation. On the basis of the data reported on earlier in this paper, it would seem that the office of the ISO is achieving a reasonable turnaround of complaints, with only 22% of complaints received in the first six months outstanding as at the end of June. This compares favourably with the IOB turnaround of 117 days[153] and the Australian turnaround of 14 weeks.[154]

Despite this reasonable performance to date, it is the writer's opinion that the ISO Scheme is deficient in not stipulating at least some broad guidelines for timing the various stages in the process. Without such guidelines, the complainant has no measure by which to assess whether the process is proceeding reasonably. If the ISO Scheme is to be seen as a better option than the courts, then it needs to give some assurance of certainty, if not of outcome, then at least of procedure.

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[153] Above n111, 81.
[154] Above n96, 7.

2 *Sanctions*

The Ministry states that there should be effective sanctions to dissuade insurers from rejecting decisions. The only sanction, other than litigation in contract, is in the power of the Commission to terminate the participation of an insurer in the Scheme.

Such an action would have a potentially serious effect on a provider of life insurance. It would amount to a breach of the LOA Code of Business Practice, putting at risk the insurer's "authorised" status under s7A(2) of the Securities Act 1978, and thus jeopardising the insurer's exemption from the general obligations imposed on issuers of securities to the public.

The effect of termination of participation in the Scheme on other kinds of insurer is less clear, but is likely to be of lower impact. Since there are a small number of general insurers (most notably NZI Insurance) who are not participants in the ISO Scheme and who still function without difficulty, being excluded from the Scheme does not appear to have any sanction value. The Ministry in proposing that effective sanctions should exist to dissuade insurers from rejecting decisions did not identify what such sanctions might be. It seems likely that the Ministry's focus was on there being a system in which binding decisions would be made and that the enforceability of such decisions would provide the requisite sanctions.

Given the importance of public relations to the insurance industry, it is often suggested that the negative publicity of an insurer being seen to renege on their commitment to the ISO Scheme would be a sufficient deterrent and obviates the need for explicit sanctions. Whether such a view is credible will only be known once the data is available to be assessed.

3 *Consumer involvement*

The Ministry puts great emphasis on consumer involvement in the oversight of dispute resolution schemes. The Commission would seem to meet the Ministry's minimum requirement for consumer representation in that the Commission does consist of equal numbers of industry and

consumer representatives. However, the fact that the Board has no consumer representation on it and that the Board has power of appointment over a number of positions, means that out of the nineteen positions comprised in the Board, Commission and the Review Committee, the Board is in control of fourteen. Even allowing for the undoubted independence of the current Chairperson of the Commission, there is clearly not a state of equality between industry and consumer representation within the ISO Scheme.

4 *Publicity*

The publicity requirements seen as necessary by the Ministry are generally being met by the ISO. However, the results of a small and informal survey undertaken by the writer to assess the effectiveness of the publicity activity of both the ISO office and the insurance companies themselves indicated that information and knowledge about the ISO Scheme was somewhat patchy.[155]

There is clearly a need for a monitoring programme to be set in place, examining such matters as whether insurers are receiving and utilising ISO Scheme information, and on what occasions do they make the insured aware of the ISO Scheme. Insurers have a contractual duty as participants in the ISO Scheme to inform their customers about internal complaints procedures and the ISO Scheme. This duty can be met to some degree by including appropriate explanatory information on proposal and policy documents.

C *Fairness and other matters*

The fact that the ISO has to have regard to what is fair and reasonable in making decisions does not deal with the question of procedural fairness. In paragraph 4.1 of the Terms of Reference the ISO is given the power to decide on the appropriate procedure in respect of each complaint and decisions on such matters are expressly barred from appeal or review in paragraph 5.9. This situation, when coupled with the express statement in paragraph 4.5 that the ISO will not be bound by any rule or requirement of natural justice, leaves the ISO Scheme open to criticism.

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[155] See Appendix 8.

The main requirements of natural justice in this context are: (i) that adequate notice of the reasons for both the insurer's decision and the consequent decision made by the ISO be given to the complainant; (ii) that both complainant and the insurer are given reasonable opportunity to be heard by the ISO; and, (iii) that the decisions of the ISO are made without bias. The Terms of Reference contain no guarantees on any of these aspects.

A further factor which serves to complicate the proper functioning of natural justice is the investigative mode of dispute resolution used by the ISO. While this approach may be appropriate for disputes involving parties of significantly unequal power or where there are sensitive issues (as in sexual harassment cases), it does bring with it certain problems. In 1992, the IOB Ombudsman was quite explicit about the problems inherent in the multifunctional nature of the investigative approach typically adopted by ombudsmen:[156]

> ...for those concerned this may involve problems: statements may be made and facts conceded to a conciliator which would not be admitted to an adjudicator. The inquisitorial approach adopted by Ombudsmen leaves little room for "without prejudice" communications. Equally the ombudsman must himself bear firmly in mind the capacity in which he or his staff is communicating with the parties at any stage of the proceedings so as to avoid any suggestion of premature prejudice... In practice this can prove difficult.

In light of the IOB Ombudsman's comments, the "without prejudice" provisions of the ISO Scheme's Terms of Reference[157] must be taken as applying only where cases are referred to external processes.

There are proposals under discussion to amend paragraphs 4.5 and 5.2 of the Terms of Reference so as to remove the provision that the ISO is not bound by the rules of natural justice. These proposals seek to align the Terms of Reference with the procedural standards used by the Chief Ombudsman, in particular the provisions of s18(3) of the Ombudsmen Act 1975 which allow the Ombudsman to hold hearings if deemed necessary. It is not certain when, or even if, these amendments will be enacted, but it is the writer's opinion that until they are the ISO Scheme will be open to the criticism of being materially deficient in this respect.

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[156] Above n97, 45.

[157] ISO Terms of Reference, paragraphs 4.4 and 8.1.

VII CAN COMPLAINTS HANDLING BE RATED?

With the advent of the new ratings regime for general insurers[158], it may be opportune for the industry and the regulators to consider the possibility of adding a requirement to the ratings assessment process, dealing with the standard of complaints performance of insurers.
This should not be seen as an unreasonable requirement by the industry since they have characterised the ratings regime as being more than a merely financial rating exercise.[159] Performance in complaints matters would be a measure that consumers could use to assess the credibility of insurers and would add significantly to the weight and credibility of the ISO Scheme.

Such a measure may also effectively address the non-participation problems attendant on any totally voluntary scheme by creating an incentive for insurers to either join the ISO Scheme or come up with an alternative that is at least as good. This proposed measure could also provide the means to impose sanctions on insurers of the kind that are at present only applicable to life insurers, as noted above.

The data for such a rating exercise are already collected by the ISO and used in the calculation of funding levies. This data could be combined with regular statistical reports on the insurers' internal complaints systems to produce a complaints profile to add to the other measures used in the rating process.

The fact that the Insurance Council is designated as the body that negotiates with and recommends ratings agencies[160] means that it is the industry which is setting the standards for the ratings process and extending its self-regulation. Therefore, given that the ISO Scheme is also an industry self-regulation initiative it would be reasonable to expect the suggested integrated approach to be taken.

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158 Insurance Companies (Ratings and Inspections) Act 1994.
159 Discussion held with the Chief Executive of the Insurance Council, 19 April 1995.
160 Above n158, s17.

The new ratings system will clearly have some public relations value to the industry and given that it is likely that the ratings system will replace the present statutory deposits system,[161] then it is not unreasonable for the public to expect that the ratings system will be meaningful to consumers in the fullest possible sense.

VIII CONCLUSION

It is clear that there is some way to go yet in the development of satisfactory dispute resolution processes in the insurance and savings industry, whether in New Zealand or elsewhere. Of the three jurisdictions considered, it would seem that the UK is the most advanced. New Zealand's recent initiative with the ISO Scheme appears to be a step in the right direction, charting a course between the excesses of formalism and informalism. There are clearly some grounds for concern about the ISO Scheme, though it is acknowledged that it is early days yet and much will depend on the ability of the first ISO to establish an effective and independent operation.

In ADR terms, there are questions to be resolved about accessiblity, the adequacy of public information, and the degree of actual independence achieved by the Scheme. The question of the fairness of the Scheme in light of the strictures written into the Terms of Reference, makes impartial and public review absolutely essential. Real effort will have to be made to avoid the Procrustean possibilities of these strictures. The real benefit to the insurance and savings industry must surely come from encouraging use of the ISO Scheme by complainants and for this to happen the Scheme will have to establish a reputation for independence, flexibility and effectiveness. If this is achieved then the ISO Scheme can justly reject the labels that have been applied to its UK counterpart ("Industry lapdog" or "Consumer champion") and instead fulfill the role that the Insurance & Savings Ombudsman has identified, that of an independent agent for change.[162]

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[161] Insurance Companies Deposits Act 1955. All enterprises in the business of insurance are required to pay a deposit to the Public Trustee as a measure which was originally intended to provide a minimal level of security for insureds. The amounts required for deposit can range from as little as $2000 to a maximum of $500,000.

[162] T Weir *Insurance Tomorrow*(Address given to the Insurance Institute of New Zealand National Conference, 31 May 1995) 16.

APPENDICES

APPENDIX 1

AN IDEAL DISPUTES RESOLUTION SCHEME

Jeremy Mitchell, an international consumer consultant and former Director of both the UK National Consumer Council and Consumer Affairs at the Office of Fair Trading stated:

> *While the great majority of financial services transactions are completed without difficulty, cheap, quick and effective redress procedures need to be available for the small minority of disputes.*[5]

This section considers the features of an "ideal" complaints handling scheme as identified by consumer groups and representatives, and compares these with various New Zealand insurance industry association schemes.

An ideal complaints handling scheme has the following features:

1 low or no cost;

2 efficiency of complaint-handling;

3 independence (fairness and consumer involvement);

4 publicity for the scheme;

5 coverage; and

6 regular review of the scheme.

These features are discussed in detail below.

1 Cost

Consumers should not have to pay for redress on a user-pays basis. In this way, consumers will not be discouraged from pursuing their dispute. The cost should be borne by all policyholders through their premium payments.

5 The Consumer and Financial Services: New Horizons, UK, 1988.

2 Efficiency

The scheme should be directly accessible to consumers. Consumers should have to rely on the company referring the case, nor should there be any screening process. It must be available immediately after the complaint has been rejected by the insurance company. It should be straightforward to understand and use.

The complaint should be dealt with reasonably speedily. Consumers should be informed, through publication of guidelines incorporated in a code of practice, how complaints will be handled. They should be told how soon to expect a ruling to be made. For cases which are expected to take longer than normal, the consumer should be kept informed, by letter, of the reasons for the delay and the expected date of completion.

Adequate staff and money should be available to operate the scheme.

Decisions should be binding on member companies, and effective sanctions should exist to dissuade members from rejecting decisions. Consumers should have the option of pursuing redress further in the forum of their choice. They should not be forced to arbitration, should they be dissatisfied with the outcome of the complaint.

3 Independence

To gain consumer confidence in the way insurance associations handle complaints, dispute resolution schemes should have consumer involvement. At least an equal ratio of consumer and industry representatives is a minimum.

Past experience has shown that industry bodies might argue for the complaints body to be undertaken by association members themselves with no form of independent and/or outside involvement.

Such an approach means that justice will not be seen to be done. Society will consider that the association will act only in their members' interest even if this is untrue, and the scheme's credibility will suffer.

Consumer and industry representation is a feature of a number of complaints-handling bodies such as the Australian insurance panels and New Zealand Banking Ombudsman scheme. The UK Insurance Ombudsman Bureau is overseen by a Council of twelve, nine of whom are consumer representatives.

Consumer involvement in the complaints-handling process may take in one or more stages: the direct involvement in complaints inquiries and investigations; making determinations on complaints; and overseeing the operations of the investigation staff and secretariat.

The industry should consult with consumer and community groups and the Ministry of Consumer Affairs as well as industry members, to get a feel for the problems and complaints that arise in their industry and to determine issues which should be covered before deciding on the features of their scheme.

The ideal scheme should involve consumer representatives in developing the complaints-handling process and in the process itself; it should also provide for consumer input into the monitoring and evaluation of the scheme.

The secretariat (or investigators) should be appointed by the committee of consumer and industry representatives to ensure their experience and independence meet the required standards.

4 Publicity

The scheme should be well advertised generally and well promoted at the time a complaint is made to the company. The information provided should detail how to contact the complaints body for information or to lodge a complaint, the procedures involved in determining the complaints outcome (including time limits), who will be involved in the investigation, and what other options for obtaining redress are open to the consumer.

Both policyholders and the general public should be informed of the issues arising from complaints and of the way in which these issues were dealt with. This information should be made available regularly.

To ensure public acceptance of the scheme it should be open to public scrutiny. This ensures consumer representatives had some accountability to the consumer groups who appoint them.

Brochures explaining the schemes should be available in plain English and in other languages.

5 Coverage

The terms of reference of the complaints-handling scheme should be extensi enough to cover the main areas of complaint and should allow adequate awar to be made. A code of practice should exist detailing acceptable and undesirab practices. The scheme should consider these issues and be flexible enough address new issues as they arise.

6 Review

The operation of an ideal complaints-handling scheme should undergo a regul (for example, every two or three years) public review to identify problems a provide for a process to remedy the scheme's shortcomings. Reviews should b carried out in consultation with consumer and community groups.

The Minister of Justice invited the Chief Ombudsman to be a member of the Panel which was to be responsible for the content of the public education campaign for the Electoral Referendum to be held on 19 September 1992 to provide citizens with the opportunity to vote on whether or not they wish to change the existing system for electing Members of Parliament. The Chief Ombudsman was appointed as Chairman of the Panel. It was not the Panel's function to promote reform, but to oversee the publicity campaign to ensure that balanced and neutral information was presented to the public on the options.

Industry Ombudsmen

With the enactment of the provisions relating to the protection of the name "Ombudsman", criteria had to be established for use by the Chief Ombudsman when considering applications to use the name. In setting those criteria, the Chief Ombudsman consulted with colleagues overseas to draw on their experience, particularly in the United Kingdom and Australia where "industry ombudsmen" have been appointed. He also consulted with the Ministry of Consumer Affairs and the Consumers' Institute to gain a "consumer perspective" on the use of the name.

As a result of those consultations, the Chief Ombudsman established a set of criteria against which he would consider applications. His overall aim is to ensure that an office using the name is one which will afford the New Zealand consumer the right to establish a complaint against an organisation, free of charge, and have it considered by a person of independence and influence and, if sustained, expect a remedy. The Chief Ombudsman decided that in looking at any application, he would consult with the Ministry of Consumer Affairs and the Consumers' Institute. As a general rule, an Ombudsman scheme will only be granted the authority to use the name "Ombudsman" if it is independent, accessible, fair and effective. The aim of the approval process will be to see that, in the interests of the consumer, minimum standards are set for an Ombudsman operation.

The criteria for guidance are:

1. Unless authorised by statute, no position entitled "Ombudsman" should be established in any area where the Ombudsman has or may be given jurisdiction under either the Ombudsmen Act 1975 or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987. Such a position would confuse the public and undermine the constitutional role of the statutory Ombudsmen.
2. Where it is proposed to have an "Ombudsman" type position which did not conflict with the position in (1) above, the holder of the name "Ombudsman" must be appointed and funded in a manner which enables him/her to operate

constantly before the consuming public. The appointed Ombudsman should have the right to make recommendations to change given aspects of the Charter.

3. The role of the person proposed as an "Ombudsman" is to receive complaints directly from a complainant, free of charge, and impartially investigate the facts, and conclude with a decision to not sustain or sustain and, if appropriate, achieve a remedy. The name Ombudsman would not be agreed if the role was seen to be a counsel or advocate for special interest groups. The position will need to be seen to be independent and impartial by both the consumer and the organisation to ensure maximum effectiveness and influence.
4. The use of the name by a non Parliamentary Ombudsman will be of greatest value to consumers when the appointee operates in a jurisdiction which is national in character. Permission to use the name "Ombudsman" will not normally be granted for unique local or regional roles.
5. Where all the above criteria are met the term "Ombudsman" should not be used alone, but only in conjunction with a description which makes the role clear, eg, "Banking Ombudsman"; the name on this basis to be used in the public Charter and in correspondence and publicity.
6. All approvals will require that the approved Ombudsman will produce an annual report and make it publicly available. Additionally, it will be desirable that the Ombudsman scheme be subject to periodic public reviews to allow consumers to indicate the degree of credibility which they accord the complaint system being followed.

Approval of "Banking Ombudsman" and "Banking Ombudsman Commission"

On 2 April 1992 the Chief Ombudsman, being satisfied that the above criteria had been met, announced that he had approved the use of the name "Ombudsman" for a "Banking Ombudsman" and for the "Banking Ombudsman Commission", the independent body to which the "Banking Ombudsman" is accountable.

Prison Visits

The investigation of complaints made by inmates required that visits be made to the following prisons and detention units:

Paremoremo Maximum Security and Auckland Medium Security Prisons, Lake Alice Hospital, Te Moenga Maximum

APPENDIX 3

RULES OF THE INSURANCE AND SAVINGS OMBUDSMAN COMMISSION

INDEX TO THE RULES OF THE INSURANCE AND SAVINGS OMBUDSMAN COMMISSION

RULES
OF THE INSURANCE AND SAVINGS OMBUDSMAN COMMISSION
ADOPTED 13 MAY 1994

RULE 1: Definitions and Interpretation

1.1 In these Rules unless the context otherwise requires the following expressions have the following meanings:

"Alternate Member" means each alternate member of the Commission appointed in accordance with Rule 11.6;

"Annual Meeting" means the annual meeting of the Commission held in accordance with Rule 14.1;

"Auditor" means the auditor or auditors for the time being of the Commission;

"Authorised Life Insurance Company" bears the meaning set out in Section 2(1) of the Securities Act 1978;

"Award" means a binding award of the Insurance and Savings Ombudsman made against a Participant pursuant to paragraph 5.4 of the Terms of Reference;

"Board" means the board constituted pursuant to Rule 23;

"Chairperson" means the chairperson of the Commission;

"clear days", in relation to the period of a notice, means that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect;

"Codes" means the codes of practice established from time to time relating to the provision of all or any of the Services or the carrying on of a business relating thereto and applicable or relevant to a Participant;

"Commission" means the Insurance and Savings Ombudsman Commission established by Rule 2;

"Complainant" means a person (not being a Participant) making a complaint to the Insurance and Savings Ombudsman;

"Eligible Body" means any corporation or other entity which provides all or any of the Services and includes an Authorised Life Insurance Company but excludes:

(a) a Registered Bank (as that term is defined in the Reserve Bank Act 1989) or any Subsidiary of a Registered Bank;

(b) any corporation or other entity which provides Personal Line Insurance Services and is not a member of the IC;

(c) any corporation or other entity which provides Medical Insurance Services and is not a member of the HIA;

"First Period" means the period comprising the initial two full financial years of the Scheme and the period prior thereto;

"General and Medical Insurance Participant" means each Participant which provides Personal Line Insurance Services and/or Medical Insurance Services;

"HIA" means the Health Insurance Association of New Zealand;

"IC" means The Insurance Council of New Zealand Inc;

"Institute" means the Consumers Institute of New Zealand;

"Insurance and Savings Ombudsman" means the Insurance and Savings Ombudsman appointed in accordance with Rule 16.1;

"Levy" means any fee, subscription, levy or other payment as may be determined by the Commission from time to time in accordance with Rule 10;

"Life Insurance and Savings Participant" means each Participant which provides Life Insurance Services and/or Savings Services;

"Life Insurance Participant" means a Participant which is an authorised life insurance company within the meaning of the Securities Act 1978;

"Life Insurance Services" means the provision of Life Insurance Policies (as that term is defined in the Securities Act 1978) in New Zealand for: (i) personal or domestic purposes (and not provided for business or commercial purposes); or (ii) business or commercial purposes where and only where the life insured is an Associated Person of the owner of the Life Insurance Policy (the term Associated Person used in this definition shall bear the meaning set out in Section 8 of the Income Tax Act 1976, excluding paragraph 8(1)(a) thereof);

"LOA" means the Life Office Association of New Zealand, Inc;

"Medical Insurance Services" means the provision of policies of insurance in New Zealand for personal or domestic purposes (and not provided for business or commercial purposes) effecting cover for:

(i) costs or expenses incurred by the insured or any insured family member in obtaining health or medical services; or

(ii) personal injury to or disability of the insured or any insured family members by accident;

"Member" means a member of the Commission;

"Minister" means the Minister of Consumer Affairs, or if there is no such portfolio, the Minister responsible from time to time for the administration of the Fair Trading Act 1986;

"month" means calendar month;

"Nominated Consumer and Community Groups" means the consumer and community groups having a direct interest in consumer issues relating to and/or advising consumers in respect of, some or all of the Services, as may from time to time be nominated by the Minister;

"Nominated Industry Groups" means the LOA, the IC, the HIA and any other industry group or organisation representing groups of Participants as may from time to time be approved by the Board;

"Office of the Insurance and Savings Ombudsman" means the establishment, including its officers and employees, established to enable the Insurance and Savings Ombudsman to perform his or her functions and duties;

"Participant" means each Eligible Body entered into the Register as a participant in the Scheme in accordance with Rule 9.1;

"Participant named in the complaint", or "Participant concerned" means any Participant against which a complaint is made;

"Personal Line Insurance Services" means the provision of policies of fire and general insurance in New Zealand for personal or domestic purposes (and not provided for business or commercial purposes) effecting cover for:

(i) domestic residential dwellings occupied and used solely as a principal or secondary home by the insured;

(ii) contents and personal property, granted in respect of property used for private and domestic purposes only (not being property used in connection with any business or trade activity);

(iii) motor vehicles used solely for private and non-commercial purposes;

(iv) marine vessels, ships, boats and aircraft used solely for private and non-commercial purposes;

(v) domestic and international travel undertaken for private or domestic purposes (not being undertaken for business or commercial purposes) by the insured and family members;

(vi) private and domestic property in transit (not being property used in connection with any business or trade activity);

(vii) death, personal injury, illness or redundancy of the insured, issued solely for the period of and in connection with a conditional or hire purchase agreement, loan or other financial arrangement obtained for private or domestic purposes (not being undertaken for business or commercial purposes);

(viii) personal property of the insured (used solely for private and non-commercial purposes), issued solely for the term of and in connection with a conditional or hire purchase agreement, loan or other financial arrangement;

(ix) motor vehicles, marine motors, appliances and other personal property of the insured (used solely for private and non-commercial purposes) by way of extension to a manufacturer's or vendor's warranty; or

(x) public liability incurred by the insured in the course of private and domestic activities (not being cover for public liability arising in the course of any trade, occupation or commercial activity);

"Register" means a register of Participants in the Insurance and Savings Ombudsman Scheme ;

"Related Company" bears the meaning set out in Section 2(3) of the Companies Act 1993 (on the basis that the word "subsidiary" used in that definition bears the meaning set out in these Rules);

"Retirement Commissioner" means the commissioner appointed pursuant to Section 5 of the Retirement Income Act 1993;

"Review Committee" means the committee appointed in accordance with Rule 22.2;

"Rules" means these Rules as amended from time to time, and a reference to a particular Rule has a corresponding meaning;

"Savings Participant" means a Participant which provides Life Insurance Services and/or Saving Services which is not a Life Insurance Participant;

"Savings Services" means savings, superannuation (including Superannuation Services), investment, funds management and funds deposit services provided in New Zealand for personal or domestic purposes (and not provided for business or commercial purposes) and includes the issue, allotment and/or transfer of ownership of any Security (as that term is defined in the Securities Act 1978) but excludes: (i) the provision of credit under a credit contract; and (ii) a superannuation or savings scheme where any contribution or deposit is made in accordance with the terms of the scheme, by or on behalf of an employer or other third party;

"Scheme" means the Insurance and Savings Ombudsman Scheme established by these Rules and the Terms of References;

"Secretary" means the secretary of the Commission appointed in accordance with Rule 12.1;

"Services" means and includes:

(a) Personal Line Insurance Services; and

(b) Medical Insurance Services; and

(c) Life Insurance Services; and

(d) Savings Services;

provided by each of the Participants in the ordinary course of their business and includes advice and services relating to or incidental to, those Services. Personal Line Insurance Services and Medical Insurance Services provided by a Subsidiary or Related Company of a General and Medical Insurance Participant shall, where that Subsidiary or Related Company is not itself a Participant, be deemed to have been provided by the General and Medical Insurance Participant. Superannuation Services provided by a Subsidiary or Related Company of a Life Insurance Participant shall, were that Subsidiary or Related Company not itself a Participant, be deemed to have been provided by the Life Insurance Participant;

"Subsidiary" means a subsidiary within the meaning of Sections 5 and 6 of the Companies Act 1993 (on the basis that the words "of whatsoever nature and wheresoever and whensoever incorporated or constituted" are inserted after the words "body corporate" where those last mentioned words appear in Section 5(3) of the Companies Act 1993) and, in addition, a company shall be deemed to be a subsidiary of another company if it is controlled by that other company;

"Superannuation Service" means a superannuation scheme registered in accordance with the Superannuation Schemes Act 1989;

"Terms of Reference" means the regulations established from time to time by the Board which constitute and govern the powers and duties of the Insurance and Savings Ombudsman (and, in particular, the complaints which he or she may consider);

"In writing" and "written" includes printing, lithography, photography, typewriting and all other modes of representing or reproducing words in an enduring visible form.

1.2 In these Rules unless the context otherwise requires:

(a) references to the singular number (including without limitation references to "individual", "Complainant" and "Participant") include the plural number and vice versa;

(b) references to dollar amounts are to amounts in New Zealand dollars;

(c) the word "person" includes a firm, body corporate, unincorporated association or an authority; and

(d) a reference to a statute (or to a provision of a statute) means the statute or provision as modified or amended and in operation for the time being, or any statute or provision enacted in lieu or in substitution thereof and includes any regulation or rule for the time being in force under the statute or provision.

1.3 Headings to these Rules do not affect their construction or interpretation.

RULE 2: Establishment of the Commission

There is hereby established a commission to be known as the "Insurance and Savings Ombudsman Commission."

RULE 3: Objects Duties and Powers of the Commission

3.1 The Commission shall:

(a) appoint an Insurance and Savings Ombudsman with power (on behalf of the Commission):

(i) to consider, subject to the Terms of Reference, complaints in connection with the provision within New Zealand of any of the Services by any Participant; and

(ii) to facilitate the resolution of such complaints whether by agreement, by the making of recommendations or Awards or by such other means as shall seem expedient;

(b) in the event that the Insurance and Savings Ombudsman is suspended, indisposed or otherwise prevented from carrying out his or her duties, appoint any person to act as deputy or substitute for the Insurance and Savings Ombudsman for such period of time and, subject to these Rules, on such terms and conditions as it shall think fit (and so that while such deputy or substitute shall hold office, these Rules shall apply to him or her, with any necessary alterations, in every respect as if he or she were the Insurance and Savings Ombudsman);

(c) subject to these Rules, give such assistance to the Insurance and Savings Ombudsman concerning the performance of his or her duties as it shall deem expedient;

(d) receive, consider and refer to the Board all recommendations from the Insurance and Savings Ombudsman for changes to the Terms of Reference pursuant to paragraph 7.9(a) of the Terms of Reference;

(e) receive, consider and refer to the Securities Commission, the Minister, any Nominated Industry Group or any other appropriate body as the case may require all recommendations from the Insurance and Savings Ombudsman in relation to statutes, regulations or codes pursuant to paragraph 7.9(b) or (c) of the Terms of Reference and to report to the body or organisation responsible for the administration of the Code and to the Securities Commission (in the case of breach or alleged breach of the LOA's Code of Business Practices for Life Insurance Companies) details of any breaches or alleged breaches of any Code reported by the Insurance and Savings Ombudsman pursuant to paragraph 7.11 of the Terms of Reference;

(f) monitor these Rules, the Terms of Reference and the operation of the Scheme (generally and by way of the review procedure set out in Rule 22) and from time to time recommend to the Board such amendments to these Rules or the Terms of Reference as the Commission thinks fit;

(g) at its Annual Meeting receive and, if thought fit, approve the annual report of the Insurance and Savings Ombudsman for the period corresponding to the financial year of the Commission last ended;

(h) from time to time, and not less frequently than once in each year, consider and, if thought fit, approve a financial budget prepared by the Insurance and Savings Ombudsman, each such budget to be prepared in respect of a period corresponding to a financial year of the Commission;

(i) in relation to each financial year of the Commission, prepare or procure the preparation of every document required to be comprised in the accounts of the Commission in respect of that period;

(j) levy, charge, collect and receive Levies from Participants and expend the same in furthering all or any of the objects of the Commission or providing for the expenses of the Commission;

(k) pay all expenses preliminary or incidental to the formation of the Scheme.

3.2 The Commission may:

(a) collaborate with government or other authorities (whether national, local or otherwise) or any person on all matters relating to and affecting the provision of the Services and the settlement of complaints in relation thereto;

(b) taking into consideration the financial budget for the Commission, retain or employ advisers or employees in connection with the objects of the Commission and to pay them such fees or remuneration as may be thought expedient;

(c) make payment of reasonable and proper remuneration and out of pocket expenses to any Member;

(d) invest the moneys of the Commission not immediately required in such manner as may be thought expedient;

(e) take on lease or otherwise take possession of any real property, and in particular any land, buildings, offices and any rights or privileges necessary or convenient for the purposes of the Commission, and to manage, demise, let, dispose of, or otherwise deal with all or part of any such property, and to alter, improve and maintain any premises which may be from time to time be required for the purposes of the Commission and to purchase, take on lease or exchange, hire or otherwise acquire any personal property and to sell, dispose of, turn to account or otherwise deal with any such property;

(f) establish and support or aid in the establishment and support of associations, institutions, funds and trusts for the purpose of providing pensions, superannuation, insurance, retirement or other benefits to employees or ex-employees of the Commission or their dependants;

(g) do all such other lawful things as may be incidental to or conducive to the attainment of any of the above objects.

3.3 The Commission shall have the power to suspend or to remove the Insurance and Savings Ombudsman at any time in its absolute discretion.

3.4 The Commission may delegate any of its powers, duties or functions to one or more committees consisting of Members, officers and/or employees of the Commission and/or such other persons as the Commission shall determine. Any such committee shall exercise the powers so delegated in accordance with any directions, regulations, rules or restrictions (including, without limitation, any regulation specifying a quorum for the transaction of business by it) that may from time to time be imposed on it by the Commission. The meetings and proceedings of such a committee shall be governed (with any necessary alterations) by the provisions of these Rules regulating the meetings and proceedings of the Commission (excluding the provisions as to the quorum for transaction of business which shall, in the absence of direction, rule, regulation or restriction made by the Commission to the contrary, be 50% of the members of the committee at the relevant time) so far as the same are applicable and are not superseded (either expressly or implicitly) by any direction, regulation, rule or restriction made by the Commission.

3.5 The Commission or any committee established by the Commission, may invite any person, whether a Participant or not, to attend any of its meetings for the purpose of consultation.

RULE 4: Application of Income

4.1 The income and property of the Commission, from wherever derived, shall, subject as hereinafter provided, be applied solely towards the promotion of the objects of the Commission as set out in these Rules, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to the Participants provided that nothing herein shall prevent the payment in good faith of reasonable and proper remuneration and out of pocket expenses to any Member or employee of the Commission or to any Participant, in return for any services actually rendered to the Commission, or for any information or advice supplied, nor prevent the payment of interest on money lent, or payment of a reasonable and proper rent for premises demised or let to the Commission by any Participant.

4.2 The Commission shall allocate from its income such funds as are necessary to meet the costs and expenses of the Office of the Insurance and Savings Ombudsman, in accordance with the budget(s) approved in accordance with Rule 3.1(h).

RULE 5: Contribution on Winding-Up

Every Participant undertakes to contribute to the assets of the Commission in the event of the Commission being wound up during the time in which it is a Participant or within one year afterwards, for payment of the debts and liabilities of the Commission contracted before the time at which it ceased to be a Participant and for the costs, charges and expenses of winding up, such contribution to be proportionate to the amount of any Levy paid or payable pursuant to Rule 10.3 during the First Period or 10.5 for any subsequent year by each such Participant in the financial year of the Commission last ended before the commencement of such winding up.

RULE 6: Distribution of Assets on Winding-Up

If upon the winding up or dissolution of the Commission there remains, after the satisfaction of all its debts and liabilities, any property whatsoever it shall be distributed to and amongst the Participants at the date of such winding up proportionately according to the amount of any Levy paid or payable pursuant to Rule 10.3 during the First Period or 10.5 for any subsequent year by each such Participant in the financial year of the Commission last ended before the commencement of such winding up.

RULE 7: Publicising of the Scheme

Each Participant will have its own internal complaints procedures (set up in accordance with the relevant Codes where applicable) and undertakes to the Commission to publicise the existence and availability of those procedures and the existence, availability and other details of the Scheme to its customers.

RULE 8: Membership of the Commission

8.1 The Commission shall comprise:

(a) a Chairperson appointed in accordance with Rule 11.14;

(b) two representatives of the Participants, appointed by the Board;

(c) two persons nominated by the Crown by and through the Minister.

8.2 The persons nominated to be Members pursuant to Rule 8.1(c) shall be persons who have an interest in and are knowledgeable about consumer interests relating to any aspect of the Scheme.

8.3 Members shall be appointed for a period not exceeding two years. A person may be re-appointed at the expiry of any period of office but so that he or she shall not hold office for a period greater than six consecutive years.

8.4 Notwithstanding Rule 8.3, a Member shall automatically cease to be a Member if he or she:

(a) becomes bankrupt or makes any arrangement or composition with his or her creditors generally; or

(b) becomes of unsound mind, or becomes subject to an order under the Protection of Personal and Property Rights Act 1988; or

(c) has for more than six months been absent without permission of the Chairperson (or in the case of the Chairperson, the majority of the other Members) from the meetings of the Commission held during that period; or

(d) is convicted of an indictable offence; or

(e) commits any act of dishonesty whether relating to the Commission or otherwise or is guilty of serious misconduct or any conduct tending to bring the Commission or him or herself into serious disrepute; or

(f) is removed by notice in writing to the Member from:

(i) in the case of the Chairperson, the Board;

(ii) in the case of any other Member, the person or body who appointed that Member or nominated that Member for appointment; or

(g) resigns by notice in writing to the Commission.

8.5 Upon a Member ceasing to be a Member pursuant to Rule 8.4 the resulting vacancy shall be filled:

(a) in the case of the Chairperson, by appointment in accordance with Rule 11.14;

(b) in the case of any other Member, by the nomination of the person entitled to appoint that Member pursuant to Rule 8.1.

RULE 9: Entitlement to and Cessation of Participation

9.1 Each Eligible Body shall be entitled, subject to Rule 9.3, to be a Participant. An Eligible Body shall become a Participant upon:

(a) execution by that Eligible Body of the Register. The Register shall consist of one or more documents in the form annexed to these Rules each executed by or on behalf of one or more Participants; and

(b) payment by that Eligible Body of the entry fee (if any) prescribed pursuant to Rule 10.4.

9.2 The participation of any Participant may at any time be terminated by the Commission:

(a) if that Participant ceases to carry on or provide any of the Services in New Zealand; or

(b) where that Participant provides Personal Line Insurance Services, if that Participant ceases to be a member of the IC; or

(c) where that Participant provides Medical Insurance Services, if that Participant ceases to be a member of the HIA; or

(d) upon the expiry of twelve months notice of withdrawal given by such Participant; or

(e) if that Participant has not paid any Levy demanded by the Commission pursuant to Rule 10.10 within three months after demand is made; or

(f) if that Participant has failed to comply with an Award made by the Insurance and Savings Ombudsman, in accordance with the Terms of Reference.

9.3 Cessation of participation of a Participant:

(a) shall not entitle the Participant to repayment of the whole or any part of any Levy previously paid by it;

(b) shall be without prejudice to the Participant's liability to pay any Levy which has become due and payable before such cessation;

(c) shall be without prejudice to the Participant's liability to contribute to the assets of the Commission upon winding up of the Commission in accordance with Rule 5; and

(d) shall be without prejudice to the Participant's obligations in respect of any dispute referred to the Insurance and Savings Ombudsman before

such cessation.

9.4 Upon cessation of participation of a Participant who is, or upon receipt of notice of withdrawal from a Participant who is, an Authorised Life Insurance Company the Commission shall immediately give notice of that cessation or withdrawal to the Securities Commission.

9.5 Upon cessation of participation of a Participant who is, or upon receipt of notice of withdrawal from a Participant who is, a member of the IC the Commission shall immediately give notice of that cessation or withdrawal to the IC.

RULE 10: Levies on Participants

10.1 The Commission may at any time and from time to time obtain money for the purposes of the Commission by raising a Levy from each Participant.

10.2 The Commission may raise from each Participant who is a Participant on the day three months after the adoption of these Rules, a special Levy being in aggregate an amount no greater than the amount of the costs incurred by the Commission and its promoters in the period prior to the adoption of these Rules and by the Commission and the Office of the Insurance and Savings Ombudsman in the period of three months following such adoption of these Rules, in respect of the preparation and adoption of these Rules and the Terms of Reference and in respect of all other costs related to the establishment of the Scheme, the appointment and establishment of the Commission, the appointment of the Insurance and Savings Ombudsman and the establishment of the Office of the Insurance and Savings Ombudsman. The amount of any such special Levy to be charged to each Participant in its own right shall be determined in the same manner as the apportionment of the Levies charged in the First Period pursuant to Rule 10.3.

10.3 Subject to Rule 10.4, the share of the aggregate amount of each Levy raised in the First Period to be charged to each Participant in its own right shall be:

(a) in the case of a General and Medical Insurance Participant, a share of 50% of the total Levy of the Commission, apportioned between the General and Medical Insurance Participants in the following manner:

(i) the sum of One Thousand Dollars ($1,000.00) from each General and Medical Insurance Participant provided that where Personal Line Insurance Services or Medical Insurance Services are provided by a Subsidiary or Related Company of a General and Medical Insurance Participant and that Subsidiary or Related Company is not itself a Participant, that General and Medical Insurance Participant shall pay, in addition to the amount referred to above, the sum of One Thousand Dollars ($1,000.00) for each such Subsidiary or Related Company;

(ii) a share of the balance of the 50% of the total levy of the Commission, apportioned between the General and Medical Insurance Participants in the same proportions as the Gross Written Premium derived by each General and Medical Insurance Participant from provision (or deemed provision) of the Personal Line Insurance Services and/or Medical Insurance Services in the preceding financial year bears to the total Gross Written Premium derived by all General and Medical Insurance Participants from provision (or deemed provision) of the Personal Line Insurance Services and/or Medical Insurance Services in that financial year. In this Rule 10.3(a)(ii), the term "Gross Written Premium" shall mean total amount derived by a Participant on all contracts for provision (or deemed provision) of Personal Line Insurance Services and/or Medical Insurance Services entered into by that Participant after deduction of all returned or rebated premium amounts but without deduction of any amounts on account of commissions or brokerage.

(b) in the case of a Life Insurance and Savings Participant a share of 50% of the total Levy of the Commission, apportioned between the Life Insurance and Savings Participants in the following manner:

(i) the sum of Two Thousand Dollars ($2,000.00) from each Life Insurance Participant;

(ii) the Sum of One Thousand Dollars ($1,000.00) from each Savings Participant;

(iii) a share of the balance of the 50% of the total levy of the Commission, apportioned between the Life Insurance Participants in the same proportions as the total number of Contracts held by each Life Insurance Participant at the end of the preceding financial year bears to the total number of Contracts held by all Life Insurance Participants at the end of that financial year. In this Rule 10.3(b)(iii), the term "Contract" shall mean each separate agreement for the provision (or deemed provision) of Life Insurance Services or Superannuation Services provided that where any agreement provides for provision (or deemed provision) of Life Insurance Services or Superannuation Services to more than one person that agreement shall be treated in calculation of the Life Insurance Participant's Levy proportion as being a separate Contract with each person to whom Life Insurance Services or Superannuation Services are provided (or deemed to be provided) and for the avoidance of doubt where a Life Insurance Participant provides (or is deemed to provide) Life Insurance Services or Superannuation Services to the same person pursuant to more than one agreement each such agreement shall be treated in calculation of the Life Insurance Participant's Levy proportion as being a separate Contract;

(c) In the case of each Savings Participant, an additional levy (of an amount to be determined in advance by the Commission) for each complaint accepted for consideration by the Insurance and Savings Ombudsman in respect of each Savings Participant. For the purpose of calculating any such levy, a complaint shall be said to have been accepted for consideration by the Insurance and Savings Ombudsman where the Insurance and Savings Ombudsman has determined that the complaint is within his or her jurisdiction pursuant to paragraph 4.1 of the Terms of Reference, has given a copy of or details of the complaint to the Participant concerned pursuant to paragraph 4.2(a) of the Terms of Reference and the Participant concerned has not successfully disputed or appealed the Insurance and Savings Ombudsman's determination as to

jurisdiction pursuant to paragraph 4.1 of the Terms of Reference;

Provided That where a Participant is both a General and Medical Insurance Participant and a Life Insurance and Savings Participant, the share of the aggregate amount of each Levy to be charged to that Participant shall be calculated by reference to both paragraph (a) and paragraphs (b) and (c) above.

10.4 Where a Participant becomes a Participant after the date three months after the adoption of these Rules, that Participant shall pay such entry fee as may be prescribed by the Commission and such entry fee (if any) shall be applied in accordance with Rule 4.

10.5 Subject to Rules 10.4 and 10.6, the amount of each Levy raised in respect of each financial year commencing on or after the expiry of the First Period to be charged to each Participant in its own right shall be the aggregate of:

(a) a share of 75% of the total Levy of the Commission, apportioned in the same proportion as the number of complaints accepted for consideration by the Insurance and Savings Ombudsman concerning that Participant in the preceding financial year, bears to the total number of complaints accepted for consideration by the Insurance and Savings Ombudsman in the preceding financial year. For the purposes of calculating any such share, a complaint shall be said to have been accepted for consideration by the Insurance and Savings Ombudsman where the Insurance and Savings Ombudsman has determined that the complaint is within his or her jurisdiction pursuant to paragraph 4.1 of the Terms of Reference, has given a copy of or details of the complaint to the Participant concerned pursuant to paragraph 4.2(a) of the Terms of Reference and the Participant concerned has not successfully disputed or appealed the Insurance and Savings Ombudsman's determination as to jurisdiction pursuant to paragraph 4.1 of the Terms of Reference; and

(b) in the case of a General and Medical Insurance Participant, a share of 12.5% of the total Levy of the Commission, apportioned between the General and Medical Insurance Participants in the following manner:

(i) the sum of One Thousand Dollars ($1,000.00) from each General and Medical Insurance Participant provided that where Personal

Line Insurance Services or Medical Insurance Services are provided by a Subsidiary or Related Company of a General and Medical Insurance Participant and that Subsidiary or Related Company is not itself a Participant, that General and Medical Insurance Participant shall pay, in addition to the amount referred to above, the sum of One Thousand Dollars ($1,000.00) for each such Subsidiary or Related Company;

(ii) a share of the balance of the 12.5% of the total levy of the Commission, apportioned between the General and Medical Insurance Participants in the manner set out in Rule 10.3(a)(ii).

(c) in the case of a Life Insurance and Savings Participant a share of 12.5% of the total Levy of the Commission, apportioned between the Life Insurance and Savings Participants in the following manner:

(i) the sum of One Thousand Dollars ($1,000.00) from each Life Insurance Participant;

(ii) the sum of Five Hundred Dollars ($500.00) from each Savings Participant;

(iii) a share of the balance of the 12.5% of the total levy of the Commission, apportioned between the Life Insurance Participants in the manner set out in Rule 10.3(b)(iii).

Provided That where a Participant is both a General and Medical Insurance Participant and a Life Insurance and Savings Participant, the share of the aggregate amount of each Levy to be charged to that Participant shall be calculated by reference to both paragraphs (b) and (c) above.

10.6 During the third full financial year of the Scheme, the Board shall review the method of calculating the amount of Levy to be charged to Participants pursuant to this Rule 10 and the Board shall, pursuant to Rule 18, seek from

Participants recommendations as to amendments to this Rule 10 as shall be required to put in place in the fourth and subsequent financial years of the Scheme a fair system for apportionment of the costs of the Commission amongst the Participants.

10.7 Each Participant shall at the commencement of each financial year supply to the Commission a certificate from that Participant's chief executive, in such form as the Commission shall determine, containing such information concerning the business of the Participant as may be necessary to establish any figure or statistic to be used in calculation or apportionment of any Levy. The Nominated Industry Groups shall supply and are authorised by the Participants to supply to the Commission such other industry statistics or information as may be held by the Nominated Industry Groups which may be required by the Commission to verify any information provided by a Participant or establish any figure or statistic to be used in calculation or apportionment of any Levy. The Commission's calculation of the amount of any Levy payable by a Participant in its own right shall, in the absence of manifest error, be final and binding upon the Participant.

10.8 No Participant shall obtain or be entitled to obtain from the Commission or the Board or any member, officer or employee thereof details of, or any information which, may disclose the amount, method of calculation or any figure or statistics used in the calculation of any other Participant's Levy or the number of complaints accepted for consideration by the Insurance and Savings Ombudsman concerning any other Participant.

10.9 The Commission may estimate in advance the total amount of all Levies payable by a Participant during a financial year and may require payment in such instalments and at such times as the Commission determines. All necessary adjustments, credit or further payments shall be made after all the statistics and returns necessary to calculate or apportion the Levies are available to the Commission.

10.10 The Commission shall serve upon each Participant a notice requesting payment of any Levy to be paid by that Participant, giving particulars of the total amount of the Levy to be paid to the Commission and the amounts payable by

that Participant.

10.11 Each Levy will be due and payable by each Participant four weeks after the notice requesting it has been served by the Commission.

RULE 11: Proceedings of the Commission

Commission Meetings

11.1 The Members may meet together for the despatch of business and adjourn and otherwise regulate their meetings as they think fit.

11.2 Three Members of the Commission may at any time, and the Secretary must on the requisition of three Members, convene a meeting of the Commission.

Questions Decided by Majority

11.3 Subject to these Rules, questions arising at a meeting of the Commission are to be decided by a majority of votes of Members (or Alternate Members) present and voting and any such decision is for all purposes deemed a decision of the Commission.

11.4 An Alternate Member of the Commission present at any meeting of the Commission has one vote for each Member for which he or she is an alternate member and if he or she is a Member also has one vote as a Member.

11.5 In the event of there being an equality of votes, the Chairperson of the meeting, in addition to his or her deliberative vote, shall have a casting vote.

Alternate Members of the Commission

11.6 One Alternate Member of the Commission shall be appointed for each Member of the Commission (other than the Chairperson) at the same time and in the same manner as each Member of the Commission is appointed.

11.7 An Alternate Member is entitled to notice of all meetings of the Commission and, if the Member is not present at such a meeting, is entitled to attend and vote in his or her stead.

11.8 An Alternate Member may exercise any powers that the Member may exercise and in the exercise of any such power by the Alternate Member he or she is an officer of the Commission and not deemed to be an agent of the Member.

11.9 An Alternate Member is subject in all respects to the conditions attaching to the Members generally except that he or she is not entitled to any remuneration otherwise than from the Member for whom he or she has been appointed as Alternate Member.

11.10 The appointment of an Alternate Member may be terminated at any time by the appointer notwithstanding that the period of the appointment of the Alternate Member has not expired. If the Member for whom he or she has been appointed an Alternate Member ceases to be a Member, then the appointment of the Alternate Member shall continue until a replacement for the former Member is appointed, at which time the appointment of the Alternate Member shall be either terminated by notice in accordance with this Rule 11.10 or re-confirmed by appointment of the Alternate Member as Alternate Member for the replacement Member in accordance with Rule 11.6.

11.11 The termination of an appointment of an Alternate Member must be effected by a notice in writing signed by the appointer and served on the Commission.

11.12 The notice of termination of the appointment of an Alternate Member may be served on the Commission by serving it on the Secretary of the Commission or by forwarding it by facsimile transmission or other means of electronic written communication and in the case of a facsimile transmission or other means of electronic written communication, the appearance at the end of the message of the name of the Member terminating the appointment is sufficient evidence that the Member has signed the notice.

Quorum for Members Meetings of the Commission

11.13 At all meetings of the Commission including Annual Meetings, the number of Members whose presence (either in person or by representation by an Alternate Member) is necessary to constitute a quorum is three provided there is present at any such meeting a Member appointed pursuant to Rule 8.1(b) (or an Alternate Member appointed for such a Member) and a Member appointed pursuant to Rule 8.1(c) (or an Alternate Member appointed for such a Member).

Chairperson of the Commission

11.14 (a) The first Chairperson of the Commission shall be appointed as both Chairperson and a Member by the Board after consultation with the Members appointed pursuant to Rules 8.1(c). The second and each subsequent Chairperson of the Commission shall be appointed as both Chairperson and a Member by the Members, including the retiring Chairperson provided that where the retiring Chairperson has ceased to be a Member by virtue of the operation of Rule 8.4 (a)-(f) (inclusive) or by reason of the death of the retiring Chairperson, the retiring Chairpersons vote in respect of the appointment of the incoming Chairperson shall be exercised by a representative of the Board.

(b) The Chairperson shall be appointed to hold that office for the period or periods as set out in Rule 8.3.

(c) The Board and each Participant shall use their best endeavours to ensure that no person is appointed as the Chairperson who has a material interest or a past association or relationship which may conflict with his or her duties as Chairperson.

11.15 When a meeting of the Commission is held and the Chairperson is not present within ten minutes from the time appointed for the meeting the Members present must elect one of their number to be Chairperson of that meeting.

Written Resolution by the Commission

11.16 A resolution in writing signed or assented to by letter, facsimile or any other electronic written communication or printed message by all the Members (or by

their respective Alternate Members) shall be deemed to have been passed as if it had been passed at a meeting of the Commission duly convened and held.

11.17 For the purposes of Rule 11.16, two or more separate documents in identical form signed by one or more Members (or Alternate Members) are together deemed to constitute one document containing a statement in those terms signed by those Members (or Alternate Members) on the respective dates on which the separate documents are signed or otherwise assented to. A letter, telegram, facsimile or other electronic written communication or printed message shall be adequate and conclusive proof of such assent.

Commission Meeting

11.18 For the purposes of these Rules, a meeting of the Commission means:

(a) a meeting of the Members and/or Alternate Members assembled in person on the same day and at the same time and place; or

(b) the Members and/or Alternate Members communicating with each other by any technological means of oral or oral and visual communications by which they are able simultaneously to hear each other and to participate in discussion notwithstanding that they (or one or more of them) are not physically present at the same place;

and a Member or Alternate Member participating in a meeting pursuant to Rule 11.18(b) is deemed to be present (including for the purpose of constituting a quorum) and entitled to vote at the meeting.

Validity of Acts of Members

11.19 All acts done by any meeting of the Commission or by any person acting as a Member are, notwithstanding that it is afterwards discovered that there was some defect in the appointment of a person to be a Member, or to act as a Member, or that a person so appointed was disqualified, valid as if that person had been duly appointed and was qualified to be a Member.

11.20 (a) Except as otherwise provided by these Rules, neither a Member nor an Alternate Member shall vote at a meeting of the Commission on any resolution concerning a matter in which he or she has, directly or indirectly, an interest which is material and which conflicts or may conflict with the interests of the Commission.

(b) A Member or Alternate Member shall not be counted in the quorum present at a meeting in relation to a resolution on which he or she is not entitled to vote.

(c) The Commission may by a majority of votes suspend or relax to any extent, either generally or in respect of any particular matter, any provision of the Rules prohibiting a Member or Alternate Member from voting at a meeting of the Commission. All Members shall be entitled to vote at a meeting of the Commission on a resolution put pursuant to this Rule 11.20(c) and Rule 11.20(a) shall have no application to such a resolution.

(d) If a question arises at a meeting of the Commission as to the right of a Member or Alternate Member to vote, the question may, before the conclusion of the meeting, be referred to the Chairperson and his or her ruling in relation to a Member or Alternate Member other than him or herself shall be final and conclusive. The Chairperson's ruling in relation to him or herself shall be subject to approval of a majority of the other Members.

11.21 Members, including the Chairperson, shall each be remunerated by the Commission on such terms and conditions as the Commission shall following consultation with the Board, determine in respect of each Member and the Chairperson provided that any Member, including the Chairperson, may elect not to receive such payment. Members, including the Chairperson, shall be entitled to be paid such travelling, hotel and other expenses as are reasonably and properly incurred by them in connection with the business of the Commission. Alternate members shall be remunerated only in accordance with Rule 11.9 but shall be entitled to be paid such travelling, hotel and other expenses as are reasonably and properly incurred by them acting in the place of any Member in

connection with the business of the Commission.

11.22 Subject only to Rule 11.21, a Member may not hold any other office of profit under the Commission nor, either personally or by his or her firm, act in a professional capacity for the Commission.

Minutes

11.23 The Commission must cause minutes to be made:

(a) of the names of Members present at all meetings of the Commission; and

(b) of all proceedings of Annual Meetings and of other meetings of the Commission;

and cause those minutes to be entered in the minute book within one month after the relevant meeting is held.

11.24 The minutes referred to in Rule 11.23 must be signed by the Chairperson of the meeting at which the proceedings took place or by the Chairperson of the next succeeding meeting.

RULE 12: Secretary

Appointment of Secretary

12.1 The Commission shall appoint the Insurance and Savings Ombudsman or one of the other employees of the Commission to act as Secretary to the Commission on such terms, at such a remuneration and upon such conditions as it thinks fit.

Suspension and Removal of Secretary

12.2 The Commission shall have the power to suspend or remove the Secretary at any time in its absolute discretion.

Powers and Duties of Secretary

12.3 The Commission may vest in the Secretary such powers, duties and authorities as it may from time to time determine and the Secretary must accept all such powers and authorities subject at all times to the control of the Commission.

Secretary to Attend Meetings

12.4 The Secretary is entitled to attend all Annual and other meetings of the Commission and may be heard on any matter except where the Secretary has, directly or indirectly, a personal interest in the business of that meeting of the Commission. The Secretary shall not be entitled to vote at any meeting of the Commission.

RULE 13: Inspection of Records

The Commission may determine whether and to what extent, and at what times and places and under what conditions, the accounting records and other documents of the Commission or any of them will be opened to the inspection of Participants, and a Participant does not have the right to inspect any document of the Commission except as provided by law or authorised by the Commission.

RULE 14: Annual Meetings

14.1 The Commission must, in addition to any other meeting held by it, hold a meeting to be called the Annual Meeting at least once in every calendar year and within three months of the end of each of the Commission's financial years, and shall at that meeting receive the annual report of the Insurance and Savings Ombudsman, and approve a financial budget for the Commission and the Office of the Insurance and Savings Ombudsman for the succeeding year.

14.2 In addition to the Members (and where applicable the Alternate Members), the following persons shall be entitled to attend and speak (but shall not be

entitled to vote) at any Annual Meeting of the Commission:

(a) the Insurance and Savings Ombudsman;

(b) the Secretary;

(c) each Participant, through a representative appointed by that Participant;

(d) each Nominated Consumer and Community Group, through a representative appointed by that Nominated Consumer and Community Group;

(e) the Minister, either personally or through a representative;

(f) the Auditor;

(g) each member of the Board; and

(h) each Nominated Industry Group, through a representative appointed by that Nominated Industry Group.

14.3 No other person shall be entitled to attend any Annual Meeting unless expressly authorised by the Commission.

14.4 The Commission shall, at its Annual Meeting, appoint an Auditor to prepare an audit certificate for the annual financial statements of the Commission in the succeeding year. Such appointment shall be effective from the end of the Annual Meeting and expire at the next succeeding Annual Meeting. The Board shall appoint the Auditor for the period up to the first Annual Meeting.

RULE 15: Financial

15.1 The Commission shall:

(a) cause proper financial records to be kept for the activities of the Commission and the Office of the Insurance and Savings Ombudsman;

(b) cause financial statements to be prepared at such intervals as the Commission shall determine;

(c) cause annual audited financial statements to be prepared for presentation at the Annual Meeting and for inclusion in the Annual Report;

(d) have such bank accounts as it deems necessary, and shall operate these bank accounts in such manner as the Commission determines from time to time.

15.2 All cheques, promissory notes, bankers' drafts, bills of exchange and other negotiable instruments, and all receipts for money paid to the Commission, shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be, in such manner and by such persons as the Commission determines from time to time.

RULE 16: The Insurance and Savings Ombudsman

16.1 (a) The Insurance and Savings Ombudsman shall be appointed by the Commission to hold office with the Commission (subject to paragraph (b) of this Rule) for a period of two years and at such remuneration and on such terms and conditions of engagement as the Commission shall think fit. The person holding the office of Insurance and Savings Ombudsman may be reappointed at the expiry of his or her period of office. The Insurance and Savings Ombudsman may be suspended or removed from office at any time in accordance with Rule 3.3.

(b) The Insurance and Savings Ombudsman shall neither be an employee of, nor hold any office or position with a Participant, nor shall he or she, either personally or by his or her firm, act in a professional capacity for the Commission or any Participant.

(c) The Insurance and Savings Ombudsman shall be entitled to be paid such travelling, hotel and other expenses as are reasonably and properly incurred by him or her in connection with the business of the Commission or the Office of the Insurance and Savings Ombudsman.

(d) The Insurance and Savings Ombudsman shall receive notice of and shall be entitled to attend and/or participate in (but not to vote at) every meeting of the Commission, except where the Insurance and Savings Ombudsman has, directly or indirectly, a personal interest in the business of that meeting of the Commission.

16.2 The powers and duties of the Insurance and Savings Ombudsman shall be as set out in the Terms of Reference.

16.3 Each Participant shall be deemed by virtue of execution of the Register to have undertaken to the Commission (but not to any other Participant) to be bound by the Rules, the Terms of Reference and by any Award which, in accordance with the Terms of Reference, is made by the Insurance and Savings Ombudsman against it and accepted by the Complainant. Services provided by a Subsidiary or Related Company of a Participant shall, where that Subsidiary or Related Company is not itself a Participant, be deemed to have been provided by the Participant and each Participant shall ensure and if necessary, procure that each such Subsidiary or Related Company complies fully with the Rules, Terms of Reference and any Award. Where such a Subsidiary or Related Company of a Participant fails to comply with an Award, the Participant shall be bound by and shall comply with that Award.

16.4 The Insurance and Savings Ombudsman shall automatically be removed from office if he or she:

(a) becomes bankrupt or makes any arrangement or composition with his or her creditors generally; or

(b) becomes of unsound mind, or becomes subject to an order under the Protection of Personal and Property Rights Act 1988; or

(c) resigns by notice in writing to the Commission; or

(d) is convicted of an indictable offence; or

(e) commits any act of dishonesty whether relating to the Commission or otherwise or is guilty of any serious misconduct or conduct tending to bring the Commission, the Scheme or him or herself into serious disrepute; or

(f) following a medical examination by two medical practitioners made at the direction of the Commission or at the initiative of the Insurance and Savings Ombudsman, is declared by both of the examining medical practitioners to be permanently incapable of performing his or her duties; or

(g) shall absent him or herself from his or her duties without the permission of the Commission and the Commission has resolved to terminate his or her appointment; or

(h) by reason of illness or accident, is incapacitated from attending to his or her duties for more than an aggregate period of two months in any period of twelve consecutive months and the Commission has resolved to terminate his or her appointment.

RULE 17: Confidentiality

17.1 Except as provided in Rule 17.2 or as required by law or as properly and reasonably required in connection with any legal proceedings instituted by or against the Commission or any of its officers or any of the Members, no Member or Alternate Member shall disclose to any person (other than another Member or Alternate Member or the Insurance and Savings Ombudsman) any information concerning a complaint referred to the Insurance and Savings Ombudsman from which it would or might be possible to identify the Complainant or any Participant named in a complaint or any other information or matter of a confidential nature or any matter relating to the handling of

complaints by the Insurance and Savings Ombudsman.

17.2 Rule 17.1 shall not, subject to the Terms of Reference, prohibit the disclosure of any information to any Participant named in a complaint.

RULE 18: Changes to the Rules

18.1 Prior to making any alteration or addition to or any deletion or replacement of these Rules or Terms of Reference, the Board shall give notice of the proposed alteration, addition, deletion or replacement to and consult with each Participant, the Nominated Consumer and Community Groups, the Nominated Industry Groups, the Minister and the Securities Commission.

18.2 These Rules and the Terms of Reference may at any time be altered, added to, deleted or replaced by the Board provided that the Board has undertaken consultation pursuant to Rule 18.1 and provided further the Board shall give sixty clear days notice of its intention to do so to every Member, every Alternate Member and the Insurance and Savings Ombudsman.

RULE 19: Notices

19.1 A notice may be given by the Commission to any Participant or other person receiving notice under these Rules either by serving it personally or by sending it by post, facsimile transmission or any other means of electronic written communication to such Participant or other person at the address as shown in the Register or the address supplied by such Participant or other person to the Commission for the giving of notices to such Participant or other person.

19.2 Where a notice is sent by post, service of the notice is deemed to be effected by properly addressing, prepaying, and posting a letter containing a notice, and the notice shall be deemed to have been served two days after the date of its posting.

19.3 Where a notice is sent by facsimile transmission, or other means of electronic written communication service of the notice is deemed to be effected by properly addressing the facsimile transmission or other means of electronic written communication and the notice is deemed to have been served on the date of its despatch.

19.4 Notice of every Annual Meeting of the Commission must be given in a manner authorised by Rule 19.1 to:

(a) each Member and Alternate Member of the Commission;

(b) the Insurance and Savings Ombudsman;

(c) the Secretary;

(d) each Participant;

(e) each Nominated Consumer and Community Group;

(f) the Minister;

(g) the Auditor;

(h) each member of the Board; and

(i) each Nominated Industry Group.

19.5 No other person is entitled to receive notices of Annual Meetings.

RULE 20: Realisation of Assets on Winding Up

If the Scheme is wound up the Commission may proceed to realise the property of the Commission or set such value as it considers fair upon any property to enable it to satisfy any outstanding debts or liabilities and to divide the then remaining property to and among Participants in accordance with Rule 6.

RULE 21: Indemnity

Every Member, Alternate Member, the Insurance and Savings Ombudsman and every agent, officer or employee of the Commission is hereby indemnified out of the property of the Commission against any liabilities incurred by him or her in his or her capacity as Member, Alternate Member, Insurance and Savings Ombudsman or agent, officer or employee, notwithstanding any irregularity or informality in his or her appointment, arising out of or pursuant to the lawful activities of the Commission except that such indemnity shall not extend to protect such Member, Alternate Member, Insurance and Savings Ombudsman, agent, officer or employee from any damage or loss arising out of wilful neglect, default or dishonesty on their part.

RULE 22: Review of the Scheme

22.1 The Commission shall in the third year following adoption of these Rules and at intervals of not more than five years thereafter, conduct a public review of the operation of the Scheme and of the Terms of Reference. The initial public review shall be conducted at a time and in a manner that ensures that the report of the Review Committee is available to the Retirement Commissioner for consideration in the initial periodic report completed pursuant to Section 22 of the Retirement Income Act 1993.

22.2 For the purposes of the review the Commission shall appoint a Review Committee which shall consist of:

(a) a chairperson appointed by the Board in consultation with the Commission, who shall be chairperson of the Review Committee;

(b) two representatives of the Participants, nominated by the Board;

(c) two representatives of the Nominated Consumer and Community Groups, nominated by the Minister;

(d) a representative of the Minister, nominated by the Minister.

No person who is a Member, Alternate Member, Insurance and Savings Ombudsman or agent, officer or employee of the Commission shall be appointed to the Review Committee.

22.3 The Review Committee shall determine the procedures and timetable to be adopted in the review but shall ensure that submissions and comments regarding the operation of the Scheme are invited from:

(a) each Participant;

(b) each Member;

(c) each Nominated Industry Group;

(d) each Nominated Consumer and Community Group;

(e) the Institute;

(f) the Minister;

(g) the Insurance and Savings Ombudsman;

(h) the Securities Commission;

(i) the general public; and

(j) any other person or group the Review Committee considers appropriate.

22.4 On completion of its review, the Review Committee shall prepare and present to the Commission a written report regarding the operation of the Scheme. The report shall include such recommendations as the Review Committee thinks appropriate or desirable for the more efficient or improved operation of the Scheme and may include recommendations as to:

(a) improving publicity and access to the Scheme;

(b) desirable amendments to the Terms of Reference;

(c) improvements to the procedures and practices adopted by the Insurance and Savings Ombudsman; and

(d) improvements to any other aspect of the operation of the Scheme.

22.5 The Commission shall arrange publication of the Review Committee's report and shall ensure that copies are made available to all those persons listed in Rule 22.3(a) - (h) and all other persons who have made a submission or comment to the Review Committee. The Commission shall consider the Review Committee's report at the next succeeding meeting of the Commission. The contents of the Review Committee's report shall also be discussed at the next succeeding Annual Meeting.

RULE 23: The Board

23.1 There shall also be established a Board whose sole object shall be to perform those functions ascribed to it in these Rules being:

(a) approval of Nominated Industry Groups pursuant to Rule 1;

(b) appointment of two Members pursuant to Rule 8.1(b) and two Alternate Members pursuant to Rule 11.6;

(c) appointment of the first Chairperson pursuant to Rule 11.14;

(d) appointment of two representatives to the Review Committee pursuant to Rule 22.2(b);

(e) appointment of the Chairperson of the Review Committee pursuant to Rule 22.2(a);

(f) review of Rule 10.5 pursuant to Rule 10.6;

(g) consultation concerning Members' remuneration pursuant to Rule 11.21;

(h) appointment of the first Auditor pursuant to Rule 14.4;

(i) amending the Rules and Terms of Reference pursuant to Rule 18.

The Board shall have all powers necessary to complete those functions but shall have no other object or powers. The Commission shall provide such services and assistance to the Board as may be necessary to enable it to perform its functions and shall bear any costs incurred by the Board in performance of its functions.

23.2 The Board shall comprise:

(a) two persons nominated by the IC;

(b) two persons nominated by the HIA;

(c) two persons nominated by the LOA;

(d) two persons nominated by those of the Nominated Industry Groups representing Participants who provide Savings Services.

23.3 Board members shall be appointed for such period as the organisation, group or persons appointing the Board member shall determine and may from time to time and at any time be removed and/or replaced by the organisation, group or persons appointing the Board member.

23.4 The Board shall meet upon (or as soon as practicable after) adoption of these Rules and thereafter shall meet as and when necessary to perform the Board's functions but no less regularly than once in every period of twelve months. Meetings may be called by the chairperson of the Board or by requisition of not less than three members of the Board. Notice of meetings shall be given to

each Board member in accordance with Rule 19.1 which Rule shall be read as if references to the Commission were references to the chairperson of the Board and references to the Participants were references to members of the Board. It shall not be necessary to give notice of a meeting of the Board to any member for the time being absent from New Zealand. No person other than the members of the Board shall be entitled to receive notice of Board meetings or to attend, speak or vote at any Board meeting except at the express invitation of the Board.

23.5 The Board shall at its first meeting and thereafter at twelve monthly intervals, elect from amongst its members a chairperson who shall hold office for a period of twelve months, unless earlier removed or replaced by a resolution of the Board. Upon expiry of his or her term of appointment, a chairperson shall be eligible for re-election. If at the commencement of any meeting of the Board the chairperson of the Board is absent, the members present may elect a temporary chairperson from the members of the Board then present to be chairperson of that meeting.

23.6 The chairperson of the Board shall cause minutes to be made in books provided for that purpose:

(a) of all appointments of officers made by the Board;

(b) of the names of the members of the Board present at each meeting of the Board;

(c) of all resolutions and proceedings at all meetings of the Board.

23.7 The quorum necessary for the transactions of the business of the Board shall be six or all members of the Board, whichever is the lesser. The continuing members of the Board may act notwithstanding any vacancy in their body.

23.8 All acts done by the Board or by a member of the Board shall notwithstanding that it is afterwards discovered that there was some defect in the appointment of such person or that such person was not qualified to act, be as valid as if every such person had been duly appointed and was qualified to be a member of

the Board.

23.9 A resolution in writing signed or assented to by letter, facsimile or any other electronic written communication or printed message by all the members of the Board for the time being entitled to receive notice of a meeting of the Board, shall be as valid and effectual as if it had been passed at a meeting of the Board duly convened and held. Two or more separate documents in identical form signed by one or more members of the Board are together deemed to constitute one document containing a statement in those terms signed by those members of the Board on the respective dates on which the separate documents are signed or otherwise assented to.

23.10 For the purposes of these Rules, a meeting of the Board means:

(a) a meeting of the members of the Board assembled in person on the same day and at the same time and place; or

(b) the members of the Board communicating with each other by any technological means of oral or oral and visual communications by which they are able simultaneously to hear each other and to participate in discussion notwithstanding that they (or one or more of them) are not physically present at the same place;

and a member of the Board participating in a meeting pursuant to Rule 23.10(b) is deemed to be present (including for the purpose of constituting a quorum) and entitled to vote at the meeting.

23.11 A meeting shall nonetheless be validly called if all of the members of the Board for the time being entitled to receive notice shall, at or before the meeting, have agreed in writing to waive notice of the meeting.

23.12 The Board may meet together for the despatch of business, adjourn and otherwise regulate its meetings as it thinks fit. Questions arising at any meeting shall except as set out in Rule 23.13 be decided by a majority of votes. In the case of an equality of votes the chairperson of the meeting shall, in addition to his or her deliberative vote, have a casting vote.

23.13 Notwithstanding the provisions of Rule 23.12, a question arising at any meeting of the Board relating to exercise of the Board's powers or functions conferred by Rule 18 shall require the support of 75% of the members of the Board present and entitled to vote at that meeting provided that:

(a) where the question arising at any meeting of the Board relates to exercise of the Board's powers or functions conferred by Rule 18 in respect of:

(i) Rules 10.3(a), 10.5 and/or Rule 23.13;

(ii) paragraph 3.2 of the Terms of Reference;

(iii) any other provision of the Rules or Terms of Reference which affects the interpretation, construction, operation or effect of the provisions set out in sub-paragraphs (i) and (ii) above;

that exercise of the Board's powers or functions conferred by Rule 18 shall also require the support of 75% of the members of the Board appointed pursuant to Rule 23.2(a) and (b); and

(b) where the question arising at any meeting of the Board relates to exercise of the Board's powers or functions conferred by Rule 18 in respect of:

(i) Rules 10.3(b) and (c), 10.3(c), 10.5 and/or 23.13;

(ii) paragraph 3.3 of the Terms of Reference;

(iii) any other provision of the Rules or Terms of Reference which affects the interpretation, construction, operation or effect of the provisions set out in sub-paragraphs (i) and (ii) above;

that exercise of the Board's powers or functions conferred by Rule 18 shall also require the support of 75% of the members of the Board appointed pursuant to Rule 23.2(c) and (d).

APPENDIX 4

REGISTER OF PARTICIPANTS

The undersigned wishes to become a Participant of the Insurance and Savings Ombudsman Scheme and accordingly covenants with the Insurance and Savings Ombudsman Commission to be bound by The Insurance and Savings Ombudsman Rules, The Insurance and Savings Ombudsman Terms of Reference and any award of The Insurance and Savings Ombudsman made in accordance with the Insurance and Savings Ombudsman Terms of Reference and to comply with and observe all the terms, conditions and obligations thereof. It is acknowledged that The Insurance and Savings Ombudsman Rules and The Insurance and Savings Terms of Reference may be altered, added to, deleted or replaced from time to time in accordance with the terms of The Insurance and Savings Ombudsman Rules and that such alterations, additions, deletions or replacements will be binding upon each Participant.

Dated the day of 1994

The Common Seal of)
)
was)
affixed in the presence of:)

_____
Director

_____
Director/Secretary

Signed for and on behalf)
of)
by its)
duly authorised attorneys)
in the presence of:)

_____
Signature

_____
Name

_____
Occupation

_____
Address

APPENDIX 5

THE INSURANCE AND SAVINGS OMBUDSMAN TERMS OF REFERENCE

INDEX TO THE INSURANCE AND SAVINGS OMBUDSMAN TERMS OF REFERENCE

THE INSURANCE AND SAVINGS OMBUDSMAN
TERMS OF REFERENCE

ADOPTED 13 MAY 1994

1. Definitions and Interpretation

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

"Annual Meeting" means the annual meeting of the Commission held in accordance with Rule 14.1 of the Rules;

"Authorised Life Insurance Company" bears the meaning set out in Section 2(1) of the Securities Act 1978;

"Award" means a binding award of the Insurance and Savings Ombudsman made against a Participant pursuant to paragraph 5.4;

"Chairperson" means the chairperson of the Commission;

"clear days", in relation to the period of a notice, means that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect;

"Codes" means the codes of practice established from time to time relating to the provision of all or any of the Services or the carrying on of a business relating thereto and applicable or relevant to a Participant;

"Commercial Judgment" means assessments of risk, of physical or moral hazard, of character or of financial or commercial criteria;

"Commission" means the Insurance and Savings Ombudsman Commission established by Rule 2 of the Rules;

"Complainant" means a person (not being a Participant) making a complaint to the Insurance and Savings Ombudsman;

"General and Medical Insurance Participant" means each Participant which provides Personal Line Insurance Services and/or Medical Insurance Services;

"Insurance and Savings Ombudsman" means the Insurance and Savings Ombudsman appointed in accordance with Rule 16.1 of the Rules;

"Life Insurance and Savings Participant" means each Participant which provides Life Insurance Services and/or Savings Services;

"Life Insurance Services" means the provision of Life Insurance Policies (as that term is defined in the Securities Act 1978) in New Zealand for: (i) personal or domestic purposes (and not provided for business or commercial purposes); or (ii) business or commercial purposes where and only where the life insured is an Associated Person of the owner of the Life Insurance Policy (the term Associated Person used in this definition shall bear the meaning set out in Section 8 of the Income Tax Act 1976, excluding paragraph 8(1)(a) thereof);

"Medical Insurance Services" means the provision of policies of insurance in New Zealand for personal or domestic purposes (and not provided for business or commercial purposes) effecting cover for:

(i) costs or expenses incurred by the insured or any insured family members in obtaining health or medical services; or

(ii) personal injury to or disability of the insured or any insured family members by accident;

"Member" means a member of the Commission;

"month" means calendar month;

"Office of the Insurance and Savings Ombudsman" means the establishment, including its officers and employees, established to enable the Insurance and Savings Ombudsman to perform his or her functions and duties;

"Participant" means each person who becomes a participant in the Scheme in accordance with Rule 9.1 of the Rules;

"Participant named in the complaint", or "Participant concerned" means any Participant against which a complaint is made;

"Personal Line Insurance Services" means the provision of policies of fire and general insurance in New Zealand for personal or domestic purposes (and not provided for business or commercial purposes) effecting cover for:

(i) domestic residential dwellings occupied and used solely as a principal or secondary home by the insured;

(ii) contents and personal property, granted in respect of property used for private and domestic purposes only (not being property used in connection with any business or trade activity);

(iii) motor vehicles used solely for private and non-commercial purposes;

(iv) marine vessels, ships, boats and aircraft used solely for private and non-commercial purposes;

(v) domestic and international travel undertaken for private or domestic purposes (not being undertaken for business or commercial purposes) by the insured and family members;

(vi) private and domestic property in transit (not being property used in connection with any business or trade activity);

(vii) death, personal injury, illness or redundancy of the insured, issued solely for the period of and in connection with a conditional or hire purchase agreement, loan or other financial arrangement obtained for private or domestic purposes (not being undertaken for business or commercial purposes);

(viii) personal property of the insured (used solely for private and non-commercial purposes), issued solely for the term of and in connection with a conditional or hire purchase agreement, loan or other financial arrangement;

(ix) motor vehicles, marine motors, appliances and other personal property of the insured (used solely for private and non-commercial purposes) by way of extension to a manufacturer's or vendor's warranty; or

(x) public liability incurred by the insured in the course of private and domestic activities (not being cover for public liability arising in the course of any trade, occupation or commercial activity);

"Related Company" bears the meaning set out in Section 2(3) of the Companies Act 1993 (on the basis that the word "subsidiary" used in that definition bears the meaning set out in these Terms of Reference);

"Rules" means the Rules of the Insurance and Savings Ombudsman Commission (as amended from time to time), and a reference to a particular Rule has a corresponding meaning;

"Savings Services" means savings, superannuation, investment, funds management and funds deposit services provided in New Zealand for personal or domestic purposes (and not provided for business or commercial purposes) and includes the issue, allotment and/or transfer of ownership of any Security (as that term is defined in the Securities Act 1978) but excludes: (i) the provision of credit under a credit contract; and (ii) a superannuation or savings scheme where any contribution or deposit is made in accordance with the terms of the scheme, by or on behalf of an employer or other third party;

"Scheme" means the Insurance and Savings Ombudsman Scheme established by the Rules and these Terms of References;

"Services" means and includes:

(a) Personal Line Insurance Services; and

(b) Medical Insurance Services; and

(c) Life Insurance Services; and

(d) Savings Services;

provided by each of the Participants in the ordinary course of their business and includes advice and services relating to or incidental to, those Services. Services provided by a Subsidiary or Related Company of a Participant shall, where that Subsidiary or Related Company is not itself a Participant, be deemed to have been provided by the Participant;

"Subsidiary" means a subsidiary within the meaning of Sections 5 and 6 of the Companies Act 1993 (on the basis that the words "of whatsoever nature and wheresoever and whensoever incorporated or constituted" are inserted after the words "body corporate" where those last mentioned words appear in Section 5(3) of the Companies Act 1993) and, in addition, a company shall be deemed to be a subsidiary of another company if it is controlled by that other company;

"Terms of Reference" means these Terms of Reference as amended from time to time in accordance with the Rules;

"In writing" and "written" include printing, lithography, photography and typewriting and all other modes of representing or reproducing words in an enduring visible form.

1.2 In these Terms of Reference, unless the context otherwise requires:

(a) references to the provision of Services include references to their non-provision;

(b) references to the "resolution of a complaint" include withdrawal, dismissal, settlement, compromise, acceptance or determination of that complaint;

(c) references to "acts or omissions giving rise to the complaint" means the acts or omissions by which the Complainant becomes aware of or is affected by the original cause of the complaint and not the act or omission that constitutes the original cause of the complaint.

(d) references to the singular number (including without limitation references to "individual", "Complainant" and "Participant") include the plural number and vice versa;

(e) references to paragraphs are to paragraphs of these Terms of Reference;

(f) references to dollar amounts are to amounts in New Zealand dollars;

(g) the word "person" includes a firm, body corporate, unincorporated association or an authority; and

(h) a reference to a statute (or to a provision of a statute) means the statute or provision as modified or amended and in operation for the time being, or any statute or provision enacted in lieu or in substitution thereof and includes any regulation or rule for the time being in force under the statute or provision.

1.3 Headings to these Terms of Reference do not affect their construction or interpretation.

2 Principal Powers and Duties of the Insurance and Savings Ombudsman

2.1 The Insurance and Savings Ombudsman's principal powers and duties are:

(a) to consider at no cost to the Complainant complaints arising out of the provision within New Zealand of any of the Services by any Participant; and

(b) subject to paragraph 3, to facilitate the resolution of such complaints whether by agreement, by making recommendations or Awards or by such other means as seem expedient.

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

3. Limitations on the Powers of the Insurance and Savings Ombudsman

3.1 The Insurance and Savings Ombudsman shall only consider (or continue to consider) a complaint made or referred to him or her if he or she is satisfied that:

(a) the amount which the Complainant has claimed or could claim in respect of the subject matter of the complaint does not exceed $100,000, and the claim comprised in the complaint is not part of a larger claim which the Complainant has made or could make, or is not related to another claim which the Complainant has made or could make, where the aggregate amount of all such claims would exceed $100,000, provided that the Insurance and Savings Ombudsman shall have the power to consider and (notwithstanding paragraph 5.4) make a recommendation or Award in respect of a complaint over a claim in excess of $100,000 where the Participant named in the complaint consents to the Insurance and Savings Ombudsman considering that complaint; and

(b) it is not more appropriate that the complaint be dealt with by a court, or under another independent or statutory complaints or conciliation procedure or under an arbitration procedure; and

(c) the complaint is made or referred to him or her by or on behalf of the person to whom, for whom or for whose benefit the Participant's Services in question were provided; and

(d) either:

(i) the complaint has been fully considered by the internal complaint procedures of the Participant named in the complaint and the Complainant has not accepted as full settlement any observations made or conditions of settlement or satisfaction offered by that Participant and deadlock has been reached, or the Participant has not advised the Complainant that deadlock has been reached within 3 months of the complaint being formally made to it. A certificate from a Participant that a complaint has been fully considered by its internal complaints procedure and that a deadlock has been reached shall be conclusive evidence of that fact; or

(ii) the Participant does not have available an internal complaints procedure which is operated in a bona fide manner either in accordance with the Codes or otherwise so as to provide a fair and proper procedure for the consideration, settlement and satisfaction of complaints; and

(e) the complaint is made to him or her not later than two months after the latter of:

(i) the date the Participant has informed the Complainant that deadlock has been reached, and informed him or her also of the existence of the Insurance and Savings Ombudsman and of the two month limit; and

(ii) the date of commencement of the Scheme; and

(f) the acts or omissions giving rise to the complaint first occurred on or after the latter of:

(i) 1 March 1993;

(ii) the date six years prior to the date upon which the complaint was first raised by the Complainant with the Participant concerned; and

(g) except where relevant new evidence is available, the subject matter of the complaint was not comprised in a complaint by the same Complainant (or any one or more of them) previously considered by the Insurance and Savings Ombudsman; and

(h) neither the complaint made to him or her nor any other complaint by the same Complainant (or any one or more of them) in respect of the same subject matter is, has been or becomes to the knowledge of the Insurance and Savings Ombudsman the subject of any proceedings in or before any court, tribunal or arbitrator, or any other independent or statutory complaints or conciliation body, or of any investigation by a statutory ombudsman; and

(i) the Complainant and any other person to whom any Participant named in the complaint owes a duty of confidence in respect of any information which the Insurance and Savings Ombudsman may request that Participant to produce to him or her for the purpose of his or her consideration of a complaint, have waived in writing that duty of confidence; and

(j) the Complainant has supplied to the Insurance and Savings Ombudsman a confirmation of the acceptance of the provisions of paragraphs 8.1 and 8.2 in accordance with paragraph 8.3; and

(k) the complaint is being pursued reasonably by the Complainant and not in a trivial, frivolous or vexatious manner or in bad faith.

3.2 The Insurance and Savings Ombudsman shall have no power to consider a complaint or make any recommendation or Award in respect of provision of Personal Line Insurance Services and/or Medical Insurance Services by a General and Medical Insurance Participant to the extent that the complaint relates to:

(a) the Participant concerned's Commercial Judgment, underwriting practices, methods or procedures in determining prices or premiums payable for the Personal Line Insurance Services or Medical Insurance Services;

(b) the Participant concerned's decision or determination to:

(i) accept or issue a policy or agreement for provision of Personal Line Insurance Services or Medical Insurance Services; or

(ii) renew an existing policy or agreement for provision of Personal Line Insurance Services or Medical Insurance Services; or

(iii) terminate an existing policy or agreement for provision of Personal Line Insurance Services or Medical Insurance Services in accordance with its terms; or

(iv) impose conditions or limitations on the cover provided by or terms of a policy or agreement for provisions of Personal Line Insurance Services or Medical Insurance Services either upon issue or acceptance of the policy or agreement, upon renewal of an existing policy or agreement or during the term of an existing policy or agreement if permitted by its terms; or

(v) set the premiums charged or other charges made in respect of a policy or agreement for provision of or on the Personal Line Insurance Services or Medical Insurance Services, including without limitation, any variation of those premiums or charges upon renewal of an existing policy or agreement or during the term of an existing policy or agreement if permitted by its terms.

3.3 The Insurance and Savings Ombudsman shall have no power to consider a complaint or make any recommendation or Award in respect of provision of Life Insurance Services and/or Savings Services by a Life Insurance and Savings Participant to the extent that the complaint relates to:

(a) the Participant concerned's Commercial Judgment, underwriting or investment strategies, practices or policies; or

(b) methods or procedures in determining prices or charges payable for the Life Insurance Services or Savings Services or the returns or earnings offered in connection with Life Insurance Services or Savings Services; or

(c) the Participant concerned's interest rate policies, funds management performance or declared earning rates; or

(d) the Participant concerned's investment practices over and beyond the Participant's adherence to the "prudent person" standard appropriate to the nature of the investment portfolio; or

(e) the Participant concerned's decision or determination to:

(i) terminate or refuse cover under an existing policy or agreement for provision of Life Insurance Services or Savings Services in accordance with its terms, as a result of or by reason of material non-disclosure; or

(ii) impose conditions or limitations on the cover provided by or terms of a policy or agreement for provisions of Life Insurance Services or Savings Services either upon issue or acceptance of the policy or agreement, upon renewal of an existing policy or agreement or during the term of an existing policy or agreement if permitted by its terms;

but this shall not preclude the Insurance and Savings Ombudsman from considering complaints about matters of administration or matters of misrepresentation.

3.4 The Insurance and Savings Ombudsman shall have no power to make a recommendation or Award in respect of a complaint:

(a) to the extent that it relates to a practice or policy of a Participant which does not itself give rise to a breach of any obligation or duty owed by the Participant to the Complainant;

(b) if any Participant named in the complaint gives or has previously given the Insurance and Savings Ombudsman a notice of the kind described in paragraph 6.1.

4. Procedure

4.1 Subject to the other provisions of these Terms of Reference, the Insurance and Savings Ombudsman shall, in his or her own discretion, decide the procedure to be adopted by him or her in considering complaints. In considering complaints, the Insurance and Savings Ombudsman shall generally adopt an inquisitorial rather than an adversarial approach. He or she shall also decide whether or not a complaint falls within the Terms of Reference, and in reaching this decision shall consider representations from the Complainant and from the Participant concerned. When requested, he or she shall within a reasonable time give the reasons in writing for his or her decision as to whether or not a complaint falls within the Terms of Reference. Where a Participant disputes the Insurance and Savings Ombudsman's decision as to whether a complaint falls within the Terms of Reference that Participant may refer the dispute to the High Court of New Zealand for resolution by way of a declaratory judgment.

4.2 Upon receipt of a complaint which the Insurance and Savings Ombudsman determines to be within the Terms of Reference the Insurance and Savings Ombudsman shall;

(a) forward to the Participant concerned a complete copy of the complaint if the complaint is made in writing, or if the complaint is not made in writing, full details of the complaint, and the Participant concerned shall be entitled to respond thereto; and

(b) proceed to consider and achieve a resolution of the complaint in accordance with these Terms of Reference as expeditiously as possible.

4.3 The Insurance and Savings Ombudsman may require a Participant named in the complaint to provide any information relating to that complaint, which is, or is alleged to be, in its possession. If the Participant possesses such information, it shall as soon as is reasonably practicable disclose it to the Insurance and Savings Ombudsman (unless the Participant certifies to the Insurance and Savings Ombudsman that the disclosure of such information would place the Participant in breach of its duty of confidentiality to an identified third party whose consent it has used its best endeavours to obtain). The Insurance and Savings Ombudsman shall promptly produce to the Participant named in the complaint any waivers of that Participant's duty of confidentiality referred to in paragraph 3.1(i) that have been received by the Insurance and Savings Ombudsman.

4.4 Where any party to a complaint requests access to any information on the Insurance and Savings Ombudsman's files in connection with the complaint (whether obtained or received by the Insurance and Savings Ombudsman from any other party to the complaint or not) the Insurance and Savings Ombudsman shall make that information available to that party provided that such information shall only be made available on the basis that:

(i) the information is supplied to that party on a "without prejudice" and confidential basis; and

(ii) the information will not be disclosed by that party to any other person or entity without the written consent of the party who originally supplied that information to the Insurance and Savings Ombudsman.

Prior to making such information available to any party in accordance with this paragraph 4.4, the Insurance and Savings Ombudsman shall obtain from that party a written acknowledgement and agreement as to the basis upon which that information is made available.

4.5 Notwithstanding paragraph 5.6 the Insurance and Savings Ombudsman shall not in considering any complaint or in making any recommendation or Award (but not in making a determination as to whether a complaint falls within the Terms of Reference):

(a) be bound by any legal rule of evidence;

(b) be bound by any rule or requirement of natural justice or procedural fairness.

5. Resolution, Recommendations and Awards

5.1 At any time that a complaint is under consideration by him or her the Insurance and Savings Ombudsman may seek to promote a resolution of the complaint by agreement between the Complainant and the Participant concerned.

5.2 If there is no such agreement, the Insurance and Savings Ombudsman may, at the request of either the Complainant or the Participant concerned, make a written recommendation for resolution of the complaint. Such a recommendation shall include a summary of the Insurance and Savings Ombudsman's reasons for making his or her recommendation. Prior to making any such recommendation however, the Insurance and Savings Ombudsman shall give the Complainant and the Participant concerned one month's notice of his or her intention to make a recommendation, and during the period of that notice (or such longer period as the Insurance and Savings Ombudsman may specify) the Complainant and the Participant may make further representations to the Insurance and Savings Ombudsman in respect of the complaint.

5.3 If the Insurance and Savings Ombudsman intends to:

(i) propose, pursuant to paragraph 5.1, that a complaint be resolved on terms which appear to him or her to be acceptable to both the Complainant and the Participant named in the complaint; or

(ii) make a recommendation pursuant to paragraph 5.2, for the resolution of a complaint;

and that resolution would involve the provision by the Participant of valuable consideration (whether in the form of a money payment or otherwise), then the Insurance and Savings Ombudsman's proposal or recommendation shall, unless the Participant has otherwise requested or agreed, state that it is open for acceptance by the Complainant only if he or she accepts it in full and final settlement of the subject matter of the complaint and agrees to waive and surrender all rights and causes of action (statutory or otherwise) he or she may have against the Participant in respect of the subject matter of the complaint.

5.4 If the Insurance and Savings Ombudsman has made a recommendation which, within one month after it is made, has been accepted by the Complainant but not by the Participant named in the complaint, the Insurance and Savings Ombudsman may make an Award against the Participant. An Award shall comprise a money sum which, except as otherwise provided in the Terms of Reference, shall not exceed $100,000. No Award shall be of an amount greater than the amount that is in the opinion of the Insurance and Savings Ombudsman:

(a) in the case of a complaint concerning the entitlement of the Complainant or the liability of the Participant under a policy of or agreement to provide Services, the maximum possible entitlement of the Complainant or liability of the Participant under that policy or agreement; or

(b) in any other case, appropriate to compensate the Complainant for direct loss or damage suffered by him or her by reason of the acts or omissions of the Participant against which the Award is made.

The Insurance and Savings Ombudsman may in addition to the money sum grant to the Complainant such additional amount as is in the opinion of the Insurance and Savings Ombudsman appropriate to reimburse or compensate the Complainant for any incidental expenses reasonably incurred by the Complainant in making and pursuing the complaint. For the avoidance of doubt, such additional sum may, when aggregated with the money sum result in the total amount of the Award exceeding $100,000.00.

5.5 An Award shall be in writing and shall state the amount awarded and a summary of the Insurance and Savings Ombudsman's reasons for making the Award. The Award shall state that, if within one month after its issue the Complainant agrees to accept it in full and final settlement of the subject matter of the complaint and agrees to waive and surrender all rights and causes of action (statutory or otherwise) the Complainant may have against the Participant arising out of the subject matter of the complaint, the Award shall be binding on the Complainant and (in accordance with its undertaking to the Commission) the Participant against which it is made. The Insurance and Savings Ombudsman shall issue a copy of the Award to the Complainant and the Participant concerned and shall issue to the Complainant a form (addressed to the Insurance and Savings Ombudsman and the Participant) to be completed by the Complainant whereby he or she may accept the Award in full and final settlement of the subject matter of the complaint.

5.6 In making any recommendation or Award under these Terms of Reference the Insurance and Savings Ombudsman shall do so by reference to what is, in his or her opinion, fair and reasonable in all the circumstances, and:

(a) may observe any applicable rule or law or relevant judicial authority (including but not limited to any such rule or authority concerning the legal effect of the express or implied terms of any contract between the Complainant and any Participant named in the complaint); and

(b) may have regard to: (i) (subject to paragraphs 3.2 and 3.3) general principles of good insurance, marketing, business and/or investment practices; and (ii) any Codes applicable to the subject matter of the complaint.

5.7 The Insurance and Savings Ombudsman shall not be bound by any previous decision made by him or her or by any of his or her predecessors in office. In determining what are the principles of good insurance or business practice he or she shall, where he or she considers it appropriate, consult within the insurance and savings industry. In determining what is fair and reasonable in any circumstances the Insurance and Savings Ombudsman may consider:

(a) the financial, linguistic and intellectual competence, and the educational, cultural and personal circumstances of the Complainant, as are relevant to the complaint;

(b) the manner in which the Complainant has been dealt with by the Participant both prior to and subsequent to the complaint;

(c) the manner in which the Complainant has approached the Participant both prior to and subsequent to the complaint;

(d) the history of the relationship between the Complainant and the Participant or any other Participant providing the Service(s) in respect of which the complaint arises;

(e) the degree to which the Participant was in control of the systems and procedures which are the subject of the complaint;

(f) any other matter the Insurance and Savings Ombudsman considers relevant.

5.8 The Insurance and Savings Ombudsman shall not make a recommendation or Award except in accordance with the provisions of paragraphs 5.2 to 5.7.

5.9 Except as provided in paragraph 4.1 no decision, determination, recommendation or Award (including without limitation a decision or determination as to the procedure to be adopted in considering complaints) of the Insurance and Savings Ombudsman shall be capable of review by any other person, court, tribunal, statutory complaints authority, or other body including (but not by way of limitation) by way of appeal, judicial review, declaration, conciliation or arbitration.

6. Test Cases

6.1 At any time before the Insurance and Savings Ombudsman has made an Award, a Participant named in the complaint may give to the Insurance and Savings Ombudsman a notice in writing containing:

(a) a statement, with reasons, that in the opinion of the Participant the complaint involves or may involve: (i) an issue which may have important consequences for the business of the Participant or of Participants generally; or (ii) an important or novel point of law; and

(b) an undertaking that, if within three months after the Insurance and Savings Ombudsman's receipt of the notice either the Complainant or the Participant institutes in any court of New Zealand proceedings against the other in respect of the complaint, the Participant will: (i) pay the Complainant's reasonable and actual costs and disbursements (to be taxed, if not agreed, on a solicitor and client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Participant (except by way of respondent's notice, cross-appeal or other similar procedure); and (ii) make interim payments on accounts of such costs if and to the extent that it appears reasonable to the Participant to do so.

6.2 Upon receipt of a notice pursuant to paragraph 6.1, the Insurance and Savings Ombudsman shall cease to consider the complaint and he or she shall inform the Complainant in writing of the receipt of the notice, the day of its receipt and the effect of the notice upon the complaint.

7. Other Powers and Duties of the Insurance and Savings Ombudsman

7.1 The Insurance and Savings Ombudsman shall be responsible for the day to day administration and conduct of the business of the Office of the Insurance and Savings Ombudsman. He or she shall have power to incur expenditure on behalf of the Commission in accordance with the current financial budget approved by the Commission.

7.2 The Insurance and Savings Ombudsman shall not exercise any power which the Rules expressly give to the Commission or any other person.

7.3 In consultation with the Chairperson, and subject to his or her approval, the Insurance and Savings Ombudsman shall have power on behalf of the Commission to appoint and dismiss employees, consultants, independent

contractors and agents, and to determine their terms of employment or engagement.

7.4 Except as agreed between the Insurance and Savings Ombudsman and the Commission, the Insurance and Savings Ombudsman shall attend each meeting of the Commission and shall give the Commission any information and assistance (including general information about any complaint) which they reasonably request.

7.5 Except as provided in paragraphs 4.4 and 7.6 or as required by law or as properly and reasonably required in connection with any legal proceedings instituted by or against the Commission or any of its officers or any of the Members, the Insurance and Savings Ombudsman shall not disclose to any person (including a Member) any information concerning a complaint considered by him or her from which it would be possible to identify the Complainant or any Participant named in the complaint or any other information of a confidential nature which he or she has obtained in the course of his or her duties.

7.6 Paragraph 7.5 shall not prohibit the disclosure of any information to the Chairperson or to any employee, consultant, independent contractor or agent of or with the Commission to the extent that such release of information is reasonably necessary for the purpose of enabling the Insurance and Savings Ombudsman to perform his or her duties. It shall not be a breach of paragraph 7.5 for the Insurance and Savings Ombudsman or any employee of the Office of the Insurance and Savings Ombudsman to disclose to the Commission any information required for the purposes of calculating levies to be made by the Commission on Participants. The Insurance and Savings Ombudsman shall report to the Participant concerned any threat to that Participant's staff, property or business of which he or she becomes aware in the course of his or her duties.

7.7 At least twenty-eight days before the Annual Meeting of the Commission the Insurance and Savings Ombudsman shall send to the Commission a report containing, in relation to the preceding financial year of the Scheme, a general review of his or her activities during that year and such other information as the Commission may reasonably direct.

7.8 To inform the community of his or her activities the Insurance and Savings Ombudsman shall publish an annual report.

7.9 The Insurance and Savings Ombudsman may from time to time make recommendations to the Chairperson in relation to:

(a) the amendment or variation of the Terms of Reference; or

(b) any relevant statutes or regulations which may be introduced, amended or modified and which have a bearing on the discharge of his or her responsibilities; or

(c) any Code or other code of practice which may be introduced, amended or modified and which has a bearing on the discharge of his or her responsibilities.

7.10 The Insurance and Savings Ombudsman shall have the power to delegate to any employee, consultant, independent contractor or agent any of his or her powers, duties or functions. Any such delegate shall exercise the powers so delegated in accordance with these Terms of Reference and with any directions, regulations or restriction that may from time to time be imposed by the Insurance and Savings Ombudsman. The exercise of such a delegated power shall be valid and effective as if exercised personally by the Insurance and Savings Ombudsman.

7.11 The Insurance and Savings Ombudsman shall, notwithstanding anything else herein contained, where he or she identifies in the course of investigation of a complaint a breach or alleged breach by a Participant of a Code, report details of that breach or alleged breach to the Chairperson, who shall, pursuant to Rule 3.1 report to that breach or alleged breach to the body or organisation responsible for the administration of the Code and, where the Participant concerned is an Authorised Life Insurance Company and the breach or alleged breach is of the Life Office Association of New Zealand, Inc's Code of Business Practices for Life Insurance Companies, to the Securities Commission.

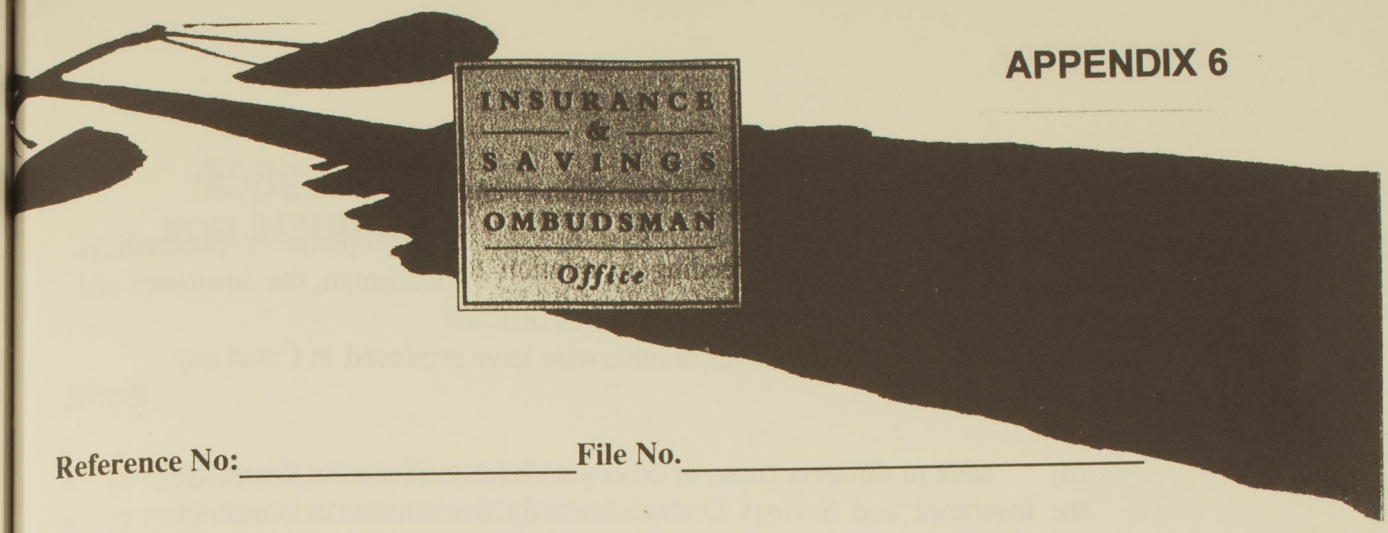
8 Privilege, Confidentiality and Return of Documents

8.1 The reference of a complaint to the Insurance and Savings Ombudsman pursuant to these Terms of Reference shall be deemed to be a process of "without prejudice" negotiation between the Participant and Complainant. All documents, evidence or information supplied by any party to and/or received by the Insurance and Savings Ombudsman and all letters, statements and communications made to and/or received by the Insurance and Savings Ombudsman in connection with the Insurance and Savings Ombudsman's consideration of a complaint shall accordingly be deemed to have been made or supplied on a strictly "without prejudice" and confidential basis. All documents, evidence or information supplied by the Insurance and Savings Ombudsman to any party and all letters, statements and communications made by the Insurance and Savings Ombudsman to any party in connection with the Insurance and Savings Ombudsman's consideration of a complaint shall be deemed to have been supplied to that party on a strictly "without prejudice" and confidential basis and shall be held and retained by that party as confidential and shall not be disclosed or released by that party to any other person or entity.

8.2 Upon resolution of a complaint or upon the making of an Award or recommendation (whether accepted by either party or not) the Insurance and Savings Ombudsman shall within two months thereof, return to each party all documents, evidence or information provided by that party in connection with the complaint. The Insurance and Savings Ombudsman shall not make or retain any copies of or extracts from such documents, evidence or information. No documents, evidence or information made available to the Insurance and Savings Ombudsman in the course of a complaint shall be produced by or shall be able to be discovered from the Insurance and Savings Ombudsman in connection with or in the course of any proceeding arising out of or in connection with the complaint or in proceedings instituted by or against the Insurance and Savings Ombudsman, the Commission or any of its officers. The disclosure of any document, evidence or information to the Insurance and Savings Ombudsman or by the Insurance and Savings Ombudsman in connection with or in the course of a complaint shall not waive, release or otherwise adversely affect any privilege or confidentiality attaching to that

document, evidence or information. No documents, evidence or information supplied by the Insurance and Savings Ombudsman to any party to a complaint and no letter, statement or communication made by the Insurance and Savings Ombudsman to any party to a complaint shall be produced by or shall be discovered from that party in the course of any proceedings arising out of or in connection with the complaint.

8.3 Each Complainant shall, by virtue of his or her reference of the complaint to the Insurance and Savings Ombudsman, be deemed to have agreed and accepted the provisions of paragraphs 8.1 and 8.2 and such agreement or acceptance shall be an implied term or condition of the Insurance and Savings Ombudsman's consideration of the complaint. The Insurance and Savings Ombudsman shall not commence or proceed with consideration of a complaint until the Complainant or each of them has confirmed in writing his, her or their acceptance of the provisions of paragraphs 8.1 and 8.2.



Reference No:_____ **File No.**_____

I/We_____
(Full Name)

of _____
(Full Postal Address)

_____

Phone_____ **Fax** _____

Re:_____
(Insurance/Savings Company/Organisation):

I/We hereby authorise the Insurance and Savings Ombudsman to make all enquiries that he or she considers appropriate in relation to my complaint and I/we hereby authorise and request that any party approached by the Insurance and Savings Ombudsman [or his/her appointed representatives] disclose to him/her [or them] all relevant personal information about me/us, and all documents and material related to the complaint which are held by that party.

I/We confirm that I/We understand and accept the terms disclosed pursuant to the Privacy Act 1993 detailed below.

I/We acknowledge and accept the provisions of paragraph 8.1 and 8.2 of the Insurance and Savings Ombudsman's Terms of Reference, and in particular my obligations under those provisions as summarised overleaf.

I understand and accept that in terms of paragraph 8.1 and 8.2 of the Insurance and Savings Ombudsman's Terms of Reference:

1. The determination of the complaint will be carried out on a 'without prejudice' basis between the Insurance/Savings Company/Organisation named above and me.

2. I must keep all documents, evidence and information supplied to me, and all letters, statements and communications made to me, by the Insurance and Savings Ombudsman (together called 'information') absolutely confidential.

Level Seven, BDO House, 99-105 Customhouse Quay, PO Box 10-845, Wellington, New Zealand.
Telephone 04 499 7612, Facsimile 04 499 7614, Freephone 0800 888 202.

3. I may not release or disclose any information to any other person or entity.

4. I may not in any legal proceeding in relation to the complaint or proceedings instituted by or against the Insurance and Savings Ombudsman, the Insurance and Savings Ombudsman Commission or any of its officers:

   (i) use, disclose, discover or otherwise have produced in Court any information;

   (ii) seek to discover from, or otherwise have produced in Court by, the Insurance and Savings Ombudsman any documents, evidence or information made available to the Insurance and Savings Ombudsman in connection with the complaint;

   (iii) seek to discover from any party to the complaint any documents, evidence or information made available to that party by the Insurance and Savings Ombudsman, or any letters, statements or communications made by the Insurance and Savings Ombudsman to that party in connection with the complaint.

5. No disclosure of documents, evidence or information by or to the Insurance and Savings Ombudsman in relation to the complaint will affect any privilege or confidentiality attaching to that document, evidence or information.

Privacy Act 1993

In accordance with the Privacy Act 1993 you are advised that:

1. The personal information supplied by you to this office, or obtained about you by this office, will be used only for the investigation of your complaint.

2. To enable investigation of your complaint, some or all of the personal information supplied by you to this office, or obtained about you by this office, may be disclosed to the Insurance/Savings Company/Organisation named overleaf, unless you advise this office that you wish specific information not to be disclosed.

3. If you fail to supply any personal information to this office when requested to do so, that failure may affect the ability of the Insurance and Savings Ombudsman to consider your complaint.

4. You have the right to request access to, and correction of, any information about you held by the office of the Insurance and Savings Ombudsman.

5. You are entitled to be supplied on request with the names and addresses of the agencies (if any) to whom this office discloses personal information about you.

Signed: _____ Dated _____

MODEL INTERNAL COMPLAINTS PROCEDURE FOR INSURANCE AND SAVINGS ORGANISATIONS

Aims

- to resolve disputes with customers
- to minimise customer dissatisfaction
- to provide market feedback to management
- to assist in the review of complaints by the Insurance and Savings Ombudsman when internal processes fail

Important Principles

of a complaint resolution procedure

Fairness

- it should allow a complainant the right to be heard and to answer the "case" against him or her
- the cause of the complaint should ultimately be reviewed by someone not involved in the original decision/act/omission

Effectiveness

- the complainant should be dealt with at an early stage by people with the authority to remedy the cause of the complaint
- the complainant must be taken seriously and must be made to feel they are being taken seriously
- the procedure should allow a complainant direct access to the Insurance and Savings Ombudsman without the need to be referred by the insurer/savings organisation

Speed

- the process should prevent the complainant from becoming discouraged, giving up and going away disgruntled
- it should, therefore, have a built-in time frame (see Codes of Practice) and a maximum of 3 steps

Accessibility

- the procedure must be easily activated by any means (telephone, personal visit, letter)
- information about the procedure should be published and available to all customers
- it should be free

Step 1

Initial notification
of complaint
to 'A'
(any staff member); clock starts

Step 2

'A' passes details to 'B'

'B' sends written acknowledgement within three days of Co.'s receipt of complaint; advises complaintant when and by whom ('B') complaint will be considered; includes complaints guidelines

'B' Investigates and decides whether complaint justified

'B' notifies complainant of decision and if/when appropriate ensures corrective action taken

Step 3

If complainant advises continued dissatisfaction
'B' refers complaint to 'C'

'C' informs complainant that matter complained about will be reviewed again, when and by whom ('C')

'C' investigates complaint and makes final decision on behalf of Chief Executive
on behalf of Chief Executive

'C' notifies complainant of decision; ensures action taken if/when appropriate

If complaint not settled 'C' advises complainant internal complaints procedure exhausted and provides details of Insurance and Savings Ombudsman Scheme

Report on informal survey done as part of research toward a LLM paper in Insurance Law Steve Rogers 5 July 1995

Methodology

The survey was conducted in May 1995 in order to get some ideas from a consumer viewpoint as to the visibility of the Insurance & Savings Ombudsman (ISO) scheme within the local offices of insurance companies. This survey was intended to provide supplementary information for the research paper on dispute resolution within the insurance industry. I was concerned to assess the degree to which the ISO scheme and internal complaints procedures were being publicised by the companies.

The survey was very informal and non-scientific, and was conducted during the course of one day by myself without the use of a formal questionnaire. The survey consisted of visiting the Wellington premises of six insurance companies, doing a visual assessment of the information on display and then approaching the customer service staff with several questions about the company's practice regarding disputed claims. One of the companies approached was NZI Insurance, and this visit was deliberately included to give some balance to the survey, given that this company is not a participant in the ISO scheme.

Results

ISO information was on display at the premises of only one company. This company had a very approachable customer service staff who knew about the ISO scheme. One other company had a small reference to the ISO scheme on the back of a general brochure. In two cases, the customer service staff had very little, or no knowledge of the ISO scheme at all.

Company-based complaints procedures were found not to be the subject of customer information at any company but NZI. Even at NZI the information was not on display in the claims section and required someone from elsewhere in the company to obtain it when I asked for it. The NZI leaflet was very clear and customer-friendly and sets a standard that other companies could well learn from.

A common response to the question about disputed claims was that the company preferred to take a one-to-one approach in resolving problems. The use of an 0800 phone for sales and claims-making purposes has been found to create an alternative (if unintended) channel for problems to be raised. One company has found that there has been a tendency for customers to go to the ISO first and be referred back to the company by the ISO.

Conclusion

I found the survey provided an interesting snapshot of the degree to which the ISO scheme has been built into the operating systems of some of the participating companies. Recognising the fact that it may not be regarded as positive marketing of one's product to emphasise the means by which disputes can be resolved, I was still surprised at the lack of front-line information about the ISO scheme. This is especially surprising given the extent to which resources have been produced and distributed by the ISO. I was also surprised at the general lack of comprehensiveness of customer service staff awareness of the totality of the dispute resolution system which the industry has adopted. The emphasis on one-to-one claims handling seems to presume that the customer doesn't need to know all of the possible options for resolving the dispute.

I must emphasise that this survey was very informal and the comments made are not intended to cast aspersions on any company or staff member.

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