



# **Memorandum of incorporation**

of

**The Ombudsman for Short-Term Insurance NPC**  
(registration number 2000/030638/08)

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### 1 Definitions and interpretation

1.1 In this Memorandum of Incorporation:

- (1) a reference to a section number refers to a section of the Act;
- (2) unless inconsistent with the context, words that are defined in the Act bear the same meaning in this Memorandum of Incorporation;
- (3) the headings to the clauses are for reference purposes only and do not affect the terms of this Memorandum of Incorporation.

1.2 Unless inconsistent with the context, the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings:

- (1) **Act** means the *Companies Act, 2008*, as amended, together with any regulations published in terms thereof;
- (2) **Board** means the board of Directors of the Company appointed in terms of this Memorandum of Incorporation;
- (3) **Company** means The Ombudsman for Short-Term Insurance NPC;
- (4) **Consumer Group** means any consumer protection group or person who is:
  - (a) a member of the South African National Consumer Union;
  - (b) a member of the National Consumer Tribunal;
  - (c) a consumer journalist or person with experience with the media and who has been involved in issues relating to consumer education, consumer protection and/or the facilitation of the resolution of complaints made by consumers against product and service providers;
  - (d) any other person who in the opinion of the current consumer representatives on the Board is a person with a substantial interest in the welfare of consumers in South Africa and who would, by virtue of their knowledge, experience and training, be a suitable candidate for representing the interests of consumers on the Board of the Company.
- (5) **Director** means a member of the Board of the Company;
- (6) **Financial Year** means a period commencing on 1 January of a calendar year and terminating on the last day of December of the same calendar year or any other period of 12 consecutive calendar months that may be decided by the Board as the financial year of the Company;

- (7) **FSOS Act** means *the Financial Services Ombud Schemes Act, 2004*, as amended, together with any regulations published in terms thereof;
- (8) **Insurer** means a short-term insurer as defined in the STIA;
- (9) **Lloyd's** means the association of persons generally known as Lloyd's which is incorporated by the Lloyd's Act of 1871 (34 Vict. C21), passed by the Parliament of the United Kingdom of Great Britain and Northern Ireland;
- (10) **Lloyd's Representative** means the person appointed by Lloyd's in terms of the STIA;
- (11) **Member** means a person who holds membership in, and specified rights in respect of, the Company and who is registered as such in the Company's members register;
- (12) **NPC** means non-profit company incorporated in terms of section 10;
- (13) **Ombudsman** means the short-term insurance ombudsman;
- (14) **Personal Lines Business** means Short-term Insurance Business in respect of which the Policyholder is a natural person;
- (15) **Policy** means a short-term insurance policy as defined by the STIA;
- (16) **Policyholder** means any policyholder in respect of whom the Ombudsman has jurisdiction relating to a Registered Complaint;
- (17) **Registered Complaint** means a complaint made to the Ombudsman by a complainant which is registered as a disputed claim and is allocated a complaint number;
- (18) **Regulatory Authority** means the Financial Services Board established by section 2 of the *Financial Services Board Act, 1990* as amended, together with any regulations published in terms thereof;
- (19) **Short-term Insurance Business** means short-term insurance business as defined in the STIA;
- (20) **STIA** means the *Short-term Insurance Act, 1998* as amended, together with any regulations published in terms thereof;
- (21) **Terms of Reference** means the terms of reference of the Company as approved by the Board from time to time; and
- (22) **Voting Rights** means the rights of a Member to vote in connection with any matter to be decided by the Company.

1.3 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any person, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision of this Memorandum of Incorporation.

1.4 Unless inconsistent with the context, an expression which denotes:

- (1) any gender includes the other genders;

- (2) a natural person includes an artificial person (including a trust) and vice versa;
  - (3) the singular includes the plural and vice versa.
- 1.5 The schedules to this Memorandum of Incorporation, if any, form an integral part hereof and words and expressions defined in this Memorandum of Incorporation shall bear, unless the context otherwise requires, the same meaning in such schedules.
- 1.6 When, in this Memorandum of Incorporation, a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by:
- (1) excluding the day on which the first such event occurs;
  - (2) including the day on or by which the second event is to occur; and
  - (3) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in clauses 1.6(1) and 1.6(2), respectively.
- 1.7 Law is construed as any law including the common law, a statute, the constitution, a decree, a judgment, a treaty, a regulation, a directive, a by-law, an order or any other measure of any government, local government, statutory or regulatory or court having the force of law.
- 1.8 Where any term is defined within the context of any particular clause in this Memorandum of Incorporation, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the same meaning ascribed to it for all purposes in terms of this Memorandum of Incorporation, despite the term not having been defined in this interpretation clause.

## **2 Incorporation and nature of the Company**

### **2.1 Incorporation**

- (1) The Company was incorporated as a non-profit company on 8 December 2000.
- (2) The Company is constituted subject to:
  - (a) the unalterable provisions of the Act that are applicable to non-profit companies;
  - (b) any provisions imposing on the Company a higher standard, greater restriction, longer period of time or any similar more onerous requirement, that would otherwise apply to the Company in terms of an unalterable provision of the Act that are applicable to non-profit companies;
  - (c) the alterable provisions of the Act, that are applicable to non-profit companies, subject to any limitation, extension, variation or substitution set out in this Memorandum of Incorporation; and
  - (d) the provisions of this Memorandum of Incorporation.

### **2.2 Powers of the Company**

- (1) This Memorandum of Incorporation does not:

- (a) contain any restrictive conditions applicable to the Company and any requirement, in addition to the requirements set out in clause 2.3, for the amendment of any such conditions; and
  - (b) prohibit the amendment of any particular provision hereof.
- (2) The Company has all of the legal powers and capacity of an individual, to the extent possible, subject to any restrictions, limitations or qualifications arising from this Memorandum of Incorporation.

### 2.3 **Objects of the Company**

- (1) The objects of the Company are:
- (a) to comply with the requirements for recognition as a voluntary scheme in terms of the FSOS Act;
  - (b) to serve the interests of the insuring public and of the insurance industry, which will include all registered Insurers and Lloyd's underwriters and their intermediaries;
  - (c) to receive and consider any complaints arising as a result of a dispute between a Policyholder and a Member.

### 2.4 **Memorandum of Incorporation and Company rules**

- (1) This Memorandum of Incorporation of the Company may be altered or amended:
- (a) in compliance with a court order effected by a resolution of the Company's Board;
  - (b) by a special resolution of the Members but subject to that special resolution having been proposed by (i) the Board, or (ii) by Members entitled to exercise at least 10% of the Voting Rights that may be exercised on such a resolution.
- (2) An amendment contemplated in clause 2.4(1)(b) may take the form of:
- (a) a new Memorandum of Incorporation in substitution for the existing Memorandum of Incorporation; or
  - (b) one or more alterations to the existing Memorandum of Incorporation by:
    - (i) changing the name of the Company;
    - (ii) deleting, altering or replacing any of its provisions;
    - (iii) inserting any new provisions; or
    - (iv) making any combination of such alterations.
- (3) After amending its Memorandum of Incorporation, the Company must file a Notice of Amendment with the Commission in accordance with the requirements contemplated in sections 16(7) and (8) of the Act.

- (4) An amendment to this Memorandum of Incorporation takes effect:
  - (a) in the case of an amendment that changes the name of the Company, on the date set out in the amended registration certificate issued by the Commission; or
  - (b) in any other case, on the later of:
    - (i) the date on, and time at, which the Commission accepts the filing of the Notice of Amendment; or
    - (ii) the date, if any, set out in the Notice of Amendment.
- (5) The Board has authority to make, amend or repeal any necessary or incidental rules (which includes the Terms of Reference relating to the governance of the Company in respect of matters that are not addressed in this Memorandum of Incorporation or the Act (which includes the Terms of Reference), by:
  - (a) delivering a copy of those rules, or any amendment or repeal thereof, to every Member by hand, by ordinary mail (at such Member's registered address) or by publishing in the press in a newspaper circulating in the area in which the Company's registered office is located. Alternatively, delivery may be by email, provided that the Member has given the Company an email address for the purposes of receiving communications; and
  - (b) filing a copy of those rules (which include the Terms of Reference), or any amendment or repeal thereof, with the Commission.
- (6) Any necessary or incidental rules made, amended or repealed as contemplated in clause 2.4(5):
  - (a) take effect on the later of:
    - (i) ten business days after the rule is filed with the Commission; or
    - (ii) the date, if any, specified in the rule; and
  - (b) are binding:
    - (i) on an interim basis from the time it takes effect until it is put to a vote at the next general Members meeting of the Company; and
    - (ii) on a permanent basis only if it has been ratified by an ordinary resolution at the meeting contemplated in clause 2.4(6)(b)(i).

**2.5 Alterations of Memorandum of Incorporation and Company rules, translations and consolidations of Memorandum of Incorporation**

- (1) The Company's Board, or an individual authorised by the Board, may alter the Company's rules (which includes the Terms of Reference), or its Memorandum of Incorporation, in any manner necessary to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the document, by:
  - (a) delivering a notice of the alteration in the manner contemplated in clause 2.4(5)(a); and

- (b) filing a notice of the alteration with the Commission.
- (2) At any time after having filed its Memorandum of Incorporation with the Commission, the Company may file one or more translations of it, in any official language or languages of the Republic, provided that every such translation must be accompanied by a sworn statement by the person who made the translation, stating that it is a true, accurate and complete representation of the Memorandum of Incorporation.
- (3) At any time after having filed its Memorandum of Incorporation with the Commission, and having subsequently filed one or more alterations or amendments to it, the Company may (or if the Commission requires it to, must) file a consolidated revision of its Memorandum of Incorporation, as so altered or amended, provided that every such consolidated revision filed with the Commission in terms of clause 2.5(3) must be accompanied by:
  - (a) a sworn statement by a Director; or
  - (b) a statement by an attorney or notary public,stating that it is a true, accurate and complete representation of the Company's Memorandum of Incorporation, as altered or amended up to the date of the statement.

## **2.6 Application of optional provisions of the Act**

The Company, as a non-profit company, chooses only to comply voluntarily with the extended accountability requirements contained in Chapter 3 of the Act relating to the appointment of an auditor, preparing audited financial statements and holding annual general meetings.

## **2.7 Non-profit company provisions**

- (1) The Company is a non-profit company; and
  - (a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in this Memorandum of Incorporation; and
  - (b) subject to clause 2.7(1)(a) may:
    - (i) acquire and hold securities issued by a profit company; or
    - (ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to the Company's stated objects.

# **3 Members**

## **3.1 Membership**

- (1) Companies underwriting Short-term Insurance Business which are registered Insurers and the person appointed by the Committee of Lloyd's in the Republic in terms of the STIA as being authorised to act on its behalf and on behalf of underwriters at Lloyd's and intermediaries shall be eligible for membership of the Company.
- (2) Applicants for membership of the Company shall apply in writing to the Board, or to a membership committee established by the Board, giving the details that the

Board or the membership committee may require. No applicant for membership of the Company may be admitted as a Member unless the applicant has agreed to be bound by the terms and conditions of this Memorandum of Incorporation and any rules formulated by the Company.

- (3) When a new Member is admitted, the Board or the membership committee will inform Members in any manner it deems appropriate.
- (4) Membership of the Company will terminate:
  - (a) upon receipt by the Company at its registered office of a notice in writing to this effect from the Member concerned;
  - (b) upon the issue of a final order of liquidation, winding-up or business rescue of the Member concerned;
  - (c) in the event of non-compliance by a Member with any obligations attached to the membership of the Member, despite expiration of a period of three months reckoned from the date of written notice by the Ombudsman on behalf of the Company to the Member concerned requiring the remedying of such default; except that the Board may extend the period of grace allowed to a particular Member to such extent and for such reasons as it may in its sole and absolute discretion consider appropriate;
  - (d) upon the passing of a special resolution to this effect by the Company in general meeting; or
  - (e) upon any Member ceasing to be an underwriter of Short-term Insurance Business and/or ceasing to be a registered Insurer in terms of the STIA or authorised Lloyd's underwriter.
- (5) The Company in a general meeting at which a quorum is present, may expel any Member from the Company by a special resolution passed by the Members.
- (6) Any Member who resigns or who is expelled is not entitled to a refund of subscriptions paid for any period in advance of the date of resignation or expulsion and furthermore remains liable for the payment of any subscriptions which were due and payable on that date.

### **3.2 Funding of the Company**

- (1) The Ombudsman will be responsible for preparing the budget of the Company.
- (2) Upon the Board approving the annual budget set out in clause 3.2(1) the annual budget will be shared pro rata by the Members according to the number of Registered Complaints which have been made against each Member.
- (3) The Board is entitled to amend the method of ascertaining the contribution which each Member is required to make in terms of clause 3.2(2) by majority vote.

### **3.3 Rights and obligations of Members**

- (1) The rights and obligations of a Member shall not be transferable and every Member shall:
  - (a) further the objects and interests of the Company to the best of its ability;



- (b) have the rights set out in this Memorandum of Incorporation; and
- (c) have the obligations set out in this Memorandum of Incorporation.

### 3.4 **Register of Members**

The Company shall maintain a register of Members as required by section 24 of the Act.

### 3.5 **Non-transferability of membership**

Membership shall be personal to the Member concerned and may not be assigned or transferred to any other person, Company or concern.

### 3.6 **Members' right to information**

Other than the rights to access information set out in section 26 of the Act or any other law, a Member has no further rights to information pertaining to the Company.

### 3.7 **Members' authority to act**

- (1) If the Company has only one Member, the ability of that Member to exercise any or all of the Voting Rights pertaining to the Company on any matter, at any time, without notice or compliance with any other internal formalities, is not restricted or varied by this Memorandum of Incorporation.
- (2) A resolution which could be voted on at a Members Meeting may instead be adopted by written consent of the Members, given in person or by electronic communication, provided that the resolution was submitted for consideration to the Members entitled to exercise Voting Rights in relation to the resolution and the resolution is voted on in writing or by electronic communication by such Members within 20 business days after the resolution was submitted to them.

### 3.8 **Votes of Members**

Each Member shall have one vote and each such vote shall, unless otherwise provided in this Memorandum of Incorporation, be of equal value to the vote of each other voting Member on any matter to be determined by the Members.

### 3.9 **Proxies**

- (1) A Member may, at any time, appoint any individual who is an employee of a Member, as a proxy to:
  - (a) participate in, and speak and vote at, a Members meeting on behalf of the Member; or
  - (b) give or withhold written consent on behalf of the Member to a decision by Members acting other than at a meeting.
- (2) the instrument that appoints a proxy must:
  - (a) be in writing, dated and signed by the Member;
  - (b) be given by the person appointing such proxy, if the appointor is a corporation, given by a representative who is an employee of a Member so authorised.

- (3) Every instrument of proxy, whether for a specified meeting or otherwise, must comply with section 58 of the Act.

### **3.10 Representation by concurrent proxies**

- (1) The right of a Member to appoint two or more persons concurrently as proxies is restricted or varied by this Memorandum of Incorporation.
- (2) A Member has the right to appoint an alternative person as proxy to the originally appointed as proxy.

### **3.11 Authority of proxy to delegate**

A Member's proxy may delegate that proxy's authority to another delegate, if that delegate is also an employee of the Member and that the Member has provided its consent to such delegation, and subject to any restrictions if set out in the instrument appointing that proxy.

### **3.12 Requirement to deliver proxy instrument to the Company**

The instrument of proxy or power of attorney appointing a proxy for any particular meeting must be delivered to the Company at its registered address not less than 24 hours (or such lesser period as the Directors may determine in relation to any particular meeting) before such meeting is due to take place, or the instrument of proxy or power of attorney shall not be treated as valid.

### **3.13 Deliberative authority of proxy**

The authority of a Member's proxy to decide without direction from the Member whether to exercise, or abstain from exercising, any voting right of the Member, except to the extent that the instrument appointing that proxy provides otherwise, is not restricted or varied by this Memorandum of Incorporation.

### **3.14 Validity of appointment**

- (1) The proxy appointment remains valid only for its intended purpose, provided that it may be revoked at any time by cancellation in writing, or the making of a later inconsistent appointment of another proxy, and delivering a copy of the revocation instrument to the proxy, and to the Company.
- (2) The appointment of a proxy is suspended at any time and to the extent that the Member chooses to act directly and in person in the exercise of any rights as a Member.
- (3) A vote given in accordance with the terms of an instrument of proxy or power of attorney appointing a proxy shall be valid notwithstanding the legal incapacity of the Member or revocation of the instrument or power of attorney unless notice in writing of such legal incapacity or, revocation is received by or on behalf of the Company not less than 24 hours (or such lesser period as the Board may determine in relation to any particular meeting) before the time appointed for holding the meeting.
- (4) Within 14 days of any change of the proxy or alternate proxy of any Member, the Member must notify the company secretary of the Company of such change and must in addition provide the address of the newly appointed proxy or alternate proxy.

### **3.15 Record date for exercise of Member rights**

- (1) If, at any time, the Board fails to determine a record date for any action or event, the record date for the relevant matter is:
  - (a) in the case of a meeting, the latest date by which the Company is required to give Members notice of that meeting; or
  - (b) in any other case, the date of the action or event.

## **4 Members meetings**

### **4.1 Requirement to hold meetings**

The Company is not required to hold any Members meetings other than those specifically required by section 61 of the Act and this clause 4, but may do so.

### **4.2 Members' right to requisition a meeting**

- (1) The right of Members to requisition the Board to call a Members meeting may be exercised if, in aggregate, written and signed demands for a meeting with substantially the same purpose are made by the holders of at least 10% of the Voting Rights entitled to be exercised in relation to the matter to be considered at the meeting, provided that each such demand describes the specific purpose for which the meeting is proposed.
- (2) In addition, any general meeting may be called by two or more Members holding not less than 10% of the Voting Rights.

### **4.3 Location of Members meetings**

The authority of the Board to determine the location of any Members meeting and the authority of the Company to hold any such meeting in the Republic or in any foreign country, is not restricted or varied by this Memorandum of Incorporation.

### **4.4 Calling a Members meeting**

If the Company is unable to convene a Members meeting because it has no Directors or because all of its Directors are incapacitated, any Member may convene a meeting.

### **4.5 Notice of Members meetings**

- (1) The minimum number of days for the Company to deliver a notice of a Members meeting to the Members is 15 business days before the meeting is to begin or 24 hours if agreed on in writing by Members holding not less than 90% of the votes exercisable at such meeting.
- (2) A notice of a meeting must be in writing and include the information set out in sections 62(3) and 63(3) of the Act.

### **4.6 Electronic participation in Members meeting**

The authority of the Company to conduct a Members meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, provided that the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting, is not restricted or varied by this Memorandum of Incorporation.

#### 4.7 Quorum for Members meetings

- (1) Subject to the provisions of clause 4.7(2) to clause 4.7(7) (both inclusive), and clause 4.9 the quorum for:
  - (a) a Members meeting to begin is sufficient persons present in person or by proxy at the meeting to exercise, in aggregate, at least 25% of all of the Voting Rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting; and
  - (b) a matter to begin to be considered at the meeting is sufficient persons present in person or by proxy at the meeting to exercise, in aggregate, at least 25% of all of the Voting Rights that are entitled to be exercised on that matter at the time the matter is called on the agenda.
- (2) Notwithstanding clause 4.7(1), where the Company has more than two Members, a meeting may not begin, or a matter begin to be considered, unless at least three Members are present at the meeting and the requirements of clause 4.7(1) are satisfied.
- (3) If, within 30 minutes after the appointed time for a meeting to begin, the requirements of clauses 4.7(1), or 4.7(2) if applicable:
  - (a) for that meeting to begin have not been satisfied, the meeting is postponed without motion, vote or further notice, for one week; and
  - (b) for consideration of a particular matter to begin have not been satisfied:
    - (i) if there is other business on the agenda of the meeting, consideration of that matter may be postponed to a later time in the meeting without motion or vote; or
    - (ii) if there is no other business on the agenda of the meeting, the meeting is adjourned for one week, without motion or vote.
- (4) The person intended to preside at a meeting, where the quorum requirements in clause 4.7(1), or clause 4.7(2) if applicable, are not satisfied, may extend the 30 minute limit allowed for a reasonable period on the grounds that:
  - (a) exceptional circumstances affecting weather, transportation or electronic communication have impeded, or are impeding, the ability of Members to be present at the meeting; or
  - (b) one or more delayed Members have communicated an intention to attend the meeting, and those Members, together with others in attendance, would satisfy the quorum requirements; or
  - (c) any other reason such person considers appropriate.
- (5) After a quorum has been established for a meeting, or for a particular matter, the meeting may continue, or the matter may be considered, so long as at least 25% of the Members with Voting Rights entitled to be exercised at the meeting, or on that matter, are present at the meeting.
- (6) If the quorum requirements in clause 4.7(1), or clause 4.7(2), if applicable, have not been satisfied at the time appointed for a postponed meeting to begin, or for an adjourned meeting to resume, the Members present in person or by proxy will be deemed to constitute a quorum.

- (7) The chairperson at a meeting shall not be entitled to a second or casting vote in addition to a deliberative vote at a meeting of Members.

#### **4.8 Adjournment of Members meetings**

- (1) Subject to clauses 4.7, 4.8(2) and 4.8(3), a Members meeting or the consideration of any matter at the meeting, may be adjourned from time to time, on a motion supported by persons entitled to exercise, in aggregate, a majority of the Voting Rights held by all of the persons who are present at the meeting at the time and that are entitled to be exercised on at least one matter remaining on the agenda of the meeting, or on the matter under consideration, as the case may be.
- (2) An adjournment of a meeting, or the consideration of a matter at the meeting, in terms clause 4.8(1), may be either to a fixed time and place or until further notice, as agreed at the meeting.
- (3) A meeting may not be adjourned beyond the earlier of:
  - (a) 120 business days after the record date determined in accordance with clause 3.15; or
  - (b) 60 business days after the date on which the adjournment occurred.

#### **4.9 Members resolutions**

- (1) For an ordinary resolution to be approved by Members, it must be supported by the holders of more than 50% of the Voting Rights exercised on that resolution.
- (2) For a special resolution to be approved by Members, it must be supported by the holders of at least 75% of the Voting Rights exercised on that resolution.

#### **4.10 Annual General Meeting**

- (1) Annual general meetings of the Company must be held no later than 30 September each Financial Year at a time, date and place determined by the Board.
- (2) In addition to the requirements of clause 4.5, the notice calling an annual general meeting must include the financial statements to be presented, or a summarised form thereof.
- (3) The agenda at an annual general meeting shall include but shall not be limited to:
  - (a) presentation of the Directors' report and annual financial statements for the immediately preceding financial year; and
  - (b) election of Directors, to the extent required by the Act or this Memorandum of Incorporation; and
  - (c) any matters raised by Members, with or without advance notice to the Company.

## **5 Directors and officers**

### **5.1 Composition of the Board**

- (1) The Company's Board must comprise not more than eleven Directors appointed by the Company at the annual general meeting. All Directors appointed must be residents in the Republic.

- (2) The composition of the Board of the Company is:
- (a) two independent non-executive Directors appointed from a list compiled by the Ombudsman in consultation with every member of the Board, who are persons who, by virtue of their training, expertise, experience in the business world and stature in the community, are able to add to the standing of the Company in the eyes of all its stakeholders,
  - (b) three Directors representing the Members appointed from a list of any person who is nominated by the chief executive officer of a Member and who accepts such nomination;
  - (c) four Directors from the Consumer Group appointed from a list of the most appropriate candidates compiled by the Ombudsman in consultation with current consumer Directors on the Board;
  - (d) one Director representing the South African Insurance Association NPC, appointed *ex officio*; and
  - (e) one Director representing the Financial Services Board, appointed *ex officio*.
- (3) A Member will advise the Company within 14 days of being requested to do so by the Company whether a representative of their organisation is available to stand for election as a Director.
- (4) A list of persons available to stand for election as Directors of the Company must be made available to the Members by the Company not later than 21 days before the annual general meeting at which the Board for the ensuing year is to be elected.
- (5) Any person appointed as Director:
- (a) holds office:
    - (i) for a term of three years unless removed from office earlier in accordance with the provisions of this Memorandum of Incorporation; or
    - (ii) until he or she resigns by notice in writing to the Company; or
    - (iii) until he or she is disqualified therefrom by virtue of any provision of the Act or for any reason whatsoever.
  - (b) ceases to be a Director and must vacate the office of Director if such Director:
    - (i) is the representative of a Member whose Membership is terminated in terms of clause 3.1(4); or
    - (ii) ceases to be an employee or director of the Member; or
    - (iii) ceases to qualify as a representative of the Consumer Group; or
    - (iv) is absent from three consecutive meetings of the Board without leave of the chairperson. The vacancy must be filled by the Board at its first meeting after the occurrence of the vacancy.

- (6) There are no *ex officio* Directors in addition to any Directors appointed in terms of this Memorandum of Incorporation and the elected Directors.
- (7) The authority of the Board to fill any vacancy on the Board is not restricted or varied by this Memorandum of Incorporation but the person appointed must be appointed taking into account the required composition of the Board. A Director appointed must be a person who satisfies the requirements for election as a Director and has all the powers, functions and duties, and is subject to all the liabilities, of any other Director.
- (8) Any person appointed to fill a vacancy on the Board in terms of clause 5.1(7) retains office for the rest of the original term that his or her predecessor was appointed to serve subject to any conditions stipulated in clause 5.1(5).
- (9) In order to become or to continue to act as a Director or a prescribed officer of the Company, a person must not be:
  - (a) a juristic person;
  - (b) an unemancipated minor, or a person under a similar legal disability;
  - (c) a person who has been declared a delinquent or placed under probation by a court in terms of section 162 or section 47 of the *Close Corporations Act, 1984*, except to the extent permitted by the order of probation;
  - (d) an unrehabilitated insolvent;
  - (e) prohibited in terms of any public regulation to be a Director;
  - (f) removed from an office of trust, on the grounds of misconduct involving dishonesty;
  - (g) a person who has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence:
    - (i) involving fraud, misrepresentation or dishonesty;
    - (ii) in connection with the promotion, formation or management of a Company;
    - (iii) in connection with having been appointed or elected as a Director or acting as a Director whilst ineligible or disqualified, or whilst having been placed under probation by a court; or
    - (iv) under the Act, the *Insolvency Act, 1936*, the *Close Corporations Act, 1984*, the *Competition Act, 1998*, the *Financial Intelligence Centre Act, 2001*, the *Securities Services Act, 2004*, or Chapter 2 of the *Prevention and Combating of Corruption Activities Act, 2004*.
- (10) A person need not satisfy any further eligibility requirements or qualifications.

## 5.2 **Alternate Directors**

No alternate Directors may be appointed to act as alternate Directors in a Director's place.

### 5.3 Authority of the Board

- (1) The authority of the Company's Board to exercise all of the powers and perform any of the functions of the Company and to manage and direct the business and affairs of the Company, is not restricted or varied by this Memorandum of Incorporation.
- (2) If, at any time, the Company has only one Director, the authority of that Director to act without notice or compliance with any other internal formalities, is not restricted or varied by this Memorandum of Incorporation.
- (3) The Board may frame, and from time to time alter, amend, add to or repeal rules dealing with the following matters:
  - (a) contributions to the budget payable by Members and the manner or time when payment is to be made;
  - (b) the proper and effective management and control of the Company and the Board;
  - (c) the general attainment and carrying out of the objects of the Company;
  - (d) the method of conducting the meetings of the Board and the Company;
  - (e) the procedure to be followed at meetings of the Company for the election of Directors;
  - (f) changes recommended by the Ombudsman to the Ombudsman's Terms of Reference;
  - (g) the election and appointment of the Ombudsman;
  - (h) the creation of the budget;
  - (i) receiving reports from the Ombudsman and making recommendations based on these reports;
  - (j) the determination of the powers and authority of the executive committee; and
  - (k) to ensure compliance by the Company with the FSOS Act.

### 5.4 Directors' meetings

- (1) A Director authorised by the Board of the Company:
  - (a) may call a meeting of the Board at any time; and
  - (b) must call such a meeting if required to do so by at least:
    - (i) 25% of the Directors, in the case of a Board that has at least 12 Members; or
    - (ii) two Directors, in any other case.
- (2) Notwithstanding clause 5.4(1), any Director may call a meeting of Directors if such Director considers there is good reason to do so.



- (3) The authority of the Board to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting, is not restricted or varied by this Memorandum of Incorporation.
- (4) The authority of the Board to adopt a decision, that could be voted on at a Board meeting, by way of written consent of a majority of the Directors, given in person or by electronic communication, provided that each Director has received notice of the matter to be decided, is not restricted or varied by this Memorandum of Incorporation. Any decision made in the manner contemplated in this clause 5.4(4) has the same effect as if it had been approved by voting at a meeting.
- (5) The Board may determine the form and time for giving notice of its meetings but such a determination must comply with any requirements set out in this Memorandum of Incorporation or the Company's rules, provided that no meeting of the Board shall be convened without notice to all of the Directors subject, however, to the provisions of clause 5.4(6).
- (6) The authority of the Board to proceed with a meeting even if there was a failure to give the required notice or there was a defect in the giving of such notice, provided that all of the Directors acknowledge actual receipt of the notice or are present at the meeting or waive notice of the meeting, is not restricted or varied by this Memorandum of Incorporation.
- (7) Board resolutions in order to be of force and effect must be approved by the majority of Directors present and voting. Each Director is entitled to speak at any meeting of the Board and will have one vote.
- (8) If within 30 minutes from the time appointed for the meeting a quorum is not present at the meeting, may be dissolved and stand adjourned to the same day in the next week, at the same time and place, or, if that day is not a business day, to the next succeeding business day. If at the adjourned meeting a quorum is not present within 30 minutes from the time appointed for the meeting the Directors present constitute a quorum. The chairperson of the Board or, if not, the vice-chairperson and failing him some other member of the Board present at the meeting and elected by the Directors present, will act as chairperson and preside at the meeting of the Board.
- (9) The Board must meet at the Company's premises at least twice during a Financial Year.
- (10) The company secretary of the Company must forward a copy of the agenda and all supporting documents (including the minutes of the previous meeting) to each of the Directors at least five business days prior to a meeting of the Board.
- (11) The company secretary of the Company must cause a copy of the minutes of any proceedings of the Board to be disseminated to all Directors and Members within 30 days of the meeting.
- (12) The quorum requirement for a meeting of Directors is six members of the Board of which one of the Directors from the Consumer Group and one of the Directors representing the Members must be present.
- (13) Each Director has one vote on a matter and a majority of votes cast on a resolution is sufficient to approve that resolution.

- (14) In the case of a tied vote the chairperson of the Board or vice-chairperson of the Board will not have a deciding vote and the resolution will fail.
- (15) The Board elects its own chairperson and vice-chairperson who will be respectively the chairperson and vice-chairperson of the Company. The chairperson and vice-chairperson of the Company will be elected on an annual basis at the first board meeting of the Directors after the annual general meeting of the Company. The chairperson will be elected from the two independent non-executive Directors.

#### 5.5 **Directors' power to effect borrowing**

The Company's Board may raise or borrow from time to time for the purposes of the Company, or secure the payment, of such sums as they think fit and may secure the repayment or payment of any such sums by guarantee, bond or mortgage upon all or any of the property or assets of the Company or by the issue of debt instruments or otherwise as they may think fit.

#### 5.6 **Directors' compensation and financial assistance**

- (1) The authority of the Company to pay remuneration to those Directors entitled to be remunerated, in accordance with a special resolution approved by the Members within the previous two years, is not restricted or varied by this Memorandum of Incorporation.
- (2) The Company shall not, directly or indirectly pay any portion of its income or transfer any of its assets, regardless of how the income or asset was derived, to any person who is or was an incorporator of the Company, or who is a Member or director, or person appointing a director, of the Company, except –
  - (a) as reasonable remuneration for goods delivered or services rendered to, or at the direction of, the Company; or payment of, or reimbursement for, expenses incurred to advance a stated object of the Company;
  - (b) as payment of an amount due and payable by the Company in terms of a bona fide agreement between the Company and that person or another;
  - (c) as payment in respect of any rights of that person, to the extent that such rights are administered by the Company in order to advance a stated object of the Company; or
  - (d) in respect of any legal obligation binding on the Company.

#### 5.7 **Indemnification of Directors**

- (1) For purposes of this clause 5.7, **Director** includes a former Director, a prescribed officer or a person who is a Member of a committee of a Board of the Company, or of the audit committee of the Company, irrespective of whether or not the person is also a Member of the Board.
- (2) The authority of the Company to advance expenses to a Director to defend litigation in any proceedings arising out of the Director's service to the Company and to directly or indirectly indemnify a Director for such expenses if those proceedings are abandoned or exculpate the Director or arise in respect of any liability for which the Company may indemnify the Director, is not restricted or varied by this Memorandum of Incorporation.
- (3) The authority of the Company to indemnify a Director in respect of any liability for which the Company may indemnify a Director, is not restricted or varied by this Memorandum of Incorporation.

- (4) The authority of the Company to purchase insurance to protect:
  - (a) a Director against any liability or expenses for which the Company may indemnify a Director as contemplated in clause 5.7(2) or clause 5.7(3); or
  - (b) the Company against any contingency including but not limited to any expenses that the Company is permitted to advance or for which the Company is permitted to indemnify a Director as contemplated in clause 5.7(2) or any liability for which the Company is permitted to indemnify a Director as contemplated in clause 5.7(3),

is not restricted or varied by this Memorandum of Incorporation.

- (5) The Company shall be entitled to claim restitution from a Director or a related Company for any money paid directly or indirectly by the Company to or on behalf of that Director in any manner inconsistent with this clause 5.7 or the Act.

#### **5.8 Committees of the Board**

- (1) The authority of the Company's Board to appoint any number of committees of Directors for managing any of the affairs of the Company and to delegate to any such committee any authority of the Board, is not restricted or varied by this Memorandum of Incorporation.
- (2) Subject to the powers and authorities granted by the Board to any such committee, the authority of:
  - (a) the Board to include persons who are not Directors of the Company, provided that such persons are not ineligible or disqualified from being a Director as contemplated in clause 5.1(9) and the Act and that no such person shall vote on a matter to be decided by the committee;
  - (b) the committee to consult with or receive advice from any other person; and
  - (c) the committee to exercise the full authority of the Board in respect of a matter referred to it,

is not restricted or varied by this Memorandum of Incorporation.

#### **5.9 The executive committee**

- (1) The executive committee carries out *ad hoc* functions delegated to it by the Board from time to time pursuant to the Terms of Reference that the Board may provide in respect of such functions.
- (2) The executive committee comprises:
  - (a) the chairperson and vice-chairperson of the Board;
  - (b) any two Directors; and;
  - (c) the Ombudsman.
- (3) The executive committee may co-opt a person that is not a Director or Member onto the executive committee if required.

- (4) The executive committee will meet when required for the purposes of performing its functions.
- (5) The powers and authority of the executive committee are at all times subject to the limitations, policies and strategies laid down by the Board.

#### 5.10 **Appointment of the Ombudsman**

- (1) The Ombudsman will be appointed and elected by a majority vote of the Board. If requested by the Ombudsman the Board may appoint a deputy Ombudsman. The appointment and election of the deputy Ombudsman will take place by majority vote of the Board.
- (2) The Ombudsman will be a natural person qualified as an attorney or advocate, of not fewer than 15 years standing, or a former judge of the High Court of South Africa, and such person must have had at least seven years involvement with the short-term insurance industry in whatever capacity approved by the Board.
- (3) Any person appointed as Ombudsman will:
  - (a) hold office:
    - (i) for an initial period of not less than three years or any other longer period determined by the Board but the initial period shall not exceed a period of five years. Such person may be re-appointed by the Board for a further period or periods from the initial period that the Board deems fit, provided that such further period or periods does or do not exceed five years in total; or
    - (ii) until he or she resigns by three months notice in writing to the Company; or
  - (b) cease to be the Ombudsman and must vacate the office of Ombudsman if such Ombudsman is removed from the office of the Ombudsman by majority vote of the Board.
- (4) The Ombudsman may not be a Director of the Company.

#### 5.11 **Powers of the Ombudsman**

- (1) The powers of the Ombudsman will be restricted to the Ombudsman's Terms of Reference determined by the Board. The Ombudsman may, however, make recommendations to the Board on any issue relating to his Terms of Reference, the efficient carrying on of the business of the Company and any other related matter.
- (2) The Ombudsman has the power to appoint staff of the Company at such remuneration and upon such other terms and conditions deemed fit within the budget constraints of the Company. The Ombudsman must perform such further functions and duties as the Board may from time to time assign to him.
- (3) The Ombudsman may attend all meetings of the Company and the Board, but is not entitled to vote at such meetings. It is the responsibility of the Ombudsman, and the chairperson of the meeting concerned, to ensure that proper minutes in customary form are kept in respect of general meetings of the Company, and all meetings of the Board and any sub-committee of the Board that may from time to time be formed. Such minutes, including the terms of all resolutions passed must be distributed in the case of general meetings to all members of the Board by the Ombudsman within 30 days of such meeting. The minutes and resolutions passed at any meeting shall be kept in a minute book to be maintained in customary form.

## 5.12 Ombudsman's remuneration and reimbursement

The Ombudsman is:

- (1) entitled to receive payment of reasonable remuneration in respect of any services rendered for the Company or on the Company's behalf.
- (2) entitled to reimbursement of all authorised and approved travelling subsistence, and other expenses properly incurred in the execution of his duties in or about the business of the Company but the authorisation or approval must be given by the chairperson of the Board.

## 5.13 Authentication of documents

- (1) Any Director or any person appointed by the Directors for this purpose shall have power to authenticate any resolutions passed by the Members or the Directors, and any books, records, accounts and other documents relating to the Company, and to certify copies or extracts from those documents as true copies or extracts and where any books, records, documents or accounts are elsewhere than at the registered office, the local manager or other officer of the Company having the custody of the documents at such other place shall be deemed to be the person so appointed.
- (2) A document purporting to be a copy of a resolution of the Directors or Members or an extract from the minutes of a meeting of the Directors or Members which is certified in accordance with clause 5.13(1) is *prima facie* evidence in favour of all persons dealing with the Company that such resolution has been duly passed or, as the case may be, that such extract is a true and accurate record of a duly constituted meeting of the Directors or Members.

# 6 General provisions

## 6.1 Accounts

- (1) The Board must keep accurate and complete accounting records required or prescribed by the Act.
- (2) The accounting records must be kept at the registered office of the Company or (subject to the provisions of section 25 of the Act) at such other location within the Republic as the Board think fit, and shall at all times be accessible and open to inspection by the Board. Except as provided by the Act or the authority of the Board, the Members have the right to inspect any accounting record or document of the Company.
- (3) The Board must, in accordance with sections 30 and 31 of the Act, cause to be prepared and laid before the Company at its annual general meeting those annual financial statements and reports and group annual financial statements and reports, if any.
- (4) Subject to the provisions of the Act, a copy of the annual financial statements and reports referred to in clause 6.1(3) must be delivered or sent by post to the registered address of each Member at least 10 business days before the annual general meeting. A Member may give the Company an address for the purposes of receiving electronic communications, in which case a copy of such documents may be delivered electronically to that Member at that address. This clause 6.1(4) does not require the Company to send or deliver a copy of such documents to any person who is not entitled to receive notice of general meetings of the Company or whose address the Company is not aware of.

## **6.2 Conversion of the Company to a profit company, disposal of assets, mergers and amalgamations**

- (1) The Company may not amalgamate or merge with, or convert to, a profit Company, or dispose of any part of its assets, undertaking or business to a profit Company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the Company.
- (2) Any proposal to dispose of all or the greater part of the Company's assets or undertaking or to amalgamate or merge with another non-profit Company must be submitted to the Members for approval, in a manner comparable to that required of profit companies in accordance with sections 112 and 113 of the Act, respectively.
- (3) Sections 115 and 116 of the Act, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in clause 6.2(2) above.

## **6.3 Winding-up**

- (1) The Company may be dissolved at any time by a special resolution.
- (2) Upon the passing of the special resolution dissolving the Company the Board must pay all outstanding debts of the Company (liquidating assets and property necessary in order to do so) and dispose of all surplus assets or money of the Company remaining in the manner directed in clause 6.3(3) below. The members of the Board remain in office until completion of their duties under this sub-clause, and the dissolution of the Company will be complete until such duties have been discharged.
- (3) Upon the winding-up or dissolution of the Company, no past or present Member or Director of the Company, or person appointing a Director of the Company, is entitled to any part of the net value of the Company after its obligations and liabilities have been satisfied.
- (4) The entire net value of the Company must be distributed to one or more non-profit companies, registered external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts which have similar objects to the Company's main Objects.
- (5) The Company's main objects may be determined in terms of the Company's Memorandum of Incorporation or by its Members, or Directors immediately before the time of its dissolution; or by the court, if the Memorandum of Incorporation, or the Members or Directors fail to make such a determination.

This Memorandum of Incorporation was adopted by special resolution either at a Members meeting held on \_\_\_\_\_ .

## **TERMS OF REFERENCE OF THE OMBUDSMAN FOR SHORT-TERM INSURANCE NPC**

### **1. PREAMBLE**

- 1.1 The Ombudsman is appointed to serve the interest of the insuring public and all short-term Insurers registered under the Short-term Insurance Act and including Lloyds. The Ombudsman provides, free of charge, an accessible, informal and speedy dispute resolution process to Policy Holders who have disputes with their Insurers where those disputes fall within the Ombudsman's jurisdiction.
- 1.2 The Ombudsman acts independently and objectively in resolving disputes and is not under instructions from anybody when exercising his or her authority. The Ombudsman resolves disputes using the criteria of law, equity and fairness. These Terms of Reference define the powers and duties of the Ombudsman.
- 1.3 The services rendered by the Ombudsman are not the same as those rendered by a professional legal advisor and are confined purely to resolution in terms of clause 3.1 below or mediation or conciliation in an attempt to settle complaints.

### **2. DEFINITIONS**

In these terms of reference the following expressions have the following meanings:

- 2.1 "the Board" means the Board of Directors of the Ombudsman for Short-term Insurance NPC ;
- 2.2 "Commercial Lines Policy" means a policy (a) issued to a person who is not a natural person, or (b) if issued to a natural person is intended to indemnify such a natural person in respect of a commercial enterprise conducted by the natural person for his or her own benefit.
- 2.3 "the Complainant" means any Policy Holder who makes a complaint to the Ombudsman in respect of any insurance services provided by their Insurer;
- 2.4 "Ruling" means, with respect to a complaint, a written directive issued by the Ombudsman which is binding on the Insurer and which is based either in law or equity;
- 2.5 "the Ombudsman" means the Ombudsman for Short-term Insurance appointed from time to time by the Board of the Ombudsman for Short-term Insurance NPC ;
- 2.6 "Ombudsman's office" means the office of the Ombudsman established to perform the functions set out in these terms of reference;



- 2.7 “Policy” means a short term insurance Policy issued by an Insurer to a Policy Holder;
- 2.8 “Policy Holder” means the person entitled to be provided with the Policy benefits under a Policy;
- 2.9 “Insurer” means a short-term insurer registered as such in terms of the Short-term Insurance Act of 1998;

### 3. **THE OMBUDSMAN’S POWERS AND DUTIES**

- 3.1 The Ombudsman shall:
  - 3.1.1 act within these terms of reference;
  - 3.1.2 receive complaints relating to the provision within the Republic of South Africa of insurance services by an Insurer to a Policy Holder;
  - 3.1.3 resolve such complaints, relating to the provision of insurance services, by agreement or by the making of a ruling or by such other means as may seem expedient, subject to these terms of reference.
- 3.2 The Ombudsman should advise the public on the procedure for making a complaint to the Ombudsman’s office and should take such steps as are reasonably possible conducive to client and industry education and training. The Ombudsman shall in his annual report referred to in clause 3.9 below provide details of steps taken in this regard.
- 3.3 On receipt of a complaint in the prescribed format, the Ombudsman will notify the Insurer of the complaint by providing the details of the complaint to the Insurer, and the Insurer shall then be obliged to give all relevant information and assistance required (including documentation requested by the Ombudsman) to enable the Ombudsman to assess fully the merits of the complaint.
- 3.4 During any period in which the Ombudsman is unable to exercise his duties owing to absence, incapacity or death or in a situation where a conflict of interest may arise, the Board may appoint a deputy or acting Ombudsman to act in place of the Ombudsman.
- 3.5 The Ombudsman shall have the overall responsibility for the conduct of the day to day administration and business of the Ombudsman’s office. The Ombudsman may

appoint an Administrator to be responsible to him for day to day matters of administration of the Ombudsman's office.

- 3.6 The Ombudsman shall have the power on behalf of the Ombudsman's office to appoint and dismiss employees, consultants, legal experts, independent contractors and agents and to determine their salaries, fees, terms of employment or engagement.
- 3.7 The Ombudsman shall have the power to incur expenditure on behalf of the Ombudsman's office in accordance with the current financial budget approved by the Board.
- 3.8 The Ombudsman shall give the Board any information and assistance which it reasonably requires, including the making of recommendations to the Board on any issues which the Ombudsman believes requires the Board's attention.
- 3.9 The Ombudsman shall publish an annual report on the activities of the office, which shall be published by 30 May of each year. Such report will be available to the public.

#### 4. **THE JURISDICTION OF THE OMBUDSMAN**

- 4.1 The Ombudsman shall only consider a complaint made to him if he is satisfied that:
  - 4.1.1 the complaint is not the subject of existing litigation;
  - 4.1.2 the complaint is not the subject of an instruction to an attorney in contemplation of litigation against the relevant Insurer except where the attorney has simply assisted the Policy Holder in bringing the application to the Ombudsman;
  - 4.1.3 the complaint does not involve a monetary claim in excess of the amount as determined by the Board from time to time.\*

*\*The limits are currently as follows namely, (a) R3.5 million for general complaints relating to all types of cover, except for home owners/building cover; (b) R6.5 million for complaints arising from home owners/building cover. The same quantum limits apply to personal lines complaints and commercial complaints.*

- 4.1.4 the complaint is made by a Policy Holder or a duly authorised representative of the Policy Holder to whom or for whom the insurance services in question were provided;

4.1.5 the complaint relates to any dispute in regard to a Policy and/or any Claim or Claims thereunder or any dispute in regard to insurance premiums, or any dispute on the legal construction of the Policy wording relating to a particular complaint complying with the requirements of this clause 4.1;

4.1.6 the complaint is being pursued reasonably by the Complainant and not in a frivolous, vexatious, offensive, threatening or abusive manner, as the Ombudsman may decide in his or her sole discretion;

4.1.7 the complaint has not become prescribed in terms of the Prescription Act, 1969 or any enforceable time bar provisions contained in the Policy, provided that in relation to any enforceable time-bar provisions in the policy

4.1.7.1 the Ombudsman shall have the power to condone non-compliance therewith upon good cause shown, and

4.1.7.2 the provisions of any enactment which provides for the extension of any period contained in such time-bar provision shall be given effect to.

4.2 Should a complaint be lodged with the Ombudsman's office and thereafter the Complainant refers such dispute to an attorney for the further conduct of the dispute and/or direct correspondence with the Insurer, or for litigation, then the Ombudsman will immediately withdraw from the matter.

4.3 With the written consent of an Insurer and at his discretion the Ombudsman may investigate a complaint which exceeds his jurisdiction and make a recommendation or a Ruling in relation thereto.

4.4 A Complainant may at any time terminate the Ombudsman's adjudication of the complaint and resort to litigation.

## 5. **LIMITS ON THE JURISDICTION OF THE OMBUDSMAN**

Subject to these terms of reference, the Ombudsman shall have the power to consider a complaint made to him and make a recommendation or Ruling in regard thereto except:

5.1 Where the Ombudsman determines that it is more appropriate that the complaint be dealt with by a court of law or through any other dispute resolution process;

5.2 Where the matter is already under the consideration by the person appointed to adjudicate disputes in terms of the Financial Advisory and Intermediary Services Act.

## 6. **TIME BARRING PROVISIONS**

6.1 Any enforceable time bar clauses in terms of a Policy shall not run against a Complainant and shall be interrupted during the period that the complaint is under consideration before the Ombudsman. In particular, the Insurer waives and abandons all or any rights to rely in subsequent litigation on any time barring provisions in the Policy applying to the commencement of litigation after rejection of a claim, or after the happening forming the subject of the claim or after notification of the claim. In the event of the complaint being finalised in the office of the Ombudsman the Complainant shall have 30 (thirty) days or the remaining period of the time bar provision of the relevant policy, whichever is the longer, within which to institute proceedings against the relevant Insurer, provided however, that the Claim had not already become time barred in terms of the Policy when the complaint was received by the Ombudsman and the Ombudsman has not condoned the late receipt of the complaint as is envisaged in clause 4.1.7

6.2 For the purposes of clause 6.1, the time during which a matter is before the Ombudsman shall (provided that the complaint is accepted for adjudication) commence on the day that it is lodged with the Ombudsman's office to the time that the Ombudsman dismisses the complaint or makes a Ruling.

6.3 Save as may be otherwise provided in the Financial Services Ombud Schemes Act 37 of 2004 as amended or in any other legislation relating to or governing the Ombudsman, the lodging of any complaint with the Ombudsman shall in no way affect the running of prescription in terms of the Prescription Act, 1969 in respect of such complaint.

## 7. **RULINGS**

7.1 When all the material facts are agreed or the facts have been established to the Ombudsman's satisfaction on a balance of probabilities, the Ombudsman may make a Ruling.

7.2 Rulings shall be based on the law and equity.

- 7.3 Where a material fact cannot be established or cannot be resolved on a clear balance of probabilities the Ombudsman may not make a Ruling. In such cases the Ombudsman shall advise the Complainant that the complaint is not one on which he or she can assist and that alternative recourse may be sought through the courts.
- 7.4 Any Ruling made by the Ombudsman shall be binding on the Insurer concerned save where an appeal against such Ruling is noted as is provided in Clause 8 below.

8. **RIGHT OF APPEAL AGAINST RULINGS OR FINDINGS OF THE OMBUDSMAN**

(As approved at the Annual General Meeting on 15 July 2013)

- 8.1 Any party affected by any formal ruling or finding on the part of the Ombudsman may appeal against the ruling or finding of the Ombudsman, either in part or in whole. In this context a "Ruling" shall mean, in relation to a complaint received, "a written directive issued by the Ombudsman which is binding on the insurer and which is based either in law or equity and fairness or a combination of law and equity". "Finding" shall mean, with respect to a complaint, "a written directive issued by the Ombudsman in relation to the complaint received in terms of which the Ombudsman has dismissed the complaint or declined to intervene in a dispute between the complainant and insurer".
- 8.2 No appeal against the ruling or finding of the Ombudsman shall be considered by any Appeal Tribunal, unless the Ombudsman shall have granted the applicant leave to appeal against such ruling or finding.
- 8.3 The Ombudsman shall only grant leave to appeal to any appellant where he is of the opinion that:
- 8.3.1 There is a reasonable prospect that the appeal, either in whole or in part, if prosecuted, will succeed; and
- 8.3.2 The matter is one of complexity or difficulty; or
- 8.3.3 The ruling or finding in question involves issues or considerations which are of substantial public or industry interest or importance or It is in the interest of justice or public policy that the ruling or decision be considered by an Appeal Tribunal; or

- 8.3.4 The ruling or decision involves principles of law where the law may be considered to be uncertain or unsettled; or
- 8.3.5 The matter in dispute involves the jurisdiction of the Ombudsman to entertain the dispute; or
- 8.3.6 The issues are of such a nature that the judgment or order sought by the appellant will not be of academic relevance only and will have a practical effect or result.
- 8.4 The power to grant leave to appeal as contemplated in this section shall not be limited by reason only of the value of the matter in dispute, or the amount claimed or awarded by the Ombudsman, or by reason only of the fact that the matter in dispute is incapable of being valued in money.
- 8.5 Notice of any intention to appeal against any ruling or finding of the Ombudsman shall be filed with the Ombudsman within a period of 30 calendar days of the handing down of any ruling or finding and shall state whether the appellant appeals against the whole or part of the ruling or finding of the Ombudsman, the findings of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded. The notice of intention to appeal shall be accompanied by an application for leave to appeal.
- 8.6 A Notice of Cross-Appeal shall be delivered within 15 calendar days after delivery of the Notice of Appeal, or within such other period of time as may, upon good cause shown, be permitted by the Ombudsman. The provisions of these rules with regard to appeals shall equally apply to cross-appeals. A "cross-appeal" shall mean a process by which the respondent in any appeal proceedings, having been advised by the Ombudsman of receipt of a notice of intention to appeal, wishes in turn to appeal against the terms of the ruling or finding made by the Ombudsman in relation to the complaint submitted to the Ombudsman.
- 8.7 Where an appeal has been noted, or an application for leave to appeal has been made, the operation and execution of the ruling or finding of the Ombudsman shall be suspended, pending the decision of the Appeal Tribunal on the matter, unless the Ombudsman, on the application of a party and on good cause shown, otherwise directs.

- 8.8 Upon receipt of a Notice of Appeal the Ombudsman shall within a period of 5 business days thereafter notify every other party to the dispute that a Notice of Appeal has been received.
- 8.9 All documentation in connection with any appeal proceedings including the notice of intention to appeal and the application for leave to appeal, shall be served upon the office of the Ombudsman by hand or alternatively by way of registered post or by e-mail save where the Ombudsman shall have expressly consented to any other method of service. Documentation served upon the Ombudsman shall be in A4 format and shall be clearly legible and capable of being photocopied. Wherever possible, original documents should form the subject of any appeal proceedings but copies of documents shall be acceptable subject to the provisions of these terms of reference.

**Applications for Leave to Appeal**

- 8.10 Any party who desires to appeal against any ruling or finding of the Ombudsman shall, within 30 calendar days of the handing down by the Ombudsman of any final ruling or finding, serve upon the Ombudsman as provided for herein, a Notice of intention to Appeal, together with an Application for Leave to Appeal which shall set out the basis for the proposed appeal as contemplated in Clause 8.5 above, together with reasons why Leave to Appeal against such ruling or finding should be granted by the Ombudsman. The granting of leave to appeal shall be a pre-requisite for the prosecution of any appeal.
- 8.11 Failing receipt by the Ombudsman of any Notice of Appeal within the time period referred to in paragraph 8 above, the final ruling or finding by the Ombudsman shall become final and binding upon the parties and shall be carried into effect without further delay.
- 8.12 Any late filing of a Notice of Appeal or an Application for Leave to Appeal shall be null and void save where accompanied by an application for condonation for the late filing of the appeal. Any application for condonation must set out in full the reasons why condonation should be granted, the reasons for any non-compliance and that the matter is one worthy of consideration.
- 8.13 The Ombudsman, after considering any application for condonation, may grant or refuse such application in his discretion.

- 8.14 Where leave to appeal against any ruling or finding of the Ombudsman is refused by the Ombudsman, the unsuccessful party may, within 15 business days of notification of such refusal, petition the Chairman of the Appeal Tribunal, to review the decision of the Ombudsman not to grant leave for appeal. The same provision shall apply *mutatis mutandis* to any application for condonation for the late filing of an appeal.
- 8.15 Any such request shall be addressed to the Chairman of the Appeal Tribunal via the Ombudsman who shall convey such request to the Chairman of the Appeal Tribunal. The Chairman of the Appeal Tribunal shall within a reasonable period of time but in any event not later than a period of 15 calendar days of the receipt of any such petition, either confirm or amend the decision of the Ombudsman not to grant leave to appeal or refusal to condone any application for the late filing of an appeal. The Ombudsman shall thereafter within a period of 5 business days, inform the parties accordingly.

### **Appeals**

- 8.16 An appeal against the ruling or finding of the Ombudsman shall be heard by an Appeal Tribunal who shall consider the matter as if it were the Ombudsman and shall include the consideration of procedural as well as substantive matters pertaining to the objection raised by such party to the decision of the Ombudsman.
- 8.17 The Appeal Tribunal may, where it considers it necessary or in the interests of justice, permit the leading of evidence or new evidence on any matter, even if the Ombudsman himself did not hold a hearing, or receive evidence on any matter prior to making a finding on any complaint referred to him.
- 8.18 Where the Appeal Tribunal decides to permit, or calls for the leading of evidence, or evidence is led on material that was never considered by the Ombudsman, the tribunal may decide, in its sole discretion to invite the Ombudsman to consider the matter in the light of such evidence and to canvass the views of the Ombudsman on the matter. The Ombudsman should be invited to comment on the new material in the manner and on such terms as it may regard to be fair to both parties.
- 8.19 Save where the Appeal Tribunal permits or calls for the leading of evidence, no evidence shall be led and the matter shall be decided by the Appeal Tribunal on the basis of the record of appeal furnished to it by the Ombudsman, including the documentation filed by the parties in connection with the appeal.



- 8.20 The record of appeal shall, save where in the opinion of the Ombudsman additional documentation is required, consist of the following:-
- 8.20.1 The complainant's Application for Assistance form and supporting documentation;
  - 8.20.2 The insurer's response to the complaint;
  - 8.20.3 The complainant's reply to the insurer's response to the complaint;
  - 8.20.4 The Ombudsman's finding in relation to the complaint and any reasons furnished by the Ombudsman for any ruling or finding; and
  - 8.20.5 The submissions or representations made by the parties to the Appeal Tribunal in connection with the appeal.
- 8.21 The Ombudsman may, in his discretion, when submitting the documentation to the Appeal Tribunal in connection with any appeal, make representations to the Appeal Tribunal by way of explanation or elaboration of his earlier determination and shall be entitled in such representations to deal with such matters as policy, industry practices and the approach followed by him in regard to equity. In addition the Ombudsman may furnish the Appeal Tribunal with such other information as he may consider to be of assistance or guidance to the Appeal Tribunal, save that the parties shall be afforded an opportunity to respond to any such additional material thus placed before the Appeal Tribunal.
- 8.22 Save as aforesaid, the Ombudsman shall not participate in the appeal process save where he should be asked to do so by the Appeal Tribunal itself on such terms and in such manner as may be determined by the Tribunal.

#### **Composition of the Appeal Tribunal**

- 8.23 The Chairman of the Board, in consultation with the Vice-Chairman, must appoint the members of the Appeal Tribunal from the persons nominated by the Ombudsman.
- 8.24 The Appeal Tribunal must consist of a Chairperson and at least two members appointed for a minimum period of two years.

- 8.25 The Chairman of the Board must appoint the Chairperson of the Appeal Tribunal and such Chairperson must either be a retired Judge or a practicing Attorney or Advocate, or a person who formally practiced as an Attorney or Advocate, with at least ten years' experience and with appropriate experience in Insurance Law.
- 8.26 The Chairperson of the Appeal Tribunal is responsible for assigning matters for adjudication, taking into consideration the nature and complexity of the dispute or any special circumstance, to a panel of two or more members of the Appeal Tribunal who are suitably qualified to decide on a particular matter.
- 8.27 The Chairman of the panel must be the Chairperson of the Appeal Tribunal.
- 8.28 The person's nominated by the Ombudsman must be:
- 8.28.1 Practicing Attorneys or Advocates or persons who formerly practiced as an Attorney or Advocate, with at least ten years' experience and with appropriate experience in Insurance Law, and may include retired Judges; or
  - 8.28.2 Persons with extensive experience in relation to the insurance industry and who by virtue of their knowledge, training and experience are able to perform the functions of a member of the Appeal Tribunal; or
  - 8.28.3 Academics with the particular knowledge of specific areas of the law or persons of specific knowledge, skill or training whose expertise as an expert in any particular field may be appropriate.
- 8.29 The Chairman of the Appeal Tribunal may, in consultation with the Chairman of the Board and the Ombudsman, appoint a person who is not a member of the Appeal Tribunal to serve on the panel if in the opinion of the Chairperson of the Appeal Tribunal such appointment is merited or deemed desirable.

### **The Hearing of Appeals**

- 8.30 The Ombudsman shall be in charge of all practical or administrative matters preceding and relating to the hearing of an appeal and shall be responsible for the preparation of the record, the giving of notices and the making of arrangements for the hearing of an appeal, the recording of evidence, if any, and all such other matters incidental to the hearing or disposal of the appeal.

- 8.31 The Appeal Tribunal shall determine its own procedure both prior to and during the course of the hearing, including the hearing of oral evidence.
- 8.32 Appeals shall be heard at such place and time and in such manner as the Appeal Tribunal shall determine from time to time.
- 8.33 Not later than 10 business days before the hearing of an appeal, the appellant shall deliver to the Ombudsman a concise and succinct statement of the main points which he intends to argue on appeal, as well as the list of legal authorities (if any) to be tendered in support of each point to be raised. Not later than 5 business days before the hearing of an appeal, the respondent shall deliver a similar statement.
- 8.34 The Chairman of the Appeal Tribunal may, after consultation with the Ombudsman, direct that a contemplated appeal be dealt with as an urgent matter and that the appeal be prosecuted at such time and in such manner as the Chairman of the Appeal Tribunal deems appropriate.
- 8.35 The Appeal Tribunal should approach the matter on appeal put forward as if it were the Ombudsman determining the complaint. The Appeal Tribunal shall take into account the balance of probabilities and its finding shall be based on the criteria of law, equity and fairness.
- 8.36 The Appeal Tribunal shall deliver its judgment on the matter in writing to the Ombudsman within one calendar month of the conclusion of the hearing. The Ombudsman shall in turn deliver a copy thereof to the parties within a period of 10 business days.

### **Representation**

- 8.37 Any party to any appeal shall have the right to be represented at the hearing but, wherever possible, the parties should confine their submissions in regard to matters before the Appeal Tribunal to written submissions contained in a statement of case including, where appropriate, heads of argument.
- 8.38 Any party who employs a representative to represent their interest before the Appeal Tribunal shall be personally responsible for any fees and expenses associated with such representation.

### **The Effect of the Decision and Order of the Appeal Tribunal**

- 8.39 Where a complainant appeals against the ruling or finding of the Ombudsman, such person shall abide by the decision of the Appeal Tribunal and the order of the Appeal Tribunal shall be final and binding in relation to the proceedings before the office of the Ombudsman. The complainant shall however be entitled, if so desired, to thereafter pursue the matter further in any court of law.
- 8.40 An unsuccessful appellant insurer shall have no further right of recourse or action and shall be bound by the terms of the order of the Appeal Tribunal save that nothing contained herein shall in any way affect the right of an insurer to review any ruling made by the Ombudsman or the Appeal Tribunal in a court of law.

### **Precedent**

- 8.41 In recognition of the requirement that rulings made by the Ombudsman shall not establish any precedent in the Ombudsman's office, the decisions of the Appeal Tribunal shall not be accorded any formal status or regarded as creating binding precedents, but may serve as guidelines for future cases. Such findings or orders may however, serve as strong persuasive value for the Ombudsman and any other Appeal Tribunal in which the same dispute may be raised so as to ensure consistency in the decisions of the office of the Ombudsman.

### **Cost to the Parties to Appeals**

- 8.42 Where an insurer notes an appeal against any final ruling of the Ombudsman and is not, in the opinion of the Chairman of the Appeal Tribunal, successful with such appeal, it shall defray the cost of such appeal incurred by the Ombudsman in connection with the appeal proceedings.
- 8.43 Where the insurer is the appellant in any proceedings, save where the Chairman of the Appeal Tribunal may direct otherwise, the cost to be paid by the insurer in relation to any appeal proceedings may be determined by the Board of the Ombudsman for Short-term Insurance, from time to time.
- 8.44 Where the complainant is the appellant in any appeal proceedings the Ombudsman may, in his discretion and taking into account, inter alia, the amount of the claim, the complexity of the issues and the complainant's personal circumstances, call upon such party to pay a deposit in an amount determined by the Ombudsman which deposit

shall be refunded to the appellant should the appellant be successful in the appeal. In the event that the appeal fails, the deposit shall be forfeited to the office of the Ombudsman and shall constitute the only liability on the part of the complainant for the costs of the appeal proceedings. If the appeal is, in the view of the Appeal Tribunal, successful, the amount paid by the appellant shall be refunded to the appellant.

8.45 In no case shall the Appeal Tribunal award costs in favour of a successful party and in no case shall a losing party to an appeal be ordered by the Appeal Tribunal to pay costs to the other party, save where the Chairman of the Appeal Tribunal considers that, having regard to the presence of exceptional circumstances, a punitive order as to costs against any party is merited.

#### 9. **POLICYHOLDER/COMPLAINANT'S RIGHTS**

The Policy Holder/Complainant's rights to institute proceedings in any competent court of law against the Insurer shall not be affected by any of the provisions of these terms of reference provided that, if the Policy Holder/Complainant institutes proceedings while the complaint is under investigation by the Ombudsman, the provisions of clause 4.2 shall apply.

#### 10. **PRECEDENTS**

Rulings shall not establish any precedent in the Ombudsman's office.

#### 11. **CONFIDENTIALITY**

(As approved at the Annual General Meeting held on 28<sup>th</sup> June 2011)

11.1 The Ombudsman shall as far as possible, maintain confidentiality unless the parties concerned expressly exempt him or her from that duty and the duty shall continue after the termination of his or her services. The duty of confidentiality shall however, not prevent the Ombudsman from:

11.1.1 Publishing details of rulings made by him or her.

11.1.2 Reporting on details of rulings or furnishing statistical information in connection with the workings of the office to the South African Insurance Association (SAIA), the Financial Services Board (FSB), the National Treasury or any other body or organisation which may be entitled to receive such information from the Ombudsman in connection with his/her

activities and/or which may have a legitimate interest in such information, having regard to its statutory mandate, role as an industry association or otherwise.

11.1.3 Publishing statistics and related information in the Annual Report of the Association concerning complaints received by the Ombudsman against members of the Association as approved by the Board of the Ombudsman for Short-term Insurance from time to time.

11.1.4 Filing, either on behalf of the Company, or any complainant from whom a complaint is received, a complaint with SAIA in connection with any Code of Conduct applicable to or adopted by that organisation and which may be applicable to any member of the Company.

11.2 The Insurer and the Complainant shall not be entitled to make use of any information which comes to their knowledge as a result of the intervention of the Ombudsman during the course of any investigation by him or her.

11.3 A complaint will be regarded as confidential as between the Policy Holder, the Insurer and the Ombudsman and it is for the Ombudsman to decide what should be disclosed to the Insurer and/or the Policy Holder.

11.4 Documents brought into being as a result of any approach to the Ombudsman shall not be liable to disclosure or be the subject of a discovery order or subpoena in the event of any legal proceedings between the Complainant and the Insurer.

11.5 The Ombudsman or any member of his staff will not be liable to be subpoenaed to give evidence on the subject of a complaint in any proceedings.

## 12. **COMPLAINTS NOT SETTLED IN DEFINED PERIOD**

The Ombudsman shall report to the Board all complaints, which have not been completed in one or way or another within a time, laid down by the Board. This time period shall initially be set at 6 (six) months calculated from the date that a complaint became an accepted complaint.