



**Australian Government**

**Private Health Insurance Ombudsman**

## **Private Health Insurance Ombudsman Mediation Guidelines**

### **Introduction**

Since 1 July 2006, the Private Health Insurance Ombudsman (PHIO) has had legislative power to require health insurers and healthcare providers to attend formal mediation, in order to resolve disputes that may affect consumers' rights and entitlements under their private health insurance cover. These disputes usually occur when there is disagreement between parties about the renewal of a Hospital Agreement.

The purpose of mediation is to assist the parties to reach a position where direct negotiation between them is likely to resolve the matter. Mediation does not involve the Ombudsman ruling on the relative merits of the parties' negotiating positions or the prices they are seeking to pay or receive. Commercial and competition issues fall within the jurisdiction of the ACCC, which regulates the *Competition and Consumer Act 2010*. The ACCC is the most appropriate body to deal with complaints about these issues.

Under Section 247-5 of the *Private Health Insurance Act 2007* (the Act), the Ombudsman may direct the parties to the complaint to participate in mediation. Under section 247-15, the Ombudsman may conduct mediation, or appoint a third party to conduct mediation.

The Ombudsman's involvement in contractual issues between health insurers and healthcare providers is subject to a test of whether there is likely to be a significant impact on consumers' rights under private health insurance arrangements. In this context, subsection 241-35 (5), paragraph (g) of the Act provides that the Ombudsman may decide not to deal with a complaint, or continue to deal with a complaint, if the complaint is mainly about commercial negotiations. The Ombudsman reserves the right to decide, on a case by case basis, whether to conduct mediation.

The Ombudsman has developed these Mediation Guidelines to assist in assessing whether mediation of a complaint is required and the process for facilitating it.

Generally, the Ombudsman's view is that compulsory mediation is a last resort, to be used when all other avenues have been exhausted, in the interests of affected consumers. The Act and associated Rules set out a number of requirements for mediation under section 247-5 and these have been incorporated into the guidelines.

## **Mediation Guidelines**

### *Voluntary Mediation*

Where the Ombudsman is notified of a complaint in relation to a Hospital Agreement that may potentially require mediation between the parties to the complaint, the Ombudsman will discuss the matter with the complainant and provide advice on any relevant issues, such as ensuring processes are put in place to protect consumers' interests, in the event that a decision is made to terminate an Agreement between a hospital and a health insurer.

The Ombudsman will also refer the complainant to the *Transition and Communication Protocols for Agreement Termination* which were endorsed by the industry, the Ombudsman and the Department of Health and Ageing in 2006.

Prior to taking further action in relation to the complaint, the Ombudsman will request information in writing from the complainant about the issues in dispute. The Ombudsman will also require that the matter has been escalated to a senior level with the other party to the complaint, and that any dispute resolution processes under the contract have been exhausted.

Once information has been provided in writing, the Ombudsman will seek information from the other party to the complaint. At this point, the Ombudsman may decide to meet with one or other of the parties, to discuss the issues of concern further. The Ombudsman may then decide to bring the parties together on a voluntary basis to try and effect a resolution by mediating between the parties.

Where the Ombudsman decides to mediate a complaint, he or she must have the complainant's agreement to do so and cannot continue to mediate if the complaint is withdrawn.

### *Compulsory Mediation*

If voluntary mediation fails to resolve the matter, the Ombudsman may decide to direct the parties to participate in formal mediation with a qualified, third party mediator appointed by the Ombudsman. Under the Private Health Insurance (Ombudsman) Rules 2007, the Ombudsman is to have regard to whether the mediator has suitable qualifications and experience in commercial mediation in considering the appointment of a mediator.

In deciding whether to give a direction under subsection 247-5 (1) of the Act, the Ombudsman is also required under the Rules to consider whether the parties have already participated in mediation, whether the mediation was unsuccessful and whether avenues for dispute resolution under the contractual arrangements have been utilised.

If the Ombudsman decides there is a case for formal mediation, he/she will write formally to each party and give 14 days notice of the requirement to attend mediation. Information about the subject of the complaint and the place of the mediation will also be provided.

If the Ombudsman directs the parties to participate in formal mediation, the Ombudsman will expect the parties to the dispute to act in good faith and in the interests of consumers in trying to achieve a resolution of the dispute. Under Section 247-5 (4), it is an offence for a party not to attend mediation if so directed by the Ombudsman.

Mediation in which a party is directed to participate will cease if the parties agree to a resolution of the matter, or the Ombudsman concludes that the matter cannot be settled by mediation.

The Private Health Insurance (Ombudsman) Rules provide that the Ombudsman must have regard to a report of the mediator before concluding that a matter cannot be settled by mediation.

A mediator appointed by the Ombudsman must provide, as soon as practicable following the mediation, a report to the Ombudsman to advise on whether the mediation took place and the outcome of the mediation.

Under section 247-20 of the Act, anything said or any admission made in mediation is not admissible in any court or in any proceedings before a person authorised by law to hear evidence.

### *Conduct of Mediation*

The legislation provides for the Ombudsman to conduct mediation, or to appoint a third party mediator. If the Ombudsman decides to appoint a third party mediator to conduct mediation, the Ombudsman has a list of suitably qualified mediators who are available to conduct mediation at a given time. The Ombudsman will consult the parties to the complaint regarding the appointment of the mediator, but will ultimately make the decision about the appointment.

Under section 247-5, the Ombudsman may direct a party to participate in mediation. It is an offence for a party so directed to fail to participate in mediation.

If the Ombudsman decides to proceed with formal mediation and engage the services of a third party mediator, the Ombudsman will cover the cost of the mediation, including venue hire, catering and mediator's fees. The Ombudsman will consider requests to cover the parties' travel expenses if long distance or interstate travel is required, taking account of the cost of the travel and ability of the party to cover this cost. Decisions to cover travel costs will be made on a case by case basis. Otherwise, parties to the mediation will be responsible for their own travel costs and the costs of any support personnel they bring to the mediation.

Once a mediator is appointed, he or she is responsible for deciding on the arrangements for the mediation, including whether legal representatives may be present at the mediation and informing the parties of any issues relating to the conduct of the mediation.

### *Outcome of Mediation*

A third party mediator appointed by the Ombudsman to conduct mediation must report to the Ombudsman, as soon as practicable after mediation is conducted, on the outcome of the mediation. This report must include the terms of the settlement, if the parties agreed to settle the complaint. If the parties were unable to reach agreement, the report must include the reasons that the mediation failed.

Once this report is received, the Ombudsman will write formally to the parties to the mediation setting out his/her understanding of the agreed settlement and timeframes. The letter will request a report from the parties outlining any action taken to comply with the terms of the settlement, within fourteen days of the date of the letter.

The Ombudsman will monitor the outcome of the mediation to ensure the parties comply with terms of the settlement and undertake any agreed action.

In the event of non-compliance with the settlement, the Ombudsman may make a formal recommendation to the non-compliant party. The Ombudsman is also able to report to the Minister for Health and make a recommendation to the Minister under section 244-15. The Ombudsman is also able to report on the outcome of mediation in its public reports.

## *Agreement Cessation during Mediation*

In the interests of consumers, it is recommended that an agreement which is in place between an insurer and a hospital should remain in effect if the Ombudsman decides to mediate the complaint (either informally or through formal, compulsory mediation) until the matter is resolved, or it is clear that a resolution cannot be achieved via mediation. An example would be where one or other party has issued a 30 day notice of termination. If the Ombudsman decides to mediate, the countdown to the termination of the agreement will be paused for the duration of the mediation process and will not resume until the mediation is completed.

## *Timeliness*

Contractual negotiations are usually conducted within tight timeframes. It is important that issues requiring mediation by the PHIO are dealt with in as timely a manner as possible. The PHIO will prioritise any complaints brought to the office and will expect insurers and healthcare providers to provide timely responses to requests for information. Ideally, responses should be provided to the office within one or two business days.

## *Additional Information*

For additional information about PHIO's mediation role, please see the "Frequently Asked Questions" document available at the following address:

<http://www.phio.org.au/complaints/industry-resources.aspx>

PHIO's *Transition and Communication Protocols Advice for Agreement Termination* are also available at the same link. Information can also be obtained by contacting the PHIO office at:

The Private Health Insurance Ombudsman

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## PHIO MEDIATION PROCESS

