

ISO SCHEME IS APPROVED

In December 2009, the ISO Scheme applied to the Minister of Consumer Affairs to become an approved dispute resolution scheme under the provisions of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (“the FSP Act”). As part of the application, details were outlined of proposed changes to the ISO’s Terms of Reference (“the TOR”) and Rules, to ensure the ISO Scheme complied with the FSP Act. The ISO Board agreed to the required changes, which became effective from 1 April 2010. The Minister of Consumer Affairs was advised and the ISO Scheme was approved as a dispute resolution scheme under the FSP Act on 19 May 2010.

On the recommendation of the ISO Commission, the ISO Board has agreed for the ISO Scheme to be expanded to include other financial service providers. We are delighted that Sovereign Assurance Company Limited is the first company to announce it has nominated the ISO Scheme as the preferred dispute resolution scheme for its Sovnet advisers.

Levy Basis for new Participants

After considering a number of funding options, the ISO Commission and Board have adopted a transitional levy basis for the 2010/2011 year. The ongoing levy basis will be reviewed when more information is available about the extent of the ISO Scheme’s new membership base.

New Participants can register with the ISO Scheme from 1 July 2010 and pay for membership to start immediately, or defer payment and membership until registration becomes compulsory on 1 December 2010.

For new Participants there is an annual fee, but no joining fee, and a complaint fee payable when a complaint is accepted for investigation. In certain situations, a discounted annual fee may apply. The base fees, exclusive of GST are as follows:

Participant Category	Base Fee
Individual Financial Advisers (“FAs”) and nominated representatives of a qualifying financial entity (“QFE”)	\$ 400
FA Business – per FA (Maximum 35 FAs)	\$ 400 \$14,000
Non-FA Business - per head (Maximum 35 FTEs)	\$ 400 \$14,000
Insurance or savings company (PLUS levy based on size of business)	\$ 1,500
PLUS	Complaint Fee
All new Participants	\$ 1,000

New Participant Manager for the ISO Office

Penelope England has joined the ISO Office as the Participant Manager. Until recently, she was the Communications and Membership Manager at the New Zealand Institute of Management. Her main focus will be coordinating the growing membership with the ISO Scheme’s expansion. She will look after existing Participants and new Participants, coordinate ISO training and communications, ensure all Participants be kept well informed and have the opportunity to contribute. Penelope will be the main point of contact for Participants on all matters other than dispute resolution. She has had 5 years experience in not-for-profit membership based organisations here in New Zealand and Australia.

In this Issue

- ISO Scheme is Approved
- Rental property and methamphetamine contamination
- The Assessment – an approach for different levels of complaint
- Consumer Information Sheets
- Case Studies for 2009
- “Consumers Transacting With Confidence”

In this publication, the Insurance & Savings Ombudsman is referred to as “the ISO” and the ISO Terms of Reference are referred to as “TOR”. In the case studies, “P” is used to denote Participant and “C” to denote Complainant.

Assessment mailing list

If you wish to:

- be added to the mailing list to receive further issues of *Assessment*;
- be removed from the mailing list so you will not receive further issues of *Assessment*; or
- amend your details on the mailing list;

please contact us at the address below.

Published by:

The ISO Office
P O Box 10 845
Wellington 6143
NEW ZEALAND

Telephone 04 499 7612
Fax 04 499 7614
Freephone 0800 888 202
E-mail info@iombudsman.org.nz
Website www.iombudsman.org.nz

Rental property and methamphetamine contamination

According to the Ministry of Health's 2008 "Draft Guidelines for the Site Remediation of Clandestine Methamphetamine Laboratories" ("P-Labs"), P-Labs have dramatically increased in number over the last 9 years. A number of P-Labs have been set up in rental houses without the knowledge of the property owner.

A consequence of "cooking" episodes of methamphetamine is the contamination of the house and its contents with methamphetamine residue or remnants of other hazardous chemicals used in the "cooking" process. This can also cause severe health problems for the occupants, necessitating decontamination of the house to a habitable state. Decontamination usually consists of major cleaning, or complete reinstatement of the affected parts of the house and probable replacement of contaminated appliances and furnishings.

P-Labs are becoming a growing concern for the insurance industry. Insurers are faced with increased risk, with potential claims for major fire/explosion, costs for alternative accommodation and loss of rent. Existing policies covering domestic rental properties, which can include cover for landlords' fixtures and fittings, generally do not contemplate the increased exposure to loss or damage from methamphetamine contamination. Therefore, insurers may believe they can simply rely on standard policy exclusions (e.g. gradual damage and intentional/malicious damage), to decline claims involving contamination.

Although each case has to be carefully considered on its merits, the ISO believes reliance on standard policy exclusions can be problematic. For example, for an insurer to rely on the gradual damage exclusion to decline a claim for decontamination, it must prove, on the balance of probabilities, that the need for decontamination was caused by a gradual process. Advice provided to the ISO by a highly qualified expert in the field of clandestine drug laboratory contamination testing and remediation, confirmed that it is possible for one episode of "cooking" methamphetamine to reasonably necessitate the same level of decontamination required after multiple episodes of "cooking" methamphetamine. Therefore, methamphetamine contamination could be regarded as a sudden or single event in regard to the policy's general cover.

While "cooking" methamphetamine is illegal, it does not automatically make the act malicious in regard to the damage and loss it causes. If reliance is placed on an exclusion for intentional/malicious acts, the insurer has to prove that, by "cooking" methamphetamine, there was malicious intent by the tenant to cause contamination damage to the house. Without substantial evidence, more often than not, proving the malicious intent of the methamphetamine contamination will be difficult and, therefore, it could be regarded as accidental.

Whatever insurers' intentions are for dealing with methamphetamine contamination claims, the ISO believes it is important that policies are clearly worded to deal with this growing exposure to loss or damage. Existing policies should be reviewed, if insurers are concerned about how their policies respond to potential decontamination claims. Insurers have to decide whether it is their intention to:

1. meet the decontamination costs in full, subject to certain obligations on the part of the property owner e.g. taking reasonable care when vetting prospective tenants; arranging regular and thorough and documented inspections of the property and immediately reporting any suspicions to the police; and/or
2. provide a limited cover for decontamination costs, subject to the same obligations as for 1; and/or
3. exclude cover completely, in which case the policy wording needs to clearly convey this intention.

Inevitably, after a house has been decontaminated, it will more likely than not be deemed to be "tainted", which could lead to a reduction in its market value. This reduction would be a consequence of the contamination, which should be excluded under the policy as consequential loss. The ISO recommends there be a full investigation and specialist assistance sought in each case, before a decision is made to accept or reject such claims.

Case Study 1

In May 2008, C purchased a house. One of the conditions of the sale was that the vendor ("the tenant") rent the house while C was overseas for about 2 months. Subsequently, C arranged landlord's cover for the house with P.

In July 2008, C returned to New Zealand. She encountered problems with the tenant not vacating the property, damaging property (e.g. broken water tank and water pump, truck damage to driveway) and not paying the rent.

In August 2008, the tenant vacated the house, and C began to renovate the house to live in it. Subsequently, C became ill from being in the house during the renovations and discovered the tenant had been arrested for manufacturing methamphetamine. Later enquiries established that the house had been contaminated from the "cooking" of methamphetamine.

In September 2008, C asked P whether she could make a claim for damage to the property and, in particular, for the decontamination of the house ("the damage"). There was an indication that the damage could have occurred prior to inception of the policy; given this, P advised C that it could not assist with a claim. C chose not to pursue the matter further.

In September 2009, C advised P that after speaking with a few brokers, she wanted to know on what grounds P could not assist her. P referred C to the clauses in the policy which:

- excluded liability for pollution or contamination;
- excluded cover for loss or damage caused by intentional or malicious acts; and
- excluded cover for any loss or damage arising from any event unless it occurred during the period of cover.

In October 2009, C advised P that the cause of the damage was "chemical contamination" and established that the damage occurred during the period of insurance. However, P advised that the damage was gradual and not covered under the policy. P advised C that a full review of the situation would be conducted. C made a claim to P, for the decontamination of the house.

P declined the claim, because it believed the damage was caused maliciously and it was gradual deterioration, which meant the policy provided no cover.



An approach for different levels of complaint - Assessment

The Assessment has evolved into a very comprehensive document. It comprises a number of parts, as follows:

- The decision – appears on page 1 as a summary of the complaint’s outcome
- Background to the complaint – lists and describes the policy, the key communications between the parties and the progress of the issue which forms the basis of the complaint
- The complaint – summarises the key dates of the complaint and states the Case Manager’s understanding of the complaint
- The policy – scanned excerpts from the policy that are relevant to a consideration of the complaint
- The issues – summarises the issues to be assessed in considering the complaint
- Assessment – the “heart” of the document which assesses the complaint in terms of relevant law, policy cover, evidence and the circumstances of the event
- Conclusion – either closure of complaint if the decision is accepted, or 14 days in which to request a review on provision of relevant, new information or evidence.

However, there is a wide range in the complexity level of complaints. The very complex complaints can involve aspects of law, multiple issues, high quantum, unclear policy interpretation, further investigation etc. Less complex complaints, on the other hand, may involve a single aspect of policy coverage and a relatively straightforward issue.

The Assessment that has evolved is suitable for the more complex complaints, particularly where the outcome could possibly be challenged. However, based on the experience of the ISO Office and understanding of complaints handling, other effective options can be used equally as successfully and improve timeliness.

Over the last few months, we have been trialling a “*Short Form*” Assessment for less complex complaints. Some of you will have seen these Assessments, as a number have been issued for recent complaints. They are used in cases where the Case Manager has discussed the details of the case with the Complainant, explained the Participant’s decision and the ISO’s jurisdiction, the law and what cover the policy provides and the Complainant understands that there are no grounds on which the ISO could uphold the complaint. The “*Short Form*” Assessment is in a letter format, usually 2 to 3 pages long, does not contain a list of background documents and the “*Assessment*” is written as confirmation of the telephone explanation. In those cases where the Complainant agrees, the file is closed at that point.

Consumer Information Sheets

The Consumer Information Sheets provide general advice on the selected topics. The practices and requirements of insurers can vary and, therefore, you should always check with your own insurer about its approach to many of the issues covered by the Consumer Information Sheets. The current 14 Consumer Information Sheets are available on our website www.iombudsman.org.nz or copies can be ordered from the ISO Office.

Case Studies for 2009

A selection of Case Studies for the complaints considered by the ISO Office in the year ended 31 December 2009 have now been added to our website and can be accessed through the News & Publications/Case Study Search section of the ISO’s website www.iombudsman.org.nz. It is expected the Case Studies for the remainder of the 2009 complaints will be added to the ISO website in the near future. We remind you of the case note search facilities, which enable a search to be based on one of the following alternatives: *All these words; This phrase; At least one of these words*. The output can be sorted according to: *Relevance; Year; Year – descending*.

Assessment

P initially relied on 4 grounds of declinature. However, the Case Manager believed only 2 were relevant to a consideration of C’s complaint to the ISO.

- Gradual deterioration

P declined the claim because it believed the damage arose from a gradual process of deterioration, in which more than 1 episode of “cooking” had caused the damage. However, for P to rely on the gradual damage exclusion to entitle it to decline the claim, it had to prove on the balance of probabilities that the damage was caused by a gradual process of deterioration, requiring more than 1 episode of “cooking” methamphetamine.

The Case Manager communicated with a highly qualified expert in the field of clandestine drug laboratory contamination testing and remediation. The expert confirmed that it was a real possibility that the contamination could have been caused by 1 “episode” of “cooking” as well as multiple episodes of cooking.

Although the damage could have been caused over a period of time by various “cooking” episodes, the Case Manager did not believe that P had proved, on the balance of probabilities, that this was the case. Therefore, the Case Manager did not believe P could rely on the gradual damage exclusion to decline the claim.

- Intentional / Malicious action

P also relied on the intentional / malicious act exclusion to decline the claim. The Case Manager did not believe there was any proof to show there was an intention to damage the house, therefore, P could not prove that “cooking” methamphetamine was an intentional act to damage the house.

Moreover, the Case Manager believed that “cooking” methamphetamine was illegal, but not malicious. From the available evidence, the Case Manager did not believe there was any proof the tenant maliciously cooked methamphetamine with the intent of damaging the house.

The Case Manager discussed the case with P and explained why he believed the exclusions which P relied on could not apply to decline the claim. After further discussions with the Case Manager, P reconsidered its declinature and accepted the claim.

Complaint Settled

“Consumers Transacting With Confidence”

Extract from the Hon Heather Roy’s address to the Australia and New Zealand Ombudsman Association (ANZOA) conference on Friday, 7 May 2010

My focus as Minister of Consumer Affairs is to promote an environment in which consumers can transact with confidence. It is worth exploring that phrase. “Consumers transacting with confidence” essentially means: consumers and suppliers have confidence in market rules; that a consumer purchases a product or service, their reasonable expectations are met; and that a consumer knowing that there is access to redress if reasonable expectations are not met.

Redress is available through the judicial system: the courts and the Disputes Tribunal. But, increasingly, alternative dispute resolution is being provided either voluntarily by industries themselves - which is my favoured option - or required by regulations. As some of you are aware, the New Zealand Ministry of Consumer Affairs is responsible for implementing and administering the financial services dispute resolution regime under the Financial Service Providers (Registration and Dispute Resolution) Act.

Under this regime, all financial service providers who offer services to the public must belong to a dispute resolution scheme. The scheme may be one that has been approved by me as Minister, or it can be the reserve scheme being established by the Ministry of Consumer Affairs. This regime, based on an alternative dispute resolution (ADR) or ombudsman scheme, is a new approach by Government to provide redress for consumers. ...

As well as providing for consumer redress the Financial Service Providers (Registration and Dispute Resolution) Act aims to improve market discipline. An industry-based ADR regime helps to facilitate this - financial service providers are more likely to ensure that their service and business practices are sound, to avoid the costs of having complaints resolved and of any remedy or compensation. Having the incentives in the right place encourages the right behaviour.

From my perspective as Minister of Consumer Affairs, the most significant value of ADR and ombudsman schemes is that they give consumers access to, and choice in the avenues for, redress. Accessibility is one of the benchmark principles that guide ombudsman scheme practices. Accessibility means the scheme’s processes should be easy to use and have no cost barriers - they must be free to consumers. Dispute resolution schemes usually use an informal, non-adversarial approach to dispute resolution; the process is simple to understand and use, and they help consumers with special needs, be they cultural, language, geographical or physical needs. It is worth remembering that the people who have the most difficulty with accessibility to schemes of any nature are very often the people who most need assistance. ...

Ombudsman schemes have expertise in the industry which they cover and their approach is to promote fair and just decisions giving regard to industry codes and the law. ADR decisions may be more appropriate and relevant than those of the judicial system because of better knowledge of the complaint context. ...

I see that the Government’s new approach to regulated dispute resolution will become a more preferred, cost effective and lighter-handed way to provide consumers access to redress in the future. ...

In summary my job is to set the right environment and then step aside so that you Ombudsmen can get on and deal with issues as they need to be addressed. From a consumer perspective, it is about having that ability to transact with confidence, but also about having the ability to do something positive about it if that transaction process has gone wrong.

Please note: “**Datacraft House**” has replaced “BDO House” for the ISO Office address. All other details remain the same.

Case Study 2

In 1992, C arranged life insurance with total and permanent disability and critical illness benefits, with P.

In January 2009, C made a claim to P, because he had suffered from a heart attack in December 2008.

P declined the claim, because it did not believe C’s heart attack had been diagnosed, based on “*new electrocardiographic changes*” (“*new ECG changes*”), as required by the policy.

C believed he had “*had new ECG changes*” and, therefore, met the policy definition of a “*heart attack*”.

Assessment

The policy was the basis of the contractual relationship between C and P. The policy did not simply state P was liable for a claim, if C had a heart attack. The policy set out precise criteria, which had to be present for P to consider C’s heart attack a “*heart attack*” in terms of the policy. For P to be liable for the claim, the diagnosis of C’s heart attack had to be based on the following (as required by the policy definition):

1. “*a history of typical chest pain*”; and
2. “*new electrocardiographic changes*”; and
3. “*elevation of cardiac enzymes*”.

C’s hospital discharge summary stated he “[p]resented ... with ‘*chest heaviness*’” and was diagnosed as suffering from a “*NSTEMI*”. As such, C’s heart attack was diagnosed, based on “*a history of typical chest pain*”.

A Cardiologist examined C’s ECG recordings and advised that “*none of them show[ed] changes characteristic of myocardial infarction (or myocardial ischaemia)*”. As such, C’s heart attack was not diagnosed based on new ECG changes.

C’s cardiac enzymes were not tested for elevation. However, in a letter to C, P said he had had “*an elevation in Troponin (cardiac enzyme substitute)*”. As such, P accepted the rise in Troponin I that C experienced as equivalent to an “*elevation of cardiac enzymes*” and considered that C’s heart attack was diagnosed based on this elevation.

The medical evidence did not show any new ECG changes. Therefore, C’s heart attack did not qualify as a “*heart attack*” as defined in the policy and C was not eligible for the heart attack benefit.

Complaint not upheld