

A message to all Financial Service Providers

Did you know that you will probably be affected by the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (“the FSP Act”)?

Under the provisions of the FSP Act, all Financial Service Providers (“FSPs”) will need to be registered. One of the registration requirements is that, if FSPs provide financial services to the public, they must be a member of an approved dispute resolution scheme, or the Reserve Scheme which is being set up by government.

Who/what is a Financial Service Provider?

The FSP Act defines a Financial Service Provider as a “*person who provides or offers to provide a financial service*”, with “*financial service*” being separately defined, in section 5 of the FSP Act. This basically covers all those who:

- provide insurance, superannuation, banking, investments, credit under credit contracts, forward exchange contracts;
- give financial guarantees;
- offer a range of defined securities to the public;
- change foreign currency; or
- provide a financial adviser service.

For the purposes of the FSP Act, “financial adviser service” has the meaning given by sections 10 and 12 of the Financial Advisers Act 2008 (“the FA Act”). Section 10 of the FA Act states that a person performs a financial service if, during the course of business, financial advice is given, an investment transaction occurs, or a financial planning service is provided. Section 12 of the FA Act lists a number of situations in which a financial adviser service is not performed. A decision is yet to be made by the ISO Scheme about whether it will provide dispute resolution services to financial advisers who provide services relating to the products of ISO Scheme Participants.

You need to ask your industry organisation whether you are subject to the requirements of the FSP Act and the FA Act and what steps you should take to become licensed. **If you need to be licensed and do not comply, you will be unable to carry on your business.**

Discussion papers

In June 2009, the Ministry of Consumer Affairs (“MCA”) is expected to issue discussion papers on the process for considering an application to become an approved dispute resolution scheme under the provisions of the FSP Act and the Reserve Scheme. The paper about the Reserve Scheme will cover matters such as the operating rules, governance arrangements and the process to establish the Reserve Scheme.

The MCA anticipates the application process and approval criteria to become an approved dispute resolution scheme will be available in late 2009. At or about the same time, the process for establishing the Reserve Scheme will also become available.

The implementation date for the changes has not been finalised at this time, but is expected to be in December 2010.

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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.

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In the meantime, the ISO Commission and the ISO Board are giving consideration to the issues which need to be addressed for the ISO Scheme to be approved as a dispute resolution scheme under the provision of the FSP Act.

Further information and details of the impact of the changes on the ISO Scheme will be provided when the overall position becomes clearer.

Case Studies for 2008

Case Studies for all complaints considered by the ISO Office in the year ended 31 December 2008 have now been added to our website – www.iombudsman.org.nz

With the inclusion of this additional information, case studies for all complaints considered between 1 January 2000 and 31 December 2008 can be accessed through the News & Publications/Case Study Search section of the ISO's website.

A hard copy of the 2008 Case Studies can be obtained by completing and returning the attached order form preferably before **30 June 2009**.

We also 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*

and have the output sorted according to:

- *Relevance*
- *Year*
- *Year – descending.*

New Consumer Information Sheet Travel Insurance

An increase in travel complaints being investigated by the ISO has highlighted that consumers often do not understand the cover provided by a travel policy.

The consumer information sheet on travel insurance has been prepared to provide a general overview for consumers about the cover provided; restrictions to the cover; limits to amounts payable under some sections and; their obligations before and during travel.

The information sheet covers:

- obtaining and understanding the policy;
- 24-hour emergency assistance;
- travel advisories – Ministry of Foreign Affairs and Trade;
- pre-existing health conditions;
- baggage and personal items; and
- safeguarding your property.

The information sheet is available from the ISO Office or on the website.

Travel insurance – the problems ... and the solutions

The ISO has produced a consumer information sheet on travel insurance to help consumers better prepare for their travel and know what to do in the event of making a claim to their travel insurer. Travel agents may also find the fact sheet useful in relaying important travel insurance information to consumers.

Case Study 1

In May 2007, C arranged travel insurance with P to cover his visit to New Zealand between November 2007 and March 2008.

In December 2007, C's mother died and C and his wife had to return to England.

In February 2008, C and his wife made a claim to P for the curtailment of the trip, which consisted of their return flights to England and local transport costs. P said the circumstances of the claim fell outside the terms of the policy, because the loss resulted from C's mother's "*frailty of old age ... Diabetes and Cerebrovascular Disease*", which were excluded from cover under the policy as "*pre-existing condition[s]*".

Assessment

The exclusion states as follows:

General Exclusions applying to all sections

WHAT YOU ARE NOT COVERED FOR

...

Loss, damage or liability arising directly or indirectly from:

1. (a) *any pre-existing condition, physical defect or infirmity or recurring medical or physical condition.*

Although P's intention was for the exclusion to include third parties, the intention had to be clearly conveyed by the policy, in a manner which is fair and reasonable to the insured.

On the Case Manager's reading of the policy conditions, it was not clear how widely the exclusion was intended to apply. In particular, it was not clear from the wording who must suffer from "... *any pre-existing condition, physical defect or infirmity or recurring medical or physical condition*", in order for the exclusion to apply.

P said the "*exclusion is not restrictive as to apply only to the named insured(s), but to any third party*". Therefore, it applied the exclusion widely. P reasoned that, "*but for*" C's mother's condition and subsequent death, C and his wife would not have curtailed the trip. Therefore, the claim arose "*directly or indirectly*" from C's mother's "*pre-existing condition[s], ... or infirmity ...*".

After reading through the policy, the Case Manager believed the exclusion should be read in relation to the insured, unless the exclusion specifically stated otherwise, e.g.: "... *act of foreign enemy ...*", "... *error of*

This “Assessment” has focused on 2 areas of travel insurance which have the potential to be problematic:

- free travel insurance as a credit card benefit; and
- pre-existing health conditions of non-travelling individuals.

1. Credit Card Travel Insurance

Free travel insurance, offered as a benefit of a credit card, may provide more restricted cover than other travel policies.

The ISO has investigated particular policy restrictions which include: cases where the cancellation or curtailment of the journey caused by the death or illness of close relatives is covered only if the relative is aged under 80 years; and cases where cancellation claims were declined in full, because the intended travel exceeded the policy’s maximum period of travel.

The Fair Insurance Code makes it mandatory for consumers to be provided with a policy document. A consumer has an obligation to read the policy. Insurers also have a duty to bring any unusual or onerous clauses in the policy to a consumer’s attention.

We believe insurers have an obligation to carefully manage the promotion of their insurance products through the credit card providers/banks. This is to ensure that consumers are made aware of the limitations of the travel insurance.

It is important for insurers to:

- know exactly how banks and other credit card providers promote the travel insurance to consumers as part of the credit card package;
- have input regarding information provided to consumers at the outset, including how the travel insurance benefit is activated and what specific/special limitations are contained in the policy’s standard terms and conditions; and
- ensure consumers are provided with the relevant insurance policy wording at the outset and any subsequent changes to the policy’s terms and conditions are provided to consumers in writing.

2. Pre-existing conditions of non-travelling individuals

It is well known that travel policies exclude cover for pre-existing medical conditions of the insured and their travelling companions, unless the insurer has agreed to provide cover on the payment of an extra premium.

However, it is less well known that these policies often also exclude pre-existing conditions of other non-travelling individuals. Such exclusions are most commonly restricted to close relatives but, in some cases, are broad enough to encompass anyone.

Pre-existing condition exclusions which incorporate non-travelling individuals can be problematic for the following reasons:

- many of the policies do not require the insured to be aware of the pre-existing condition suffered by the non-travelling individual. However, those same policies often include an offer to cover those pre-existing conditions on further assessment by the insurer. This can create an unfair situation where an insured does not apply for cover, because they are not aware of the pre-existing condition;
- even if the insured were aware of the pre-existing condition, there are issues around whether they could have reasonably foreseen the effect of the non-travelling individual’s pre-existing condition on their travel; and
- in addition, there are privacy issues around an insurer asking for the medical information of people who are not travelling. In most cases, the insured will not be entitled to request such information and the provision of such relies on the non-travelling individual allowing such access.

a travel agent ...”, “... negligence of a tour operator ...” OR “... government prohibition ...”.

If a particular person was not specified in the exclusion, the Case Manager believed a reasonable interpretation of the wording was that “... *any pre-existing condition, physical defect or infirmity or recurring medical or physical condition*” applied to the “*insured person(s) named in the policy certificate*”.

The interpretation relied upon by P extended the exclusion to apply to any other person’s health. However, given that the policy definition for “**Pre Existing Condition**” required the insured’s awareness of the condition, P had to be able to prove the insured was “*aware of, or ought to [have been] aware of*” any medical or physical conditions or circumstances suffered by the other person.

Applying P’s interpretation to the other words in the exclusion, there was no requirement for the insured to be aware of the other person’s “*physical defect or infirmity or recurring medical or physical condition*” in order to be precluded from making a valid claim. This would be an extremely onerous interpretation for the insured.

The Case Manager believed that the exclusion had to be limited to “... *the insured person(s) named in the policy certificate*” and not to “*any third party*”. Therefore, the exclusion should not apply to C’s mother to exclude liability under the policy for C’s curtailment claim.

Complaint upheld

Case Study 2

In May 2007, C booked and paid for air tickets for travel to South Africa in October 2007 with her bank gold card. Travel insurance (underwritten by P) was subsequently made available to C.

In September 2007, C’s father (“D”) died suddenly in South Africa. C changed the air tickets to the next available flight.

In October 2007, C made a claim to P for the additional costs incurred in changing the flight.

In November 2007, P declined the claim, because D was 96 years old at the time of his death. Clause 2.(a) of the policy, provided that P would reimburse an insured for expenses incurred “*as a result of: ... having to return to New Zealand during the Travel due to the Unforeseeable death ... of a Relative ...*”, qualified with “*provided that such a person is aged under 80 years*” (“the proviso”).

In order to avoid potential problems, insurers should:

- ensure that pre-existing condition exclusions are brought to an insured's attention, especially if claims for cancellation and curtailment of the journey could be dependant on pre-existing conditions of non-travelling individuals;
- make sure travel agents selling the policies receive training on pre-existing condition exclusions and the effects they have on the policy cover;
- be sensitive to the privacy of third parties and ensure that responsibilities and obligations under the Privacy Act 1993 are met; and
- be aware that if policy wordings are phrased ambiguously, the ISO may construe them *contra proferentem* the insurer.

A Reminder about “Deadlock”

When a consumer has exhausted a Participant's internal complaints process, the Participant is obliged to provide the consumer with a “deadlock” letter.

A “deadlock” letter confirms the consumer has exhausted the Participant's internal complaints process and “deadlock” has been reached. If a complaint is referred to the ISO Office outside the 2-month time limit and the “deadlock” letter does not refer to the 2-month time limit, we will accept the complaint for consideration.

However, if the “deadlock” letter was issued in the appropriate form and at the appropriate time, we can only ask the Participant whether it is prepared to waive the time limit. At that stage, we are unable to accept the complaint as of right.

Who You Gonna Call?



1. We are getting more and more enquiries from uninsured third parties saying “the insurance company told me to call you!”

However, that is incorrect. We can only deal with complaints made about an insurance company (Participant) by one of their policyholders (Complainant). The Participant must also be a member of the ISO Scheme.

2. Do your Customer Service representatives or Claims Officers know what we do? The Insurance & Savings Ombudsman, Karen Stevens, is more than happy to visit your office and give them a presentation.

Please contact Judy on 0800 888 202 to make arrangements for staff training.

C disagreed with P's declinature and stated that clause 2.(c) of the policy should apply to the claim. Clause 2.(c) provided that P would reimburse an insured for expenses incurred “as a result of: ... [a]ny other Unforeseeable Event not covered elsewhere in the Policy which is outside [his/her] control”.

Assessment

- Clause 2.(a)

In reading the policy and applying the facts, the Case Manager did not believe that clause 2.(a) was applicable to the claim. Clause 2.(a) specifically provided cover for situations where the insured was overseas and had to interrupt or cancel his/her journey “to return to New Zealand during the Travel due to the Unforeseeable death ... of a Relative” (Case Manager's emphasis).

In this case, C cancelled her travel plans, before taking the original flight. Therefore, even if D was under 80 years old, clause 2.(a) would not have provided cover for the additional costs, because C had not left New Zealand, in order to be able to “return to New Zealand”.

- Clause 2.(c)

Clause 2.(c) provided cover where expenses were incurred “as a result of: ... [a]ny other Unforeseeable Event not covered elsewhere in the Policy which is outside [his/her] control”.

The Case Manager believed C met the requirement for cover under clause 2.(c), because:

1. D's death was an “Unforeseeable Event” for C. In terms of the policy's definition, D's death was a “sudden, unexpected and unintended ... happening which [was] totally beyond [C's] control; and
2. it fell into the category of “other unforeseeable circumstances ... than those circumstances addressed elsewhere in the policy”. Cover was not provided elsewhere in the policy for cancelling a flight due to unforeseeable circumstances, before the commencement of a journey.

The Case Manager also believed clause 2.(c) was not qualified by an age limit of 80 years as set out in the proviso. The Case Manager did not believe P could rely on the proviso to clause 2.(a), when it clearly did not form part of clause 2.(c).

Complaint upheld