

New Chairperson for the ISO Board

For the last two years, David Smith has been Chairman of the ISO Board. David has also been the CEO of IAG New Zealand Limited and represented the Fire and General industry on the ISO Board. David guided the ISO Board through a number of significant changes to the Terms of Reference and the Rules and instilled in the Board Members the need for good governance and commitment. We are sorry David has left his position to return to Australia.

However, the ISO Board looks forward to continuing David's work with the appointment of Dr Ian McPherson from 1 April 2006. Ian is Group Chief Executive of Southern Cross Healthcare and represents the Health Insurers on the ISO Board. We welcome Ian and look forward to working with him for the continuing well-being of the ISO Scheme.

Changes to the TOR and the Rules

Since the last "Assessment" newsletter was published, there have been a number of changes to the TOR and the Rules. The majority of the changes stemmed from the 2003 review of the ISO Scheme, but a number of changes were made to the Rules to reflect earlier changes to the TOR. Significant areas of change are as follows:

- TOR

Previously, the ISO was unable to investigate any complaints of a commercial nature. However, small businesses are now included within the ISO's jurisdiction and the ISO is able to consider complaints for certain types of cover relating to small businesses.¹

The dollar value limits on complaints the ISO can consider have been raised. Where a claim relates to disability insurance providing for regular payments, complaints can be considered for claims up to \$1,000 per week (previously \$750 per week). Where a lump sum is involved, the limit is now \$150,000 (previously \$100,000). For claims above the revised limits, the ISO can only consider a complaint if the Participant agrees.²

It is hoped the extension of the ISO's jurisdiction, by including small businesses and raising the monetary limits, will enable the ISO to assist a greater number of consumers and Participants to resolve their disputes.

- Rules

The Test Case Procedure, which can be invoked by a Participant at any time before the ISO has made an Award under the provisions of the TOR, has been moved from the TOR to the Rules.³

Copies of the TOR and the Rules can be downloaded from our website.

In this Issue

New Chairperson for the ISO Board

Changes to the TOR and the Rules

ISO Conference – "Best Practice"

A Reminder to Participants

Consumer Fact Sheets

Staff Changes at the ISO Office

Diverse Issues

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.

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¹ Paragraph 1 of the TOR.

² Paragraph 3.1 of the TOR.

³ Rule 25 of the Rules.

ISO Conference – “Best Practice”

In September 2004, we held our first conference in Auckland. Generally, the conference was very well received, with more delegates arriving at the last minute than expected. This year, we are holding our second conference in **Auckland, on Tuesday, 26 September 2006**. The theme of the conference is “Best Practice” – in complaints handling and industry practice generally.

We are delighted to have Nina Harding, from Australia, as our keynote speaker. Nina is a well known Mediator and designer of complaints services. We are also intending to have a half-day workshop on **Monday, 25 September 2006**, with Trevor Slater, the National Relations Manager of the Financial Industry Complaints Service (FICS) in Australia.

As a result of the last conference, we have included suggestions from delegates into the topics included this year. Some of the delegates thought that there was insufficient information about issues relating to Life and Disability insurance. For that reason, we are having 2 different streams for part of the conference, relating to specific issues for Fire and General insurers and Life and Disability insurers. We are also focusing more on complaints handling in this particular conference, which should be of interest to those involved in all aspects of claims handling and supervision, complaints management and customer service.

The conference will be held at the Hyatt Hotel in Auckland and more information will be circulated about the conference to Participants in the next few months. You will also be able to access information about the conference from about June 2006 on our website.

A Reminder to Participants

The ISO Scheme is well supported by all its Participants. However, improvements in the following 3 areas will continue to ensure consumers are provided with quality service from both Participants and the ISO.

- “Deadlock” letters

When a consumer has exhausted a Participant’s internal complaints procedure, the Participant is obliged to provide the Complainant with a “*deadlock*” letter, which confirms a complaint can be referred to the ISO within 2 months of “*deadlock*” being declared.

More recently, we have encountered situations where consumers have exhausted the Participant’s internal complaints procedure but, because the Participant does not believe the ISO has jurisdiction to consider part of the matter in dispute, the Participant will not issue a “*deadlock*” letter.

Where the Participant believes part of a complaint falls outside the ISO’s jurisdiction, we suggest good practice is for the Participant to provide the Complainant with a “*deadlock*” letter which – in addition to the requisite “*deadlock*” requirements – indicates the part of the complaint it believes the ISO cannot consider. This provides the Complainant with the opportunity of making a complaint to the ISO, while assisting the Complainant’s understanding of the limits on the ISO’s jurisdiction, at an early stage.

There is frequently confusion about the ISO’s monetary limits, with Participants advising consumers the ISO cannot consider a complaint because it is above the ISO’s monetary limits. In accordance with paragraph 3.1 (a) of the ISO’s Terms of Reference, where the monetary limits of \$150,000, or \$1,000 per week for disability insurance are exceeded, the ISO can consider a complaint, if the Participant agrees.

Consequently, where the ISO’s monetary limits are exceeded, the decision on whether the ISO can consider a complaint (on the basis of the amount involved), rests with the Participant, not with the ISO. If a “*deadlock*” letter is requested in this situation and the

Case Study 1

C arranged travel insurance with P for his holiday in South East Asia. While on holiday, C caught a tuk-tuk to the train station in Bangkok, where he caught a train from Thailand to Laos. During the train journey, C noticed his backpack containing his new laptop, pocketknife, cellphone and PSP was missing. C made a claim to P for these items.

P declined the claim, on the basis that C had failed to take all reasonable precautions, had not acted in a responsible manner and had not exercised reasonable care.

In some situations, an insured’s conduct may contribute to the loss of his/her property. For this reason, insurers include policy conditions to limit liability if the insured does not take reasonable care of his/her property. This ensures the insured does not rely on his/her insurance as an alternative to taking reasonable care of his/her property.

To decline a claim under such a policy condition, an insurer must prove the insured’s conduct was grossly careless, grossly negligent, or reckless. An insured will be grossly careless, grossly negligent, or reckless where he/she appreciated that a risk existed and disregarded it, or failed to take adequate steps to avoid the risk. The courts in New Zealand consider what a reasonable person would have done in the circumstances of each particular case. As such, gross carelessness, gross negligence and recklessness include an insured who disregards a significant risk, which would have been obvious to a reasonable person who would not have taken such a risk.

P argued that C failed to exercise reasonable care because, in a tuk-tuk, “[o]ne would assume when disembarking that they would be able to readily see and check they have all their baggage items with them, particularly a back pack containing such expensive items”.

The Case Manager noted that, in its submissions to this Office, P described C’s actions as being “*totally careless*” and observed C had a “*casual attitude*” to his obligations under the policy. However, proving carelessness is not sufficient. P needed to prove that C was grossly careless, grossly negligent, or reckless, by showing he failed to recognise a significant risk which would have been obvious to a reasonable person.

Participant does not agree to the ISO considering the complaint, it is preferable to state this is the case in the “*deadlock*” letter.

In circumstances where the Participant wants the ISO to consider a complaint which would otherwise fall outside the ISO’s jurisdiction (i.e. a complaint above the monetary limits, or a complaint relating to a tenanted property), the Participant should clearly indicate it agrees to the ISO considering the complaint in the “*deadlock*” letter. This helps us, by reducing the need for further correspondence with the Participant, before the complaint is formally accepted.

- File presentation

A Participant must provide the ISO with its full, original and unedited version of its file, which should include everything relating to the complaint under consideration.

Given that most files contain a large volume of material, we appreciate information being presented in chronological order. Ordering the file in this manner will, in most cases, provide the added benefit of keeping duplicated documents to a minimum.

- Timeliness

The success of the ISO Scheme primarily depends on how it is perceived by the public, in terms of both the decisions it makes and the time it takes to provide them.

When the ISO receives the complaint and confidentiality forms from the Complainant, a complaint is formally accepted and the Participant is requested to provide its file. Because Complainants are asked to act within the same 7-day time limit as Participants when forwarding documentation to the ISO – and they generally do so – it is often difficult for us to explain to Complainants, why Participants sometimes take so long to provide their files to us. Sometimes, Participants’ provision of files can take up to several months, even with constant reminders from us. For Complainants, this raises questions about fairness, independence and why Participants are not acting within the spirit of the ISO Scheme.

Consumer Fact Sheets

The ISO is currently producing consumer fact sheets on topical insurance issues, such as non-disclosure, modifications to vehicles and gradual damage. The fact sheets will contain a brief outline of the relevant legal principles and/or policy provisions applicable to each topic. We hope they will assist in preventing, or resolving, disputes with insurance companies. They are being produced primarily for consumers and consumer organisations, as part of the ISO’s ongoing efforts to educate and inform consumers about the ISO Scheme and principles applicable to insurance. It is part of a wider effort to increase the financial literacy of all New Zealanders.

The fact sheets will be available upon request and will also be available to download from our website. We anticipate the release of some of the fact sheets, within the near future, to community and other interested groups. Please contact our Office, or visit our website, if you would like further information about availability and topics.

Staff Changes at the ISO Office

Chris Gibson went on parental leave at the end of March 2006. Chris and her husband are expecting the birth of their first child this month.

Harriet Duncan left the ISO Office at the end of March 2006, having decided to explore a new career opportunity.

Vanessa Simeonidis is leaving the ISO Office in May 2006, to travel and work overseas.

C thought he had collected all his property from the tuk-tuk, but did not realise he had left the backpack on the tuk-tuk after an hour on the train. The Case Manager believed his actions appeared to have been careless and negligent, rather than grossly careless, grossly negligent, or reckless.

P assumed that “*when disembarking ... [C] would be able to readily see and check that [he] ha[d] all [his] baggage items with [him]*”. Therefore, P did not believe C took all reasonable precautions. However, according to C, he had prepaid the driver and, as soon as he got out of the tuk-tuk, the driver drove off.

P also argued that C should have been aware of the need to take care of his property, because he had already made 3 claims during the policy’s duration. While this may have been so, P still needed to prove C was grossly careless, grossly negligent, or reckless and not merely careless or negligent.

P’s policy provided that “**[f]ailure to comply with any of these obligations may result in the loss of Your right to claim for property lost or damaged, at Our absolute discretion.**” However, the Case Manager believed this provision only gave P the discretion to decline the claim, if it could prove, to the required standard, that the insured did not comply with any of the policy obligations.

Having regard to all the circumstances, the Case Manager did not believe P had proved, on the balance of probabilities, that C was grossly careless, grossly negligent, or reckless, nor did the Case Manager believe such a finding could be made in the circumstances. Therefore, the Case Manager did not believe P was entitled to decline the claim, on the basis that C failed to exercise reasonable care.

The policy provided that “[y]ou must not leave the property unattended in a Public Place”. Therefore, the Case Manager had to consider whether the tuk-tuk was a public place and whether the backpack was left “*unattended*”.

Having regard to the definition of “*Public Place*” in the policy, a tuk-tuk could only be a public place if it could be considered “*any place to which the public has access*”. “[A]ny place to which the public has access” is a general term and the Case Manager believed it had to be interpreted, in accordance with the legal principle of *eiusdem generis*, in the context of the specific examples in the policy. The Case Manager did not believe a tuk-tuk was similar to any of the examples, because it did not have the same quality of accessibility as, for example, “... *restaurants, beaches and public toilets ...*”. On this basis, the Case Manager did not believe the tuk-tuk was a “*Public Place*”, as defined and intended in the policy.

We are pleased to welcome Mandy Groen, Administration Assistant, and Amanda Hannam, Enquiries Adviser, into the ISO Office. Both Mandy and Amanda have worked extensively in the insurance industry and are enjoying their new roles.

Diverse Issues

For the 6 months from July 2005, with the help of the ISO, consumers received in excess of \$265,000. Complaints about the declinature of claims arose out of diverse factual circumstances and included the following:

- An insured's vehicle lost traction and rolled down a hill when he was returning from a hunting trip on a farm. The insurer avoided the vehicle insurance policy from its inception, for non-disclosure of criminal convictions. After making enquiries of prudent underwriters and on a careful consideration of the particular factual situation in accordance with *State Insurance Ltd v Brightwell* (16 August 2001) unreported, High Court, Hamilton Registry, AP29/01, the ISO did not accept the convictions were material to the underwriting of the risk. The insurer was not entitled to avoid the policy and had to consider the claim.
- When travelling in South East Asia, an insured inadvertently left his backpack in a tuk-tuk. The insurer declined the claim under the insured's travel insurance policy, on the basis the insured had failed to exercise reasonable care by leaving the backpack unattended in a public place. The ISO did not believe the insured had been grossly careless, grossly negligent or reckless. Nor did the tuk-tuk constitute a place to which the public had access in the same way as the other examples used in the policy of "restaurants, beaches and public toilets". Therefore, the ISO found that the complaint should be upheld and the claim paid. (For the full casenote, see *Case Study 1*.)
- An insured made a claim under her contents insurance policy, for damage to a sofa caused by her pet rat, which had escaped from its cage. The insurer had declined the claim on the basis of an exclusion for "pest damage". The insured did not believe her rat was a "pest"; rather, it was a pet. The ISO did not accept the intention of the policy was to exclude pet rodents and, therefore, the rat could not be classed as a "pest". The ISO believed the exclusion did not apply in the circumstances to exclude cover. (For the full casenote, see *Case Study 2*.)

On a Lighter Note ...

A traveller was rushed to hospital to undergo emergency coronary surgery. The operation went well and, as the man regained consciousness, a Sister of Mercy was waiting by his bed.

"Mr. Smith, you're going to be just fine", said the nun. "However, we need to know how you intend to pay for your stay here. Do you have insurance?" "No, I don't", Mr Smith whispered hoarsely.

"How about paying in cash?" "I'm afraid I cannot, Sister", Mr Smith replied.

"Well, do you have any close relatives who could help you?" "Just my sister in Brisbane", a crestfallen Mr Smith responded, "but she's a humble spinster nun."

"I must correct you, Mr. Smith", said the nun, with a faraway look on her face. "Nuns are not spinsters. They are married to God."

"Wonderful", said Mr Smith cheerfully. "In that case, please send the bill to my brother-in-law."

Case Studies for all complaints considered in the year ending 31 December 2005 are now on the ISO's website – www.iombusdman.org.nz

Because the Case Manager did not believe the tuk-tuk was a "Public Place", the Case Manager did not consider whether C left the backpack "unattended".

Consequently, the Case Manager did not believe C left the property "unattended in a Public Place" and, therefore, he did not believe P was entitled to decline the claim on that basis.

Complaint upheld

Case Study 2

C arranged contents insurance with P. In May 2005, C made a claim to P for a two-seater sofa, damaged by her pet rat, which had escaped from his cage.

P declined the claim, relying on a "[p]est damage" exclusion, which stated there was "[n]o cover for ... **Pest damage.** There is no cover for loss or damage caused, directly or indirectly, by insects, rodents or vermin."

C argued that "the spirit and thrust of [the exclusion] relate[d] to wild animals roaming free and entering one[']s home and causing damage." C did not believe the exclusion related to "pets held in cages inside the home."

In accordance with the ordinary rules of legal interpretation, the Case Manager considered the exclusion in the context of its heading, which referred to "[p]est damage". The Case Manager believed the clear reference to "[p]est damage" coloured and qualified the meaning of the following terms within the exclusion and, therefore, the exclusion operated to only exclude damage, caused directly or indirectly, by "[p]est" rodents.

The Case Manager accepted P's argument that, regardless of whether it was a pet, the rat remained a rodent. However, the Case Manager believed it was important to note that a pet rodent, by its nature, is not a pest. A pet is fed, and cared for, by its owner/s. A pest is not owned by any person; rather, it is a troublesome and annoying creature, which people wish to be rid of.

Accordingly, as P had not shown the rodent which caused the damage to C's sofa was a "[p]est", in terms of the exclusion, the Case Manager did not believe P had proved the application of the exclusion to the claim.

Complaint upheld