

Conciliation Process

As you will all be aware, the ISO was established to provide mechanisms for complaint resolution that are fair, cost effective, informal and efficient. The ISO has introduced a further resolution process Conciliation, which we believe complements our existing processes and provides another forum of resolution to both Participants and Complainants. This is a process by which the parties to a complaint, together with the assistance of a neutral Conciliator, attempt to find a resolution to the complaint.

Why Conciliation? We believe that Conciliation helps resolve disputes by sharing information, identifying issues in dispute, discussing them and trying to reach agreement. It is an informal process which enables both parties to a dispute to openly discuss and identify the relevant issues and move the dispute towards resolution. The Conciliator will facilitate and assist both parties to equally communicate their concerns and to help generate options for resolution.

The proceedings are confidential. Nothing said or done during the Conciliation Conference can be divulged unless agreed by both parties or by force of law. Only a record of the outcome (that is, whether the complaint was or was not resolved, and the details of any settlement) is recorded.

Who is the Conciliator? The Conciliator is a member of the ISO Case Management team, who is trained in conciliation / mediation and is independent to the parties. The Conciliator will ensure that any agreement or resolution is fair and reasonable and follows industry practice and the ISO Terms of Reference.

How is the Conciliation Conference Conducted? The Conciliation Conference will generally be conducted by way of telephone conference call. Prior to agreeing to undertake the Conciliation process, the ISO expects that both parties will demonstrate a commitment to resolving the complaint; will approach the Conciliation process with an open mind; be truthful and be prepared to be open in the discussion of the issues; and be at the meeting place or telephone contact point, as arranged, to ensure the conference starts on time. Generally the Conciliation Conference will take about 2 hours, depending on the circumstances of the case.

Is Representation Required? While the ISO appreciates the importance of representation and support at these Conciliation Conferences, we do not believe that representation is necessary. However, the ISO will consider any request for representation from either party. The ISO does encourage consumers to have a family member or friend present as support during the Conciliation Conference.

To date, we have resolved 2 cases by way of the Conciliation process. Both Conciliations achieved a satisfactory result for both parties and provided a fair resolution to the matters. We have included a case summary in this issue of *Assessment*.

We envisage that the Conciliation process will be used more frequently in the future and welcome the opportunity to work with Participants and Complainants using this process. Further information regarding the process will be available shortly on the ISO Website: www.iombudsman.org.nz and, in the meantime, can be obtained by contacting the ISO on 0800 888 202.

In this Issue

Conciliation Process

Changes to the ISO Office

Complaints Corner

Review of the ISO Scheme

Consumer Information Sheets

The Disputes Resolution Working Party

Consumer Awareness of the ISO Scheme

Websites

A point to ponder ...

Non-Disclosure: proof of inducement required

Christmas Hours

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:

Office of the ISO
P O Box 10-845
Wellington
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

Changes to the ISO Office

As many of you will be aware, Sid Narraway, our friend and long standing Case Manager, passed away on 10 August 2007. Sid made a huge and lasting contribution to the ISO Office and he is sadly missed by us all.

Amanda Hannam, who is our Enquiries Adviser, is also leaving us on 18 December 2007. Amanda is relocating to Queenstown, where she and her partner will take advantage of the beautiful landscape and no doubt climb it all. We thank Amanda for all her hard work throughout the last 2 years and wish her and Andy all the very best for their future.

Complaints Corner

Between 1 July 2007 and 30 November 2007, we accepted 80 complaints for formal investigation, which is 6 less complaints compared to the same period last year. Breaking those complaints down into sectors; 58 were in fire and general; 15 in health; 6 in life; and 1 in savings.

The outcomes for complaints received and closed between 1 July 2007 and 30 November 2007 were 40 not upheld; 3 partly upheld, 5 settled; and 15 upheld. The figures for the same period last year were 43 not upheld; 1 partly upheld; 14 settled; and 10 upheld.

Between 1 July 2007 and 30 November 2007, we received 524 telephone enquiries, 75 email enquiries, 185 written enquiries and one walk in enquiry. Breaking those enquiries down into sectors; 289 were in fire and general; 51 in health; 71 in life and disability; 31 in savings and the balance were general enquiries and referrals.

Between 1 July 2007 and 30 November 2007, there were over 21,000 sessions on the website.

Review of the ISO Scheme

The ISO Commission is obliged to conduct a review of the ISO Scheme every 5 years in accordance with the Rules. The last Review was undertaken in 2003 and covered all aspects of the ISO Scheme's operation. This year the Review is more targeted, focussing on the Benchmarks of efficiency and fairness.

The selection of the Reviewer was done by way of limited tender and the ISO Commission selected Mr Phil Khoury of the Navigator Company Pty Ltd. Mr Khoury has conducted a number of similar reviews in Australia and, most recently, in Canada, bringing a wealth of experience to the Review. He will be seeking submissions from Stakeholders early in 2008 and the final report will be provided to the ISO Commission in June 2008.

Consumer Information Sheets

We have prepared a series of consumer information sheets on issues which are frequently the subject of complaints made by consumers to the ISO. We have prepared a consumer information sheet on the topic of "Jewellery Insurance" and it will be available on our website www.iombudsman.org.nz, under "News & Publications" in the near future.

Consumer information sheets can also be requested by contacting the ISO Office directly.

Case Study 1

In 1995, C arranged life insurance and trauma insurance cover with P, through one of P's agents ("the agent"). In 1997, C was diagnosed with breast cancer and made a claim to P for the trauma insurance benefit. The claim was accepted by P and, accordingly, no further trauma insurance benefits were payable under the policy.

In June 2002, C applied to have trauma insurance cover of \$50,000 added to her policy. P accepted the application and offered the trauma insurance cover, subject to an express exclusion for cancer.

In November 2005, the agent visited C's office, where he spoke to staff present about insurance cover with P and the options available for cover. According to C, the agent said that she was "fully covered thanks to ... [P]".

In or about May 2006, C was diagnosed with breast cancer. C contacted the agent to determine whether she could claim for the trauma insurance benefit. After consulting P's online system, the agent mistakenly advised C that no exclusions existed on the policy and that she was fully covered for cancer. In June 2006, C made a claim to P for the trauma insurance benefit. P declined the claim, on the basis that cancer was excluded from the trauma insurance cover.

In submitting her complaint to the ISO, C said she believed P should accept the claim, because of the agent's representations in November 2005 and at claim time, that she was covered for cancer.

Given the ISO is unable to assess credibility, the Case Manager was unable to resolve the issue of whether the agent advised C that she was covered for cancer in November 2005. However, the Case Manager believed that P was responsible for the agent mistakenly advising C, at claim time, that no exclusions existed on the policy. In considering this, the Case Manager noted that, despite any inconvenience caused, the misrepresentation at claim time did not cause any direct loss to C. As a result, it did not provide a basis on which the ISO could require P to make a payment to C. Because of this, the ISO asked P to settle the complaint. P made an ex-gratia offer to C. The offer was rejected by C.

It was agreed to resolve the matter by means of a telephone Conciliation Conference involving the ISO Office, P, C and C's solicitor. The process resulted in the resolution of the complaint on a basis which was acceptable to both P and C.

The Disputes Resolution Working Party

From 2008, significant changes will be made to the regulatory environment relating to Financial Products and Providers, including legislation applying to advisers. The ISO Commission has established a working party to consider the options for dispute resolution services in the proposed regulatory environment. The aim of the working group is to enable the ISO, with input and assistance from industry representatives, to identify and develop the various options available to the ISO Scheme.

Consumer Awareness of the ISO Scheme

In September 2007, the ISO Commission arranged for UMR Research Limited (“UMR”) to ask consumers a number of questions about the ISO Scheme, as part of a nationwide Omnibus survey. The survey was undertaken by way of a telephone survey of a nationally representative sample of New Zealanders 18 years and over. 71% confirmed that they did have insurance or savings products. 55% of those consumers were aware of the ISO Scheme and they also knew how to make a complaint.

The most disappointing aspect of the survey was in relation to information provided by insurance and savings companies. 75% of consumers said their insurance company had never told them they could complain to the ISO. 13% said they had been told and 12% said they were unsure. The report said that *“insurance companies are not telling customers that they can take complaints to the ISO if they were ever dissatisfied with the service or process of the company”*.

These results have raised a number of concerns for the ISO Commission and, in particular, how many consumers actually obtain the necessary information. Having considered a number of options, the ISO Commission determined that the most effective option would be to ask all Participants for their co-operation to include a reference to the ISO Scheme in all future policy documentation. This would be the most effective and efficient way to reach all consumers who have insurance. While the ISO Commission acknowledges that some Participants already include a reference to the ISO Scheme in their policy documents, it also believes that consumer confidence in the insurance industry can be improved and early information about the ISO Scheme could be another way to achieve this end.

Websites

Recent enquiries have shown that many Participant websites do not have reciprocal links to the ISO’s website. We believe that this would be an efficient and effective way to assist the customers of participating insurance and savings companies to access information.

We are in the process of updating our website and we have approached all of the Participants, asking whether the links can be set up.

A point to ponder ...

The following issue was raised in a complaint letter recently received by the ISO:

“[P] called my home and left a message on a communal answer phone stating that they had sent the letter of Deadlock to me. I then had to explain to my two teenage daughters what was going on – as they heard the message before I got home from work.”

Does your company/organisation have guidelines on whether a voicemail message should be left when dealing with what may be sensitive information? If there are no guidelines, should there be?

Case Study 2

In 2001, C arranged life insurance with P and in June 2006, C completed an application to increase the sum insured. In August 2006, P advised C that it was avoiding the policy and declining the application for additional cover, on the basis of non-disclosure of chronic renal failure (“the decision”).

P avoided the policy and kept the premiums paid, in accordance with the policy.

• Non-disclosure

When C completed the application, she was asked a number of questions relating to her past and current health. She answered “no” to all of the questions and did not provide any additional information. C then signed and dated the application and, by doing so, declared the information provided was “true and complete to the best of [her] knowledge”.

During its investigations for the application for additional cover, P obtained C’s medical records. These showed that C did not disclose a history of urinary tract infections, appointments with a renal physician, medication prescribed for kidney function and a number of referrals for a renal biopsy and ultrasound. Therefore, it was necessary to determine whether this information was material information, which should have been disclosed to P.

• Materiality

P was entitled to avoid the policy, if C failed to disclose material information when she arranged the policy. A fact is material if it would influence the mind of a prudent insurer in deciding whether or not to accept a proposal for insurance and, if so, on what terms. Whether a particular fact is material depends upon the circumstances of the case and is a question of fact. The onus of proof of materiality is on the insurer. In order to determine whether the information C did not disclose was material, the Case Manager presented C’s medical history (with identifying details omitted) to 2 independent underwriters and asked what their underwriting decision would have been.

Both underwriters responded that, based on C’s medical history, they would have postponed a decision until a renal biopsy had been carried out.

One underwriter also advised that, if cover had been offered, it would not have been on the same terms offered. P confirmed that, had it been aware of C’s kidney problems, it would also have requested further information from her doctor and postponed cover until the test results were available. P only entered into the contract on the terms it did, because of C’s non-disclosure of material information.

Non-disclosure: proof of inducement required

In the past, the ISO Office has investigated non-disclosure cases primarily on the basis of the materiality of the non-disclosed information. However, the case of *Jaggat v Lyttelton Marina Holdings Ltd (In Receivership)* [2006] 2 NZLR 87, has now qualified this to also include the requirement of inducement. In *Jaggat*, Panckhurst J quoted from the case of *Assicurazioni Generali v Arab Insurance Group* [2003] Lloyd's Rep. IR 131, as follows:

"In all the circumstances I would summarise the relevant principles of inducement in this context in this way:

- 1. In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.*
- 2. There is no presumption of law that an insurer or reinsurer is induced to enter in the contract by a material non-disclosure or misrepresentation.*
- 3. The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence [of] evidence from him.*
- 4. In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant nondisclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so" ("emphasis added").*

Therefore, in addition to having to prove the materiality of information not disclosed, insurers now have to show that they were induced (because of the information not disclosed) into offering insurance to the insured. Proof of inducement is now required by the common law. However, this will not alter the ISO's approach to non-disclosure complaints, because most Participants provide evidence of inducement.

Evidence of inducement is normally provided in the form of an underwriter's opinion before the insurer decides to avoid the policy. An underwriter's opinion should not be written after the avoidance of the policy, as it should be relied on by the insurer when making the decision about how it would have responded to the information, had it been disclosed. If a Participant has not provided evidence to the ISO Office to prove that it was induced to enter the contract on the terms it did, then this may be a ground for upholding the complaint.

Christmas Hours

The ISO Office will close at
5pm on Friday, 21 December 2007
and re-open at 8.30am on Monday, 7 January 2008.

On behalf of us all at the ISO Office, we wish you all a very
Merry Christmas and a Happy New Year.

Having regard to the experience of this Office and the independent underwriters' opinions, the non-disclosure was material. If C had disclosed her full medical history to P, it would have requested further information, which would have led to it imposing an additional premium, or not offering cover. On this basis, P was entitled to avoid the policy and decline to refund the premiums under the policy.

Result Complaint not upheld

ISO's Guidelines: The ISO asked P to refund the premiums, on the basis that C's non-disclosure was not fraudulent. In most policies, forfeiture of premiums is only available when there is evidence of fraud. However, P's policy allowed forfeiture, even if there was no fraud. This is contrary to the common law position and, given that the only remedy for non-disclosure at common law is avoidance, the ISO did not believe P's practice reflected good insurance practice.

Case Study 3

In November 2006, C arranged insurance for his vehicle with P. Later that month, C's keys and vehicle were stolen. C made a claim to P for the stolen vehicle. P discovered that C had not disclosed his traffic convictions when the policy was arranged.

P avoided the policy from inception, because of non-disclosure of the traffic convictions.

An applicant for insurance has a common law duty to disclose to an insurer all information, which a prudent insurer would consider material. In order to determine whether or not C's non-disclosure of his traffic convictions was material information, the Case Manager presented this fact situation to 2 independent underwriters and asked how this would have influenced their decisions to insure the vehicle. Both underwriters indicated that the information would have affected their decisions to insure the vehicle. On the basis of this information, the Case Manager believed C's non-disclosure was material.

P's underwriter confirmed P would not have offered C cover if it had been aware of the traffic convictions. Having regard to the information in the underwriting review, the Case Manager was satisfied that the non-disclosure caused P to enter into the contract on the terms provided.

Accordingly, P was entitled to avoid the policy from inception and decline to consider the claim.

Result Complaint not upheld