



Fair and reasonable decision making and the law

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ISO Scheme

- is an industry based consumer dispute resolution scheme;
- does not currently operate within a regulated market environment;
- has Rules and Terms of Reference which must now comply with legislation:

Paragraph 5.7: *“In making any decision ... the ISO shall do so by reference to what is, in his/her opinion, fair and reasonable in all the circumstances”.*

Paragraph 5.8: *“ISO shall not be bound by any previous decision ... he/she shall have regard to ... any applicable rule of law ...”.*





Fair and reasonable and in accordance with the law?

- **Rhoda James** :*“One of the strengths of private ombudsmen is the power to go well beyond maladministration in decision making. They are not only able to take account of legal rules but through the inclusion of fairness in a substantive sense in jurisdiction are able to invoke jurisprudential considerations of an equitable nature”* (Private Ombudsmen and Public Law, p.13).





Extra gloss on use of the name ...

In 1991, the Ombudsmen Act 1975 was amended to include section 28A “[n]o person ... may use the name **Ombudsman** ... except ... with the prior written consent of the Chief Ombudsman.”

Criteria for approval include a “*system and procedures ... [which] must ensure fair and impartial decision making*” (Sir Brian Elwood 2.2002).





- **Richard Nobles** :*“One must also avoid exaggerating the extent to which any ombudsman will ignore formal law. In giving effect to ideas of fairness or reasonable expectations, legal rules form an inevitable part of the background to that reasoning”*

(Keeping Ombudsmen in their Place, p.315).





UK - CA decision (2008):

Heather Moore & Edgecomb Ltd v FOS [2008] EWCA Civ 642

FOS is not required to apply law, given the statutory requirement for it to determine a complaint on a fair and reasonable basis. Required to take into account relevant law, but can depart from it giving reasons why - subject to judicial review. Lord Justice Rix at paragraph 34

Australia – Supreme Court of Victoria decision (2009):

Wealthcare Financial Planning P/L v FICS & Ors [2009] VSC

Cavanough J held that, while FICS had to have regard to the law, its overriding obligation was to make decisions that were fair in all the circumstances. FICS was not required to make decisions applying the law to the facts – it was in the business of resolving disputes.





ISO Review 2008 – focus on: *fairness and efficiency*

- decisions “*overwhelmingly fair*”;
- “*fine tuning*” required; and
- need to articulate TOR criteria in decisions.

ISO’s obligation under the TOR to make fair and reasonable decisions, having regard to the law.





ISO's Terms of Reference - paragraph 5.7

In determining what is fair and reasonable, the ISO may consider:

- (a) the educational, cultural and personal circumstances of the Complainant as are relevant to the complaint;
- (b) the manner in which the Complainant has been dealt with by the Participant;
- (c) the manner in which the Complainant has dealt with the Participant;
- (d) the degree to which the Participant was in control of the systems and procedures which are the subject of the complaint; and
- (e) any other matter the ISO considers **relevant**.





Fairness can mean different things to different people ...

- From a consumer's perspective:

“I know what the contract says, but it's not fair! I've paid premiums for years and never made a claim until now, so I should be covered. The company has a moral obligation to pay my claim”.

- From a Participant's perspective:

the ISO “should stick to the ‘hard’ aspects of any complaint – being the law and the policy wording and ... should stay away from notions of fair and reasonable or good industry practice”.





What is relevant to ensuring the ISO's decisions are fair and reasonable?

- Observing procedural fairness – natural justice, opportunity for both parties to dispute to be heard
- Having regard to the law, Codes and good practice (paragraph 5.8 TOR)
- Following an inquisitorial process – ISO makes further enquiries if necessary – underlines impartiality
- Consistency of decisions – publication and education
- Reasons provided for decision reached
- What were the reasonable expectations of the consumer when buying the product / service / advice?





Arthur suggested the ISO could use the overriding fair and reasonable jurisdiction as an “*alternative strategy for sidestepping the disfiguring aspects of insurance law*” (... Strategies for Reform, p.80).

The “*disfiguring aspects*” of the law on non-disclosure:

- Consumers usually unaware they have a duty to disclose all material information, or the extent of the duty.
- The test of materiality is the effect on a prudent insurer, not what is relevant to the reasonable insured.
- The duty is on the consumer to disclose, not on the insurance company to ask specific questions.
- Insurer’s remedy for breach of the duty is to avoid a policy retrospectively to commencement (*ab initio*), or renewal, treating it as if it never existed.

Avoidance means consumer is uninsured and will be potentially uninsurable in the future.





Levelling the playing field ...

Non-Disclosure – What does the ISO do?

1. ISO requires insurer to provide proof of the non-disclosure (111960 - 2007).
2. ISO requires insurer to apply remedies set out in policy; if remedies for non-disclosure in contract, will override common law (111702 - 2007).
3. ISO requires insurer to follow any applicable code (111878 - 2006).
4. ISO obtains independent underwriting opinions to assist with decision about whether information not disclosed is material and insurer is following good industry practice (111805 - 2007).
5. ISO requires insurer to ask specific questions (109454 – 2002).
6. ISO requires insurer to be induced to enter contract by non-disclosure: *e.g. insurer must provide underwriter's opinion that it would not have entered the contract on the same terms, but for the information not disclosed* (111996 - 2007).
7. ISO, in some cases, requires insurer to do what it would have done if on notice: *e.g. the insurer agrees to pay a claim and offset the premium which would have been paid, rather than avoid the policy* (112206 - 2008).
8. ISO requires insurer to prove the insured knew about the information not disclosed (109445 - 2001).
9. ISO will not allow an insurer to avoid a policy where insurer on notice, has the information not disclosed on its files and fails to take action (110754 - 2005).





1. ISO case study: (109454 – 2002)

Facts

The Complainant (“C”) made a claim to the Participant (“P”) under an income protection policy. P declined to consider the claim, because C had not disclosed fainting attacks when she completed the application for insurance.

While C consulted her doctor after most of the fainting attacks, she was not diagnosed with a condition or illness until after the commencement of the policy. C made a complaint to the ISO.

The Policy

The application asked C to disclose “*Conditions, Illnesses or Injuries not listed*”.

The Law

Information is **material** and must be disclosed, if it would influence the mind of a prudent insurer in deciding whether or not to accept an application and, if so, on what terms. If the insurer had been given the information and, as a result, would not have accepted the risk, or charged a higher premium, the information is material. **The law says that any information which may be material to a prudent insurer must be disclosed, even if the insured does not think it is relevant.**

Questions:

1. Did C have an obligation to disclose the fainting fits on the application?
2. Having regard to the law, what was a fair and reasonable outcome?





2. ISO case study: (115478 – 2010)

Facts

The Complainant's ("C") wife's red 2005 Volkswagen Beetle vehicle was insured with the Participant ("P"). C parked the vehicle outside a tavern, while C had a few beers with some acquaintances at approximately 5.10pm on a Friday evening. He sent his wife several text messages to pick him up – which she did at about 7.15pm. The vehicle was left locked on the side of the road. C and his wife had the only keys.

At approximately 10.00pm, the vehicle was discovered on fire about 25kms away from the tavern in a country area. The police were notified and left a voice message on C's phone at about 10.30pm. C received the message at about 8.45am the following morning. C made a claim to P for the agreed value of \$30,000.

P appointed an investigator to investigate the circumstances of the claim. The vehicle wreck was not secured by P and was removed by persons unknown. P declined the claim, because P believed the claim was "*fraudulent in that [C and his wife] were personally, or through another person or persons acting as [their] agent, involved in the taking and deliberate destruction of [the] vehicle*".

The Law

To decline a claim on the basis that it is "*fraudulent*", there must be proof that C made a deliberate representation which would give a misleading impression to a reasonable reader/listener. A higher civil standard of proof is required to prove fraud and arson and is commensurate with the gravity of the allegation; it must be clear and convincing (see *Back v National Insurance Company of New Zealand Ltd* [1996] 3 NZLR 363 Hammond J, at pp 368-371).

The Investigation

The vehicle was locked and had an immobiliser fitted, which meant it was extremely difficult to steal without the keys – it deadlocked from inside. The most likely method of stealing the vehicle was by towing on a truck or trailer. However, none of the tow companies in the area had any records of towing the vehicle. A vehicle theft police analyst confirmed that it was possible, but unlikely, for a thief to steal the vehicle by using a winch to lift it onto a truck / trailer for towing. The investigator concluded that the suggestion "*lacked credibility*", because the vehicle was "*not targeted for joy riding, theft of vehicle parts or rebirthing*". While a lock pick could have been used, they were not readily available in NZ other than to locksmiths. C said lock picks were available over the internet from China.

P was unable to conduct a vehicle examination, so the locks on the driver's door of the vehicle could not be tested – there were only photos. A fire investigator analysed the photographic evidence and formed the view that the driver's door of the vehicle was open at the time of the fire. He concluded that the photographs did not show any damage to the driver's door pillar, which would indicate that the door had been forced open. He believed "*[t]he door lock/barrel remain[ed] intact and display[ed] relatively minor fire damage – again consistent with the door being open at the time of the fire*".

Questions:

1. Was there clear and convincing evidence of fraud?
2. Having regard to the law, what was a fair and reasonable outcome?





3. ISO case study: (115710 - 2009)

Facts

The Complainant's ("C") contents were insured with the Participant ("P"). In November 2008, C moved house from the North Island to the South Island. C relied on the limited transit cover provided by the contents policy, to cover the contents in transit.

In December 2008, the container containing the contents was toppled and overturned from the top of another container, where it was stacked at a South Island port. The overturning was caused by a container being manoeuvred by a toplifter and some of the contents were damaged. C made a claim to P.

P declined the claim, because the transit cover applied to damage caused by collision or overturning of the vehicle transporting the contents, and the container was not considered a "vehicle". C disputed the declinature, believing the container in which the contents were being transported, was a vehicle for the purpose of the transit.

The Policy

The policy provided limited transit cover for "household contents while they [were] being permanently removed from [the old] house to ... [C's] next permanent residence ...". For a valid claim to exist in terms of the policy, the damage must have been "... caused directly by ... collision or overturning of the vehicle in which [the] insured property [was] being transported ...".

The Law / Definition of "Vehicle"

The policy did not include a definition of vehicle. In circumstances where there is no policy definition, the words used in the policy must be given their plain and ordinary meaning in the context of the policy considered as a whole.

P relied on the meaning of "vehicle" in the Land Transport Act 1998 ("the Act"), as follows:

- (a) *Means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved*
- (b) *Includes a hovercraft, a skateboard, in-line skates*".

The *Shorter Oxford Dictionary* (5th edition) ("Oxford") which defines the word "vehicle", as follows:

"5 A means of conveyance, usu. with wheels, for transporting people, goods, etc; ... b Any means of carriage or transport; a receptacle in which something is placed in order to be moved ... c A space rocket in relation to its payload".

P believed the "context [was] crucial", the ordinary meaning of "vehicle" should apply and cited various legal cases in support of its position. P believed the transit cover did not respond to the claim.

Questions:

1. Should the definition of "vehicle" be interpreted narrowly to exclude liability?
2. Having regard to the law, would that produce a fair and reasonable outcome?





4. ISO case study

Facts

In November 2006, the Complainant (“C”) arranged insurance for his vehicle with the Participant (“P”). Later that month, C’s keys and vehicle were stolen. There were no suspicious circumstances. C made a claim to P. C had not disclosed his 4 traffic convictions to P when the policy was arranged. P treated the policy as if it never existed and declined to consider the claim, because of C’s non-disclosure of his traffic convictions.

The Policy

The application for insurance required C to provide information about “*if you or any driver of the vehicle have had any traffic convictions in the last 5 years?*” The policy was silent about P’s remedy for non-disclosure.

The Law

Information is **material** and must be disclosed, if it would influence the mind of a prudent insurer in deciding whether or not to accept an application and, if so, on what terms. If the insurer had been given the information and, as a result, would not have accepted the risk, or charged a higher premium, the information is material. **The law says that any information which may be material to a prudent insurer must be disclosed, even if the insured does not think it is relevant.**

Questions:

1. Did C have an obligation to disclose his traffic convictions?
2. Having regard to the law, would that produce a fair and reasonable outcome?

