



Guidance on the Fair and Reasonable Jurisdiction of the Insurance & Financial Services Ombudsman (“IFSO”) Scheme

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Key Terms

Complainant means someone who has made a complaint to the IFSO Scheme in accordance with paragraph 1.1 of the TOR

FMA means the Financial Markets Authority – the Government regulator responsible for the financial markets in New Zealand

IFSO means Insurance & Financial Services Ombudsman

IFSO Scheme means the Insurance & Financial Services Ombudsman Scheme

Participant means a financial service provider which becomes a Participant of the IFSO Scheme, in accordance with clause 9 of the Constitution

TOR means the IFSO Scheme's Terms of Reference, which sets out how the IFSO Scheme works, in accordance with paragraph 1.1 of the TOR. You can find the TOR [here](#)

Paragraph 12 of the TOR

Under paragraph 12 of the IFSO Scheme's TOR, the IFSO Scheme will make a decision with reference to what is fair and reasonable in all the circumstances. The TOR set out factors the IFSO Scheme will consider, and factors the IFSO Scheme shall have regard to, when deciding a complaint, as follows:

12. Decision Making Criteria

- 12.1 When making a decision about a Complaint, the Scheme will do so by reference to what is, in its opinion, fair and reasonable in all the circumstances. In determining what is fair and reasonable, the Scheme 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 Scheme considers relevant.
- 12.2 While the Scheme is not bound by the legal rules of evidence or by its previous decisions, the Scheme shall have regard to:
 - a) any applicable rule of law;
 - b) the rules of natural justice, insofar as they apply to the procedure adopted by the Scheme in relation to the Complaint;
 - c) relevant industry practice; and
 - d) any Codes applicable to the subject matter of the Complaint.

Guidance

The purpose of this Guidance is to give Participants and their customers better insight into how the IFSO Scheme applies our fair and reasonable jurisdiction. For Participants, we hope that this will also help you apply the principles in paragraph 12 of the TOR to your own processes.

It is important to note that fairness is subjective. What you may think is fair can be completely different to your neighbour or colleague. Therefore, the Guidance is not intended to define fairness; rather, we want to give you practical examples of circumstance the IFSO Scheme will consider, when deciding what is fair and reasonable in accordance with paragraph 12 of the TOR.

The Complainant's circumstances (Paragraph (12.1 a))

This provision allows the IFSO Scheme to consider the specific circumstances of the Complainant. Simply put, the IFSO Scheme will consider whether a Complainant has any vulnerabilities which impact on the Complaint. The link between the vulnerability and the impact on the Complaint is important. Most people will experience some level or type of vulnerability at some point in their life, but that does not mean it disadvantaged them during the Complaint. What is important is to recognise there could be Complainant circumstances which should be taken into account.

You can find the FMA guidance on consumers with vulnerabilities [here](#).

Example where we used paragraph 12.1a):

What happened

The insurer believed that Jing had not disclosed that she was waiting for breast biopsy results when she arranged her health policy, so it avoided the policy and declined to consider the claim. Jing arranged health insurance through a bank. Jing spoke Mandarin, but needed assistance with English, so the bank employee translated the questions on the application into Mandarin for her, and recorded her answers in English. Jing said she told the bank employee that she had had a breast examination and test, but the bank employee denied that Jing had told her about either one.

The IFSO Scheme decision

When someone else completes an application, the insured must be given an opportunity to check that the questions and answers recorded for them are correct. Here, that was even more important, because Jing had poor understanding of English. Jing would not have been able to read or understand the questions on the application when she was asked to read them in English. Therefore, she was not given the opportunity to independently confirm that the answers recorded for her were correct. In addition, Jing said that she was rushed through the questions. This was supported by the time taken to complete the application, which would not have been enough time to have read each question in its entirety in English, let alone translate them into Mandarin. Taking into account Jing's personal circumstances, particularly her inability to understand the application and her obligations and the process followed, the decision to avoid the policies and decline to consider the claim was not fair and reasonable in all of the circumstances. Therefore, the insurer was required to reinstate the policy and consider the claim.

Participant's conduct (Paragraph 12.1 b))

This provision allows the IFSO Scheme to consider the how the Participant has dealt with the Complainant; or, more simply, the Participant's conduct relating to the Complaint. This has become a particular focus of the FMA in recent years and we note there is an expectation that Participants are customer centric and work towards achieving good customer outcomes.

Example where we used paragraph 12.1 b)¹:

What happened

Suki discovered water leaking from the ceiling of the master bedroom, so she arranged for a plumber to repair the leak and she made a claim for water damage to the house, including to the carpet, ceiling and skirting boards. The insurer told Suki she had a \$5,000 excess on the policy, but that it would arrange for someone to try dry out the house. Later, the insurer said that the claim value was below the \$5,000 excess, so Suki had to pay for the drying costs of \$2,164.42, which the insurer had paid. Suki said that wasn't fair, as she didn't know she would have to pay the drying costs; she thought it was like appointing a loss adjuster. She believed she had lost the opportunity to get quotes herself to decrease these costs.

The IFSO Scheme decision

The insurer did not explicitly tell Suki she would be paying the drying costs, and the drying company only communicated with the insurer. This meant that the insurer was in charge of approving costs, not Suki. A customer unfamiliar with insurance would have thought the drying company was appointed on the same basis as the loss adjuster. Therefore, the insurer was requiring Suki to make a connection between the \$5,000 excess and drying costs, despite these two parts of the conversation happening at different ends of the claim call. As a result, it was not fair or reasonable for Suki to be liable for the drying costs. Based on discussions with the IFSO Scheme, the insurer agreed that it would not seek recovery of the drying costs from Suki.

¹ Based on case note 00221958

Complainant's conduct (Paragraph 12.1 c))

This provision allows the IFSO Scheme to consider how the Complainant has dealt with the Participant or, more simply, the Complainant's conduct during the Complaint. This provision acknowledges that, while financial services need to be customer focused, in some cases Complainants can engage in unreasonable behaviour, which must be considered when considering a Participant's responses or decision. Examples of unreasonable behaviour can be found in the IFSO Scheme's Service Charter, which you can find [here](#). An obvious example is where a Complainant is dishonest with a Participant.

Example where we used paragraph 12.1 c):

What happened

Lola was driving the vehicle when it left the road in the middle of the night, landing on its roof. The insurer declined the claim on the basis that Lola had been dishonest about her alcohol consumption prior to the accident and failed to comply with its request to complete a privacy waiver, so the insurer could obtain her phone records. Lola had filled in part of the form, but not signed it. The insurer had made over 15 requests for Lola to complete the privacy waiver before she said that she could not print out the forms at home. The insurer then tried to send an investigator to Lola's house, to assist her with completing the privacy waiver and to interview her. It also complied with Lola's request for a female investigator. However, Lola later said she did not want anyone at her house. Two months later, Lola visited various branches of the insurer to complete the waiver. However, the branches did not hold any in stock, and Lola had not arranged for them to have some available. As a result of these interactions, Lola was trespassed from the branches. Eventually, she provided a limited waiver, but it was so late that the telephone company no longer held some of the relevant telephone and text records.

Lola said that she had complied with the investigation as much as she could, particularly considering her transport and communication issues.

IFSO Scheme decision

The policy required Lola to co-operate with the insurer's investigation and provide the information requested within a reasonable time. The correspondence and conversations between the insurer and Lola about the privacy waiver were extensive. Lola had a number of difficulties which would have impacted on her ability to engage with the investigation. However, she had originally provided part of the information requested, such as some of her telephone records, but not those from the relevant time. In addition, Lola provided only part of the waiver, altered to remove the middle of the form, and said on several occasions that she would not comply with the investigation. Consequently, Lola did not comply with the insurer's request to complete the privacy waiver within a reasonable time. As a result of this delay, the insurer's investigation was prejudiced to the extent that it was fair and reasonable for it to rely on the breach of the co-operation condition to decline the claim.

Control of the Participant's systems and procedures (Paragraph 12.1 d))

This provision is about how much control the Participant has over the systems and procedures involved in the complaint. It allows the IFSO Scheme to assess whether the Participant's processes are the cause of a complaint and whether those processes should change. There are many examples of this, with the most obvious being the processes for arranging a financial service, and the wording of the contract itself.

Example where we used paragraph 12.1 d)²:

What happened

Bonnie made a claim with the insurer for water damage to the floor vinyl in 4 areas of the house. The insurer accepted the claim and did the repairs. Bonnie complained about quality of the vinyl, particularly as there were indentations in the vinyl, as well as issues with the installation. Two of the experts agreed that the vinyl had been poorly laid. However, the insurer's experts said the indentations were due to pressure from furniture. The insurer offered \$1,000 for the issues relating to the installation, but believed it did not have to replace the vinyl, because Bonnie was carrying out renovations that would require new additional vinyl being installed anyway. Bonnie declined the offer.

The IFSO Scheme decision

The insurer's expert said that the vinyl was poorly laid and a trip hazard and recommended further investigation into what was causing the vinyl to blister. The insurer chose not to investigate, but rely on its other, more favourable expert opinions, despite Bonnie's expert also confirming the defective remediation. The policy required the insurer to remediate the damage "*to a condition as similar as possible to when it was new*". This requirement had not been met, even though the insurer was in possession of evidence confirming the issues Bonnie had raised and the insurer failed to further investigate the cause of the bubbles. The insurer was in control of the systems and procedures which were the subject of the complaint; specifically, undertaking the repair and failing to properly analyse the expert evidence when issues were raised. As it was not possible to relay the vinyl as it was, on a fair and reasonable basis, the insurer was required to make a payment to Bonnie of \$5,715.12, being the vinyl's original supply and install cost.

² Based on case 00220603

Evidence and previous decisions (Paragraph 12.2)

Paragraph 12.2 states that the IFSO Scheme is not bound by legal rules of evidence or its previous decisions. This means that the IFSO Scheme does not operate like a court, setting precedents by which it is bound. While the IFSO Scheme tries to keep its decision-making consistent, the provision allows the IFSO Scheme to make a different decision, if it is fair and reasonable to do so. However, in addition to the fair and reasonable jurisdiction under paragraph 12.1, the IFSO Scheme must also take into account the following factors:

- Rule of Law (Paragraph 12.2 a))

This paragraph sets out that the IFSO Scheme shall have regard to the law. What this means is that the IFSO Scheme must consider the law, but is able to depart from it, if it is fair and reasonable to do so. This was confirmed in the High Court's decision in *Forde*³.

- **Example where we used paragraph 12.2 a)⁴:**

What happened

With help from her broker, Aroha added a vehicle to her existing insurance policy for her farm vehicles. The insurer said that ownership of the vehicle had been transferred to Aroha's grandson, Wiremu. Wiremu was the main driver of the vehicle and he had a number of criminal and traffic convictions. The insurer avoided the policy, as it believed Aroha needed to disclose the convictions from the date the ownership changed. As a result, it avoided the policy and declined to consider the claim.

The IFSO Scheme decision

The insurer confirmed Aroha did not complete an application when she added the new vehicle. If Aroha had completed an application, she would have been asked specific questions about the criminal history of anybody who would drive the vehicle.

The law requires an insured to disclose material information, regardless of whether the insurer has asked any questions. However, the IFSO Scheme had previously notified insurers that it would take a fair and reasonable approach to disclosure and require insurers to ask questions, so that consumers would have a fair opportunity to comply with the disclosure obligations. Aroha failed to disclose information in circumstances where the insurer was responsible for allowing the vehicle to be added onto the existing farm policy without an application or, at the least, an acknowledgement of the underwriting questions. In addition, its outsourcing of the renewal process to brokers without specifying minimum requirements, such as confirmation of the underwriting questions on criminal and traffic convictions or claims history, was within its control. Aroha was never asked the underwriting questions, nor would she have had any opportunity to check the answers recorded, including on renewal. On this basis, the insurer agreed to reinstate the policy and pay the claim.

³ *IAG v Forde* [2020] NZHC 3233

⁴ Based on case 00210774

- [Natural justice \(Paragraph 12.2 b\)\)](#)

This paragraph sets out that the IFSO Scheme shall have regard to the rules of natural justice. Put simply, as they apply to the IFSO Scheme which does not hold hearings, this means that the IFSO Scheme must use a fair process to consider the complaint, which is without pre-judgment or bias, and treat both parties fairly. The IFSO Scheme's Complaints process is set out in its TOR; it is a standard process applied across all Complaints, in respect of jurisdiction, timeframes, confidentiality, investigation process, resolution methods, decision making criteria, decision making processes and remedies. The TOR are available on the website so a consumer wishing to make a Complaint is able to obtain information about the IFSO Scheme's Complaints process before making a Complaint. Taking the example of the right to be heard, each party is given a reasonable opportunity to respond to information provided by the other party.

Example where we used paragraph 12.2 b):

The IFSO Scheme position

The IFSO Scheme has no specific case notes to reflect this element. However, we have had previous complaints where a Participant has claimed confidentiality over some evidence or documentation, and states it cannot be provided to a Complainant. The IFSO Scheme's position is that a Participant cannot rely on any evidence if it refuses to give it to a Complainant, or asks the IFSO Scheme not to disclose the information to the Complainant. Therefore, the IFSO Scheme must disregard any information a party asks to remain confidential when making its decisions. This is to ensure that both parties are being treated fairly, with no bias.

- [Industry practice \(Paragraph 12.2 c\)\)](#)

This paragraph requires the IFSO Scheme to take into account industry practice. This is particularly relevant where a Participant is out of step with the industry practice, e.g. where the contract wording is more restrictive than in other similar contracts available in the New Zealand market, or where a Participant is using different processes to those most customers would be used to in New Zealand.

Example where we used paragraph 12.2 c)⁵:

What happened

Javier used an airless paint sprayer to paint the inside of the decorative balustrades on his house. After he stopped, Javier noticed that paint had drifted onto the deck, fence, outdoor furniture, patio and his vehicle. The insurer declined the claims, on the basis of a policy exclusion for claims arising from any "*process of restoring*" and because Javier had failed to take reasonable care to protect his property against paint overspray.

⁵Based on case note 00210495

The IFSO Scheme decision

The exclusion applied to loss or damage “*arising from... any process of cleaning, repairing or restoring*”. Similar policies in the market had restoration or cleaning exclusions, but these contained a saving provision, which meant that the exclusion only applied to the item being cleaned or restored. The Insurance Council of New Zealand (“ICNZ”), of which the insurer was a member, had a frequently asked question directly on point, which indicated that consequential damage, such as in this case, would be covered. Therefore, it was arguable that the provision was unusual or onerous. The law requires onerous or unusual clauses not to be hidden within the standard terms or conditions; they must be brought fairly to the notice of the insured. There was no evidence it had been brought to Javier’s attention and the insurer had since taken steps to change its policy wording in relation to the exclusion. On a fair and reasonable basis, the IFSO Scheme found that the insurer could not rely on the exclusion because it was onerous.

- **Any Codes (Paragraph 12.2 d))**

While the IFSO Scheme has broad jurisdiction to consider whether there has been a breach of a Code, this provision requires the IFSO Scheme to apply a Code by which a Participant may not be bound. For instance, if a Participant is not a signatory to the [ICNZ Fair Insurance Code](#) (“the Code”), the IFSO Scheme may still apply the principles in the Code if it is fair and reasonable to do so.

Example where we used paragraph 12.2 d)⁶:

What happened

Ngaire arranged a pet insurance policy with the insurer for her dog. In 2019, she made a claim of \$9,791.56 for veterinary fees for her dog. The insurer accepted and paid the claim. However, it deducted an “Age excess” of 20%, in addition to the excess of \$150, because her dog was more than 8 years old. Ngaire complained she was not adequately notified the insurer was lowering the age excess from 10 to 8 years old.

⁶ Based on case note 00215961

The IFSO Scheme decision

The law requires an insurer to clearly bring to the insured's attention any alterations made to policies at renewal. The law is also in line with the obligations set out in the Code developed by the ICNZ. While the Code did not apply to this particular insurer, the Code acted as clear guidance for the "*minimum service standards for insurance companies*" and, as such, demonstrated the relevant industry standard. The 2017 policy certificate provided no indication there was a change in the age excess. It was not until 2019, when the dog turned 8, that the certificate noted the age excess applied. The only way Ngaire could have found out the change had been made was by comparing the previous policy with the policy document sent to her at renewal. The insurer had not met its legal obligations or the relevant industry standard, because it did not tell Ngaire about any changes to the policy, or clearly draw the alteration to the age excess to her attention. Therefore, the insurer was required to refund Ngaire the age excess.

Conclusion

We understand that the concept of "*fair and reasonable*" can, at times, be difficult to understand and apply. Different people can and do have different views about what is fair. Fairness is not the same to everyone; it will largely depend on how someone is treated, the process used and the outcome they receive.

This Guidance is to help Participants and their customers understand how the IFSO Scheme will apply the fair and reasonable principle to its decision-making, taking into account those criteria set out in paragraph 12 of the TOR, and using actual examples. It will be updated and possibly changed from time to time, with the intention of it being of assistance to Participants and their customers.

Insurance & Financial Services Ombudsman Scheme

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