

ADELAIDE LECTURE

THE ROLE OF THE PANEL AND ITS INFLUENCE ON THE INSURANCE INDUSTRY

“It is the mark of the educated man to seek precision just so far as the nature of the subject admits.”
(Aristotle)

The Panel is in an unusual decision-making body by Australian standards in that, in addition to considering the material each party provides, we can and often do, initiate our own enquiries. In other words, we operate as inquisitors. There are advantages and disadvantages in that process in that it is not our role to elicit information that should be obtained for example, by the insurer, but on the other hand, it is very helpful to obtain additional expert witness opinion when the two doctors or engineers disagree or to interview a witness who may not have been interviewed by either party.

There are of course many areas where precision is impossible, take for example the problem of flood investigation or domestic arson or fraud. Sometimes the facts and the law are so complex or convoluted to make the search for precision impossible. In other areas such as non-disclosure or misrepresentation, there are strict rules that must be followed in accordance with the requirements of the Insurance Contracts Act and case law. We insist on precision in this area.

One of the problems for example in flood-related disputes, is to determine whether the stormwater or floodwater arrived first. In some instances where the property was built adjacent to a fast-flowing creek or river, this is quite easy but in other cases, where the property is some distance from the watercourse and there is a small local catchment area, and very heavy rain has fallen, it is necessary to obtain evidence as to when and where the watercourse first broke its banks and how the water travelled to the flooded property and whether storm or rainwater had already entered the property. In these circumstances, whilst precision is necessary, it is difficult to achieve, especially in the context of a retrospective analysis.

There are many concepts involved in insurance that both invite and defy precision such as the concept of proximate cause, utmost good faith and the reasonable person test e.g. in terms of whether reasonable care was taken, or whether someone reasonably misunderstood a question on a proposal.

Precision is also demanded from the Panel by the stakeholders. The industry expects consistency in decision-making because it wants to use our decisions as an “educative tool” and the value of the Panel’s determinations is lost if the decisions do not establish a clear and discernible pattern. If an insurance company does not know how the Panel is likely to decide a dispute, it is difficult for it in terms of its own decision-making.

In my opinion, consistency in decision-making is crucial for IOS notwithstanding it does not happen within the court system. Different judges and magistrates bring different perceptions to decision-making but at IOS, where there are a very small number of decision-makers, there is the opportunity and expectation for precision and predictable decision-making. There is also no right of appeal which puts further pressure on the insurance industry but which enhances the need for precision and consistency.

Some sections of the industry assert our decisions are not consistent. They made that complaint to the persons conducting the independent review of the Service in 2005. One insurance company

provided five examples of inconsistent decision-making but these were analysed independently and it was found there were different factual circumstances which were crucial in distinguishing the different determinations. I have stated publicly I will offer a \$500 reward if someone can locate two determinations that are inconsistent. Peter Daly has extended the reward on my behalf and states to anyone who will listen that I will buy them a racehorse. It is a pretty good offer when you think about it, as we have issued nearly 25,000 determinations since the Service began.

I have been asked to talk about the standards we have set for the industry and the community generally in our decision-making and decision-making processes. Before I do that however, I want to acknowledge the enormous improvement in decision-making and in claims processes that has been made by the industry in the ten years since I have been at IOS. I will mention several of them before I discuss the standards we have set.

Firstly, the decision-making process within the industry is much more sophisticated with the introduction of Internal Review Panels. These bodies do frequently overturn decisions of their colleagues and provide an independent analysis of each dispute. Statistics demonstrate three out of ten of the persons whose claims are finally rejected at IDR, come to the Panel. Research conducted by the reviewers reveals that most of the challengers are articulate members of the middleclass, the chattering classes as they have been described. Most members of the lower socio-economic groups fatalistically accept the insurance company's decisions as yet another example of the need to lead their lives in "quiet desperation" as Thoreau once commented.

The decision letters issued are usually well described and set out in considerable details. Gone are the days when an insurance company would write to an individual and state

"We have carefully considered your claim and decided not to pay it".

In January 2004, the Terms of Reference were changed to require a full exchange of documentation between the parties unless the Referee or I were to rule that Special Circumstances exist so the document ought not to be exchanged e.g. it contained information of an intimate or personal nature, or might lead to an outbreak of violence if disclosed. Since then, full transparency has operated between the parties both in terms of the material on which they each relied and submissions and arguments they used to justify their position. The industry has responded to these challenges admirably which adds to the quality of the decision-making process and our ability to provide precision and consistency. All of these changes have led to fewer complaints.

However, we face many challenges in setting standards and in dealing with increasing factual and legal complexity. The issues at which I want to look, are quality of decision-making in complex and legal factual areas such as domestic arson, the applicability of the concept of utmost good faith in the decision-making and claims process and the immense challenge faced in the development and marketing of policy documentation. It is always helpful to deal with specific case studies so I want to talk to you about a very interesting determination, namely 23108, which was issued by the Panel recently and will illustrate the point I am making.

This case was similar to an increasing number of disputes coming to the Panel when one of the parties to a long marriage destroys the family home by setting fire to it. The applicant and her husband had been married for 28 years at the time of the loss and, in the previous ten years, the husband's behaviour had progressively deteriorated and was characterised by physical and psychological abuse, and physical assault and abuse towards the two eldest of the five daughters. By early 2005, the situation had deteriorated to the extent where it was agreed between the parties, the house had to be sold and the proceeds distributed equally. However, following a further threat

to kill the applicant, the husband was removed from the residence by the police on 24 March 2005. The applicant then applied for an apprehended violence order and this was issued on 9 April 2005. On 4 May 2005, the husband set fire to the premises and informed witnesses he was also proposing to kill the applicant and one or more of the children.

The insurance company denied liability to meet the claim on the basis the co-insured deliberately burnt the home. Now at this point, let me talk to you about the advantages of a single decision-making process compared with the plethora of decision-makers that operate within the court system. Some of you may be aware there is a legal conflict as to the liability of insurers in these circumstances based on whether the insurance policy should be regarded as insuring joint or composite interests. If it were a policy insuring joint interests, then the wife would obtain nothing, but if the policy insured separate interests, she is entitled to be paid her interest which, in this instance, is half.

The Panel has stated in previous determinations, in its *Annual Reviews*, and public pronouncements, it favours the group of cases (*Holmes v GRE Insurance* and *Maulder v National Insurance Company of NZ*, if you are interested) in which it has been held in broadly similar circumstances, the policy is regarded as insuring separate interests because it was clear following the breakdown of the marriage, the financial interests of the parties were not common but separate.

Now, as I said, the Panel adopted this approach some years ago and in the 2003/2004 *Annual Reviews*, informed the world at large, this was its approach. One of the articles was cynically called “Keeping the Home Fires Burning”.

I return to the narrative. The applicant and her five daughters were thus homeless, their possessions were destroyed, the husband of 28 years was in gaol, they were emotionally distraught by the loss of the property, the threats to kill and other events, and the applicant was then told by her insurance company, she was entitled to nothing.

The applicant did claim for some emergency accommodation expenses under the policy and the insurance company agreed to pay expenses for a limited period. They also later agreed to pay part of the contents claim, (they initially refused to pay anything) on the basis the applicant did have a separate interest in the contents that belonged to her. However, after encouraging her to sign a six-month lease, they then withdrew the offer to pay for rental expenses, so she was left with the option of reverting to her state of homelessness or begging relatives to support her with the rental. It seemed that up to this stage, the personnel of the insurance company handling the claim had not heard of, or read any of the Panel’s decisions on this vexed issue, nor our *Annual Reviews* or alternatively, rejected them out of hand. In any event, I think we need a PR consultant.

Fortunately for the applicant, she encountered a solicitor, who had read our decisions and the cases of *Holmes* and *Maulder*. He was very thorough and persistent and probably experienced a good deal of righteous indignation about the manner in which the applicant and her five daughters had been treated, and he brought the claim to the Panel. He accused the insurer of acting with “callous indifference” towards his client.

Eventually after some months, the file reached a level within the insurance company where someone did recognise the claim had not been handled in accordance with the law, or at least the Panel’s interpretation of it, and the insurance company offered to pay one half of the cost of repairs to the home which amounted to \$109,670. This offer was rejected by the applicant’s solicitors who

also wanted accommodation expenses, interest on the monies which had been belatedly offered, legal costs, plus the outstanding balance on the mortgage.

This resulted, quite properly, in more delay so that almost 11 months after the fire, the Panel finally determined the dispute. In the interim period, the applicant (with the help of her family) was able to maintain her rented accommodation, the house continued to deteriorate in its burnt-out state, the mortgagee was accommodated in some way, the husband was kept in gaol (fortunately for the applicant and her daughters and unfortunately for him) and the applicant also incurred substantial legal costs because of the complex issues raised for determination.

The Panel determined the dispute in the same manner as it had been doing for some years, by providing the applicant with the \$109,670 (to be adjusted if necessary in view of the time that had passed since the estimate was made) being half of the cost of repairs, 12 months rent, interest on the monies to which she was entitled, and legal costs of approximately \$18,400. In the course of making its determination, the Panel made the following comments which I would like to share with you: Page 8 of the Panel's determination.

"In the Panel's opinion, leaving aside considerations of utmost good faith, an insurance company has social responsibilities to a policyholder in dealing with claims. An insurer's representative must be aware that persons in the position of the applicant and her family, assisted by concerned parties, need all the help to which they are entitled in deeply distressing times such as those encountered by the applicant. In the Panel's opinion, the member failed to properly and promptly consider the claim, to properly give consideration to the applicant's desperate circumstances, and when finally persuaded to provide some limited accommodation relief, then without any adequate warning, sought to terminate that relief in circumstances which the Panel finds as perplexing."

The Panel rarely awards legal costs although, I am beginning to believe, we should do so more frequently (a view not shared by all my colleagues). However, in this case, it did so because the insurance company, by initially refusing the claim and then offering partial but inadequate assistance, placed the applicant in a position where she was virtually forced to obtain legal advice due to her overall circumstances, and the complexity of the issues to be raised. In other words, the Panel reached the conclusion the applicant would not have been able to present her claim without the assistance of a competent and experienced solicitor.

I would be interested in some of your responses to the costs issue and the other issues raised by the dispute, particularly the suggestion the insurance company did not fulfil its social and legal responsibility to the applicant. In other determinations, we have examined the legal implications that may follow if an insurance company refuses a claim inappropriately.

I have mentioned this dispute because I think it is an excellent example of how the Panel articulates standards which it believes should be applied to the general insurance industry. I am mindful that in doing so, we do not appear to be overly judgemental or even pompous. I am also mindful that insurance companies have no right of appeal against our decisions (save for the right of judicial review if we do not offer procedural fairness) so that the responsibilities required of the Panel to set standards should be exercised very carefully and is a process that should also be open to general comment and discussion.

In the determination, we also mentioned the subject of utmost good faith which, as we all know, permeates into every aspect of the insurance transaction including of course, the claims process and applies equally to both parties. Many more learned commentators than I have analysed this term but my favourite is to equate the obligation to one of acting with "scrupulous fairness and honesty". It is an extraordinarily high standard and it applies uniquely to dealings between insurance companies

and their policyholders. I imagine if I walked into the National Bank and said to the sweet young lady behind the counter that I insist the bank acts towards me with utmost good faith, I would quickly be introduced to several security officers who would enthusiastically encourage me to leave the premises, never to return.

When I first commenced at IOS, 11½ years ago, if we were to suggest to an officer of an insurance company, they had failed to act with the utmost good faith, it would be tantamount to an accusation of paedophilia. Back then, the concept was regarded as some trendy, new age idea developed by tree-hugging consumer advocates as part of their anti-imperialist rantings. However, we have all become more thick-skinned these days and take the obligation more seriously. The Panel has, on numerous occasions, used sections 13 and 14 of the Insurance Contracts Act to deny an insurance company an opportunity of relying upon a policy exclusion if we have formed the opinion, after legal analysis, that it was legally and factually appropriate for us to do so. In case by now you are thinking you are being harangued by the president of the Victorian Bolshevik Association, I hasten to add we have also determined numerous disputes in favour of insurers where we have considered that policyholders have refused to co-operate in the investigation process and in providing information reasonably requested of them. In case you are interested, I have been a member of all the major political parties at some time or another, with the exception of the National Party. Even I have my principles.

In any event, I believe that utmost good faith is still a work in progress and should be placed directly within our stream of consciousness at all times.

The final, and possibly most important, issue I wish to raise with you is the enormous challenge of policy documentation. Now even if you have disagreed with everything I have uttered thus far, I am sure you will agree with me when I say, no-one ever reads an insurance policy at least, until a claim is made. Now, let me suggest to you, that puts the customer at an enormous disadvantage and the industry at an enormous advantage. Nevertheless, it is a subject on which I have reflected long and hard, which I suppose, adds to my uniqueness if not my eccentricity. Why is that I ask? We read mortgage documents, solicitors' communications, rate notices and loan agreements but we do not read a document which has the potential to jettison us into financial purgatory.

Well, here my humility takes over, because I do not know the answer. What I do know however, is that the Panel and I need to set legal standards about insurance policies which we have done in numerous determinations, in our *Annual Review* (the latest one published several weeks ago) and in our public presentations. The standards we have set take into account the following:

1. The provision of standard cover contained in the Insurance Contracts Act and Regulations;
2. The requirement to “clearly inform” as stated in sections 35 and 37 of the Insurance Contracts Act;
3. The requirement to inform “in a clear, concise and effective manner” as set out in the Corporations Act which applies to product disclosure statements, which many companies now categorise as the entire policy document;
4. Case law;
5. Previous determinations;
6. What we believe are good ideas – such as putting the inclusions & exclusions in the one place!

What has happened as a result of a number of factors, including the introduction of FSRA is that policies are becoming longer, more complex and convoluted which presents the draftspersons with major, if not insurmountable challenges. I ask rhetorically – how can you inform someone clearly, concisely and effectively if the critical policy term is at page 53 of a 65-page policy. It is not

uncommon for travel, motor vehicle and home buildings and contents policies to exceed 50 pages and some combined policies exceed 100 pages; longer even than Joseph Conrad's brilliant novel "*The Heart of Darkness*", well named in terms of the comparison I am drawing.

The following is what we regard as essential in terms of policy drafting:

1. all policies must have an index;
2. put all exclusions in one place, c/f 6 places;
3. call them exclusions. Do not put them in the definition section of the policy or in the "how to make a claim section". In other words, do not put the rat poison in the cookie jar;
4. if terms are artificially defined, make sure there is appropriate cross-referencing to the actual exclusions e.g. unattended luggage;
5. make sure the different policy documents speak to one another e.g. the schedule/certificate and the policy;
6. keep the PDS to reasonable limits. 15 pages is too long in my opinion;
7. avoid small print. I do not look good wearing bi-focals.

Failure to comply with these standards may result in the critical policy term not being applied in the manner contemplated.

These are several important illustrations as to how the Panel functions. We are aware that if we are expected to set standards, particularly in the context of unappealable decision-making, we should do so responsibly, creatively and in accordance with correct legal process. It is just as important our work is widely known and understood. Speaking here to you today is a significant opportunity to enhance the communication process, and I thank you all for that opportunity.

3421 words

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