

HOLOCAUST ERA INSURANCE CLAIMS

Compensating the unimaginable

MEGAN HOEY reports on the work of the International Commission on Holocaust Era Insurance Claims.

Since the end of World War II, Holocaust survivors and the heirs of Holocaust victims have sought ways to obtain compensation or restitution for the devastation of their lives and the theft or illegal distribution of their assets by the National Socialist (Nazi) regime. Claims have been made against individuals, governments, Swiss banks, insurance companies and corporations that profited from slave labour. Claims continue to be made now — 60 years since the end of the war.

Prior to and during the war, members of Jewish communities throughout Europe purchased insurance policies and annuities (sometimes referred to as ‘poor man’s Swiss bank accounts’) including life, property, travel, fire, education, and dowry, as a means of achieving future financial security for their families. In some cases these insurance policies were confiscated by the Nazi regime or paid into blocked accounts; that is, paid into an account in the name of the beneficiary but for the benefit of the Nazi regime. In other cases policies were cancelled by insurance companies when policyholders who had been detained by the regime stopped paying their premiums.

Following the end of the war, those who attempted to claim on these policies were often turned away. Some claimants were told that the insurance companies no longer existed as legal entities or had otherwise been nationalised in Eastern Europe. Others were informed that records had been destroyed or that the policies had been cancelled. Still others were advised that in order to collect on legitimate policies they required death certificates — an appalling request to make of survivors and heirs.

The International Commission on Holocaust Era Insurance Claims (ICHEIC) was created in 1998 after negotiations among European insurance companies, United States’ insurance regulatory authorities, representatives of international Jewish and survivor organisations, and the State of Israel. The aim of ICHEIC was to provide a means for addressing the shortfalls of post World War II compensation and restitution programs of the 1950s and 1960s and has since provided an opportunity for thousands of Holocaust survivors and the heirs of Holocaust victims to submit insurance claims for the first time.

A number of European insurance companies (Generali, Zurich Insurance, Allianz, AXA, and Winterthur) have signed a Memorandum of Understanding which commits them to cooperating

fully with ICHEIC to expeditiously resolve all unpaid claims by:

- providing access to their relevant books, files, records, and archives
- contributing to the establishment of a humanitarian fund administered by ICHEIC
- contributing to the costs of investigations and audits by ICHEIC.

There are two key innovations: the valuation framework and the relaxed standard of proof demanded of claimants.

ICHEIC has universalised various European claims processing procedures to ensure consistency of approach by insurance companies. Detailed valuation guidelines, as determined by ICHEIC representatives from among Jewish groups, United States’ insurance regulators, and companies, have been agreed by the participating companies. Claims are evaluated according to ICHEIC’s valuation guidelines. To arrive at a present value for the original insured sum ICHEIC and its member companies apply complex multipliers to the individual policy’s base value (taking into account the terms of the contract, the history of premium payments and the circumstances of the insured event). Claimants who do not know the value of the original policy are paid according to a table of averages.

Obviously survivors and the heirs of Holocaust victims do not have much, if any, documentation to substantiate their claims. Within the ICHEIC framework, insurance companies have accepted a relaxed standard of proof that takes into account the unique situation of Holocaust-era claimants. In assessing claims, insurance companies do not reject any evidence as being insufficiently probative of any fact necessary to establish the claim if the evidence provided is plausible in the light of all the special circumstances involved, including the destruction caused by World War II, the Holocaust, and the effluxion of time since the insurance policy was obtained. Where an insurance company cannot find any written record of a policy, the burden on the claimant to establish that a policy existed remains an onerous one, even when the burden is to establish that the assertion is ‘plausible’ rather than ‘probable’. In that situation, to credibly support the assertion that a policy was issued by the company against which the claim is

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was introduced. Article 43 states that the request for an Ad Hoc court must be presented to the President by a special committee from the House of Representatives (DPR): politicians rather than legal experts or Komnas HAM. The procedure for making a petition to the DPR for an Ad Hoc court has so far been initiated in each case by victims and their families themselves. Komnas HAM then forms a Commission of Investigation into Human Rights Violations (KPP HAM), which submits its findings to the DPR special committee for their consideration. In the absence of international pressure, as in the case of East Timor or Presidential pressure, as in the case of Tanjung Priok from Abdurrahman Wahid, the outcomes have been predictable.

The prevalence in both Indonesia and India of violence by the state and by civilians against each other, have created an environment where violence — defined as terrorism or communal or some other term — is a part of daily life. Though both proud democracies,

the separation between the political institutions of the state, the judiciary and internal security apparatus are, however, far from clearly defined. The implications for seeking justice after mass violence that has ethnic or religious overtones are clearly seen in both countries in the experiences of victims who are struggling for justice. The bold decision by the Supreme Court of India to re-try the Best Bakery case outside Gujarat demonstrates a positive move to combat corruption in the judiciary and to lay down the boundaries between it and the political institutions. Though India has a very long way to go, Indonesia could learn important lessons from its experience.

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now pursued, the claim must evidence the necessary degree of particularity and authenticity.

ICHEIC provides an avenue for appeal where claimants are dissatisfied with a valuation or a decision where a claim for an insurance policy has been rejected. There is an international panel of judges and arbitrators who have the jurisdiction to hear appeals de novo and to uphold, amend or reverse decisions, subject to either Swiss or English law depending on the circumstances.

Since its inception in 1998, ICHEIC has reviewed more than 82,000 claims and has awarded over US\$117 million to Holocaust survivors

and victims' heirs. These awards have allowed many of those who survived the Holocaust to finally close that chapter of their lives, as far as that is possible. However, ICHEIC has been required to strike a difficult balance between compensating Holocaust victims and survivors and recognising the legitimate interest that insurance companies have in an enduring legal peace in these matters. For this reason ICHEIC is no longer accepting new claims for unpaid insurance policies and aims to close down its operations in 2006.

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The quantity of content available through new technologies also creates concern. Although child pornography existed before the Internet, the Internet allows a huge amount of material to be transmitted and accessed easily, quickly and cheaply. Over two million pornographic images of children were allegedly detected by Operation Auxin in September 2004. Police commented that the scale of the operation 'paints a worrying picture in relation to the extent and spread of online child pornography'.²⁸ A Perth man reportedly paid just \$58 to download 1500 images of child pornography.²⁹

In addition to the quantity of material which can be accessed via the Internet, that the Internet is a global phenomenon makes controlling its use problematic. It is notable that Operation Auxin's initial investigations were sparked by information from police in the United States regarding the use of credit cards by Australians to purchase child pornography from Eastern Europe. Therefore, while international cooperation is helpful to identify illegal content and providers and users of it, Australia needs itself to deal with the regulation and enforcement of law in this area.

In Australia, this is clearly better dealt with at a national level than at State or Territory level. Australia's involvement in external affairs has always been a matter for the Commonwealth government. It is at this level that Australia can cooperate and negotiate with other countries in which the content may be produced or uploaded or through which it may be transmitted. However, because child pornographic content

is ultimately delivered to individuals in the States and Territories, activity is best undertaken at a national level to try to stop that content coming into Australia and to deal more uniformly with that content when it does come into Australia. For this reason, the continuing differences in this area between Commonwealth and State and Territory legislation are illogical, may complicate the policing of distribution and possession of child pornography and make a mockery of the Australian legal system.

Conclusion

Operation Auxin and the criminal laws dealing with Internet child pornography in Australia reveal but one area of inconsistency within our legal system. However, the inconsistent outcomes produced by Operation Auxin and the distinctive nature of Internet content and its wide accessibility create a strong case for the harmonisation of child pornography law. The divergent outcomes produced when individuals are charged with similar child pornography offences but under different laws according to the State or Territory in which they live detracts from the strength of our legal system.

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