

## INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

**Organisation:** QBE Insurance Group  
**Name:** Mr Duncan Ramsay  
**Position:** General Counsel and Company Secretary  
**Telephone:** 9375 4422  
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QBE INSURANCE GROUP LIMITED  
ABN 28 008 485 014

82 Pitt Street  
Sydney NSW 2000

Postal Address  
GPO Box 82  
Sydney NSW 2001

Telephone: (02) 9375 4444  
Facsimile: (02) 9231 8104  
DX 10171 Sydney Stock Exchange

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Standing Committee on Law and Justice  
Parliament House  
Macquarie Street,  
SYDNEY NSW 2000

Dear Sir

### Parliamentary Inquiry – Unfair Terms in Consumer Contracts

We refer to the Standing Committee's (the 'Committee') Terms of Reference.

As a leading Australian insurer, QBE operates in what it believes is a consumer friendly industry. In terms of the level of protection and available forms of recourse for insurance consumers ('policyholders') who feel that their insurer has not met its obligations under the insurance contract, these are varied and easily accessible, leaving policyholders well protected.

The insurance industry is heavily regulated, within Australia by APRA and ASIC and globally. Along with its aim to ensure good governance across the industry, much of this regulation is aimed at providing a balance between protection and fairness within the contractual relationship entered by the policyholder.

APRA's regulatory powers are contained in the *Insurance Act 1973 (Cth)* and involve prudential standards and prudential practice guides. The prudential standards developed by APRA have the effect of legislation and contain the minimum operating standards with which insurers must comply, such as levels of assets and capital, risk management policies and overall governance. Although not binding, the prudential practice guides are prepared by APRA to assist insurers in meeting their prudential obligations.

ASIC's financial services related regulation is primarily contained in the 2001 Financial Services Reforms which now make up Chapter 7 of the *Corporations Act 2001 (Cth)*. They involve the framework under which financial service providers such as insurers are allowed to market and distribute retail financial products to consumers, including the required levels of disclosure within policies and other documents surrounding those products. Such documents include the Product Disclosure Statement, the Statement of Advice and Financial Services Guide, some or all of which may be provided to the consumer dependant upon their individual circumstances, with their primary requirement to be clear, concise and effective.

The *Insurance Contracts Act 1984 (Cth)* (the 'ICA') continues to govern the contractual relationship between insurers and policyholders, and its terms are predicated on a principle of utmost good faith between the parties. This principle is enshrined in the ICA at section 13 which states:

*A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.*

The consumer protection aspects of the ICA are also indicated by its preamble which states:

*An Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly, and for related purposes.*

Examples of further relevant sections of the ICA which provide consumer protection include:

- Section 14(1) (*Parties not to rely on provisions except in utmost good faith*) which provides that parties may not rely on provisions of the insurance contract, if such reliance will result in a failure to act with the utmost good faith.
- Section 26(1) (*Certain statements not misrepresentations*) which provides that where a statement that was made by a person in connection with a proposed contract of insurance was in fact untrue but was made on the basis of a belief that the person held, being a belief that a reasonable person in the circumstances would have held, the statement shall not be taken to be a misrepresentation.
- Section 27 (*Failure to answer questions*) which provides that a person shall not be taken to have made a misrepresentation by reason only that the person failed to answer a question included in a proposal form or gave an obviously incomplete or irrelevant answer to such a question.
- Section 37 (*Notification of unusual terms*) which provides that an insurer may not rely on a provision included in a contract of insurance of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the insurer clearly informed the insured in writing of the effect of the provision (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise).
- Section 53 (*Variation of contracts of insurance*) which provides that where a provision included in a contract of insurance authorises or permits the insurer to vary, to the prejudice of a person other than the insurer, the contract, the provision is void.
- Section 56 (*Fraudulent claims*) which provides that where a claim under a contract of insurance, or a claim made under the ICA against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim. Further, in any proceedings in relation to such a claim, the court may, if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair, order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances.

In addition to the ICA is the *General Insurance Code of Practice* (the 'Code'), which is a voluntary code that most insurers have endorsed and agreed to be bound by its terms.<sup>1</sup> The Code sets out agreed standards and responsibilities by which those insurers will deal with policyholders. Section 1.17 of the Code states its objectives as:

- a) to promote better, more informed relations between insurers and their customers;
- b) to improve consumer confidence in the general insurance industry;
- c) to provide better mechanisms for the resolution of complaints and disputes between insurers and their customers; and
- d) to commit insurers and the professionals they rely upon to higher standards of customer service.

Similar to the ICA, the sections of the Code are structured to provide significant protection for consumers. Example of that protection include:

<sup>1</sup> <http://www.codeofpractice.com.au/>

- Section 1.10 which provides that where the Code imposes an obligation on the insurer in addition to obligations applying under a law, the insurer will also comply with this Code except where doing so would lead to a breach of a law.
- Section 2.4 which provides that the following standards apply to the selling of an insurer's products by its Employees and Authorised Representatives:
  1. Its Employees and Authorised Representatives will conduct their services in an honest, efficient, fair and transparent manner.
  2. Its Authorised Representatives will notify the insurer of any complaint they receive against them while they are acting on the insurers behalf.
  3. Its Authorised Representatives will inform the policyholder of the service they have been asked to provide and the identity of the insurer for whom they are acting.
  4. Its Employees and Authorised Representatives will not perform functions which do not match their expertise.
  5. Its Employees and Authorised Representatives will receive adequate training to carry out their sales tasks and functions competently.
- Section 3.1 which deals with insurance claims provides that within 10 business days of receipt of the policyholder's claim, the insurer will decide to accept or deny the claim and notify the policyholder of its decision, if the insurer has received all necessary information at the time the policyholder's claim is lodged and no further assessment or investigation is required.
- Section 3.2(1) provides that where further information, assessment or investigation is required on a claim, then within 10 business days of receiving the claim, the insurer will:
  - a) notify the policyholder of the detailed information the insurer requires to make a decision on the claims;
  - b) if necessary, appoint a loss assessor/loss adjuster; and
  - c) provide an initial estimate of the time required to make a decision on the claim.

Should a dispute arise between the insurer and policyholder, then through the Insurance Ombudsman Service ('IOS'), the Code provides a dispute resolution scheme by which policyholders may appeal policy and claims decisions made by their insurer on many classes of insurance<sup>2</sup> at no cost to the policyholder. The decision of the IOS is binding upon the insurer up to an amount not exceeding \$150,000, where the claim does not exceed \$290,000. The IOS is also able to make recommendations, for an amount greater than \$150,000 but not exceeding \$290,000 where the claim does not exceed \$290,000.

Within New South Wales there is further protection for policyholders with the Consumer, Trader and Tenancy Tribunal ('CTTT') where policyholders may take their complaint to be heard at minimal cost, with the CTTT having a jurisdictional limit of \$25,000.

From the above information, we believe it is clear that the insurance industry has well established consumer protections in place. Unfortunately, the historical actions of state and federal legislatures have resulted in duplicated or inconsistent legislation for the insurance industry. Examples include the Consumer Claims Act 1998 (NSW) which provides for policyholders to be able to have their insurance dispute heard before the CTTT, despite the existence of the IOS; plus the *Insurance Act 1902 (NSW)*. This 1902 Act is largely redundant due to the enactment of the ICA which prevails to the extent of any

<sup>2</sup> Examples of types of general insurance covered by the Code include: Motor Vehicle, Consumer Credit, Defamation, Engineering, Extended Warranty, General Property, Home and Contents, Home Warranty, Lenders Mortgage Insurance, Personal Valuables, Public and Products Liability, Storm and Travel

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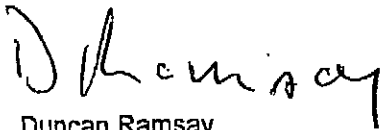
inconsistency by virtue of section 109 of the Commonwealth Constitution. However, it is still a current NSW Act even though the NSW Independent Pricing and Regulatory Tribunal in its report of July 2006<sup>3</sup> recommended that the NSW Government consider reviewing the Insurance Act 1902 (NSW) to identify any unnecessary provisions and requirements.

Therefore, when considering the Terms of Reference, we believe it is important for the Committee to focus its attention on particular areas or industries in which consumer contracts need revision, rather than recommending any broad changes.

As the ICA and the Code have been put in place to form a solid base of consumer protection for policyholders across Australia, we believe it is particularly important that the Committee not seek to impose any specific purpose legislation such as the Victorian *Unfair Terms in Consumer Contracts* legislation on the insurance industry (in which consumer protections have been operating fairly and efficiently for many years) and possibly create further duplication and/or uncertainty for both policyholders and insurers.

QBE would be pleased to assist with any further information you may require. If you have any questions, please call Peter Smiles on (02) 9375 4322 or me.

Yours faithfully



Duncan Ramsay  
General Counsel and Company Secretary  
direct: +61 (2) 9375 4422  
fax: +61 (2) 9231 6104  
email: [duncan.ramsay@qbe.com](mailto:duncan.ramsay@qbe.com)

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<sup>3</sup> Recommendation 52, pp 21 and pp 151