

DISCRIMINATORY EXCLUSION CLAUSES

Ingram v QBE Insurance (Australia) Ltd

On 18 December 2015, the Victorian Civil and Administrative Tribunal (**the Tribunal**) determined that QBE Insurance (Australia) Ltd (**QBE**) directly discriminated against Ms Ingram by including and relying upon a mental illness exclusion clause in a travel insurance policy.

In its defence, QBE relied on the actuarial/statistical data and unjustifiable hardship exceptions contained in the Equal Opportunity Act 2010 (Vic) (**EOA**) and/or the Disability Discrimination Act 2004 (Cth) (**DDA**). These defences were unsuccessful.

Facts

In late 2011, Ms Ingram booked a school tour to New York with her year 12 music class from 30 March to 11 April 2012. Ms Ingram paid for her trip in full and on 8 December 2011, Ms Ingram also purchased a travel insurance policy from QBE.

In January 2012, Ms Ingram started feeling depressed and was later diagnosed by her doctors with depression. Based on the advice of Ms Ingram's doctors and mother, she cancelled her trip. It was noted that Ms Ingram had not suffered from a mental illness in the past.

Ms Ingram's mother made enquiries with QBE in April 2012 and lodged a claim in May 2012 for the costs of the cancelled trip under the QBE policy. This claim was denied by QBE on 17 August 2012 and confirmed by way of letter on 4 December 2012.

The claim

Ms Ingram commenced proceedings in the Tribunal claiming that:

- QBE directly discriminated against her by issuing a travel insurance policy on terms which excluded all claims arising from mental illness, thereby breaching section 44 of the *EOA*.
- She was directly discriminated against because at the time the insurance policy was issued, she was a person who held the attribute of a disability pursuant to section 4 of the *EOA* which defines disability as including a disability that may exist in the future.
- QBE breached section 44(1)(a) of the *EOA* by declining to provide her cover and therefore treated her unfavourably.

Ms Ingram sought: a declaration that QBE unlawfully discriminated against her; compensation for economic loss; and compensation for non economic loss.

The policy

The policy in question was prepared on 1 March 2010 and became effective as of 22 March 2010. The policy covered claims for the costs of cancelled trips due to a sudden serious illness requiring hospitalisation or confinement. Specifically, the policy covered '...unused pre paid travel related costs less any refunds the person is entitled to receive; and medical, hospital and ambulance expenses incurred due to illness while overseas.'¹

The policy did not cover those who experienced signs or symptoms of an illness they were aware of prior to travelling and included a general exclusion clause to this effect.

¹ Paragraph [23] of the judgment, referred from page 33 of the travel insurance policy.

More relevantly, among the many general exclusions included in the policy, the exclusion that applied for the purposes of this claim was that pertaining to mental illness. Specifically, the policy cover did not extend to those suffering mental illness which included 'dementia, depression, anxiety, panic attack, stress, bipolar, mania, schizophrenia or other nervous disorder'.²

QBE's defences

In its defence, QBE submitted that:

- At the time the travel insurance policy was issued, Ms Ingram did not have a disability and therefore her claim for direct discrimination could not succeed.
- Although when Ms Ingram made her claim on 22 May 2012 QBE treated her unfavourably, QBE was permitted to do so under section 47 of the *EOA* and sections 29A and 46(2)(f) of the *DDA*.

The unjustifiable hardship exception under section 29A of the *DDA* states:

'... it is not unlawful for a person to discriminate against another person on the ground of disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.'³

Section 47 of the *EOA* and section 46 of the *DDA* effectively mirror one another and permit an insurer to discriminate against another person by refusing to provide an insurance policy to another person, or in the terms on which an insurance policy is provided, if the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely.

The actuarial or statistical data exception

There was some debate by the parties as to whether the actuarial / statistical data exception applied in this matter.

Ms Ingram argued that section 47 of the *EOA* did not apply because the act of discrimination concerned QBE's decision to refuse indemnity rather than a decision not to provide an insurance policy. However, QBE submitted and the Tribunal agreed that the exception does apply because an insurance policy is a contract containing terms which have an ongoing existence for the duration of the policy and can be relied upon at a later point in time. Therefore the mental illness exclusion clause became operative when Ms Ingram made her claim.

What was problematic for QBE was that it lacked any evidence of contemporaneous actuarial data at the time the mental illness exclusion was written into the policy. In an attempt to overcome this hurdle, QBE relied upon a report prepared in 2015 for the purposes of litigation by Associate Professor David Pitt and Dr Timothy King (**Pitt/Kyng report**).

QBE also sought to rely upon a series of other statistical reports which were publicly available in March 2010. QBE submitted that the Tribunal should have regard to all of the reports as the evidence was consistent with the particulars of its defence.⁴ QBE also invited the Tribunal to infer from these statistical reports that they were considered at the time the mental illness exclusion clause was written into the policy.

The unjustifiable hardship exception

QBE relied on section 29A of the *DDA* in arguing that it was not unlawful to discriminate against Ms Ingram because avoiding the discrimination would have imposed an unjustifiable hardship. In determining whether QBE would suffer an unjustifiable hardship, it was submitted that the Tribunal should adopt a broad approach and assess the ongoing effect of removing the mental illness exclusion clause from all policies, rather than just the policy held by Ms Ingram. QBE relied upon the Pitt/Kyng report in support of its assertion.

The Tribunal noted that it should have regard to the factors in section 11 of the *DDA* when determining whether QBE would suffer unjustifiable hardship. These included: the nature of

² Paragraph [23] of the judgment, referred from page 28 of the travel insurance policy.

³ Section 29A of the *DDA*

⁴ *Dare v Pulham* [1982] HCA 70

the benefit or detriment likely to accrue to or be suffered by any person concerned; the effect of the disability of any person concerned; and the financial circumstances and estimated amount of expenditure. QBE made submissions in respect of these matters as follows:

- the result of allowing claims arising from mental illness may lead to increased losses for QBE and increased premiums for travel and other insurance policies;
- on QBE's most favourable calculations, the net loss it would incur if the mental illness exclusion was removed would be at best 2% and more likely 7%; and
- payments may follow to other policy holders who would have had their claims met at the relevant time and into the future.

The Tribunal's findings

Direct discrimination

Ms Ingram's claim that she was directly discriminated against was upheld by the Tribunal. The Tribunal agreed with Ms Ingram's argument that the definition of discrimination applied to her as it found that she was a person for whom a disability may exist in the future.

The Tribunal determined that the discrimination was direct as opposed to indirect because the mental illness exclusion clause was '... more targeted than the requirements, conditions or practices which are considered under indirect discrimination'.⁵

The actuarial or statistical data exception

The Tribunal determined that QBE were unable to rely upon the Pitt/Kyng report under section 47(1)(b) of the *EOA* or section 46(2)(f) of the *DDA*, as it was not available at the time QBE decided on the terms to be included in the policy or at the time it denied indemnity. It was noted that even if QBE could rely on the report, the report did not identify the financial impact of not excluding mental illness claims around December 2011, when the policy was issued, to August 2012 when the claim was first refused.

In response to QBE's submission that the Tribunal should consider all publicly available statistical reports, the Tribunal determined that as it was not a court of pleadings, it was not required to review lengthy unreferenced documents. Further in relation to the publicly available reports, the Tribunal declined QBE's invitation to make the inference that the material was considered at the time the insurance policy was drafted because QBE did not produce any evidence concerning the date that mental illness exclusion clauses were initially introduced into the policy or similar policies.

The unjustifiable hardship exception

The Tribunal decided that section 29A did not apply and QBE could not rely on the unjustifiable hardship exception. In reaching its conclusion, the Tribunal had regard to the Pitt/Kyng report as well as the submissions made in respect of the test prescribed by section 11 of the *DDA*.

The Tribunal was particularly critical of the Pitt/Kyng report because:

- the financial consequences of removing the mental illness general exclusion clause were unclear as the report did not take into account pre-existing conditions; and
- the use of the ABS services statistics and their analysis did not accurately establish the number of claims that would be made by people unable to travel as a result of a mental illness.

The Tribunal was not satisfied that the Pitt/Kyng report proved, as was submitted by QBE, that QBE would suffer an absolute loss in the range of 2%-12% if the mental health exclusion clause was omitted. Further, the Tribunal was not satisfied that the submissions made by QBE in respect of section 11 of the *DDA*, established that QBE would suffer unjustifiable hardship.

Accordingly the Tribunal found that it was not reasonable for QBE to exclude mental health illness related claims from their travel insurance policies and did not accept that QBE would

⁵ *Ingram v QBE Insurance (Australia) Ltd* (VCAT Reference No. H107/2014) at [58]

have to increase the price of the insurance otherwise or bear losses for offering the insurance at the current premium rates.

Remedies

Declarations sought

Ms Ingram sought a clear public statement that QBE discriminated against her for the reason that the mental illness exclusion clause remains in QBE's policies and affects many consumers.

However, the Tribunal did not make the declaration as it did not want to express publicly that its decision automatically extends beyond the dispute between the parties and, in particular, to avoid an impression that it applies to all insurers. The Tribunal noted that its findings on the question of the application of the exceptions relied upon, turned on the evidence QBE sought to adduce and more broadly, how QBE ran its case.

Economic loss

The Tribunal awarded Ms Ingram \$4,292.48 which was the full amount claimed for economic loss and included costs associated with her cancelled trip after taking account of a refund from the credit provider.

The non-economic loss claim

The Tribunal awarded Ms Ingram \$15,000 for non economic loss in accordance with section 125 of the *EOA* which provides that compensation can be awarded for psychological injury, humiliation and hurt feelings provided there is a causal link between the breach and the claimed loss, damage or injury.

Implications

This decision provides some guidance for insurers when formulating their policy wordings. It is recommended that insurers retain any actuarial and statistical data and/or expert reports relied upon at the time policy wordings are formulated, particularly when including clauses which may be controversial. It is submitted that the decision has implications that potentially extend beyond travel insurance policies.

March 2016

This article was prepared by Kathryn Budd.

For further assistance, please contact Bruce Yeldham, Director (t: 9231 7014, e: byeldham@ypol.com.au) or Kathryn Budd, Associate (t: 9231 7011, e: kbudd@ypol.com.au)

On 1 September 2007, three of the leading insurance and commercial litigators of Phillips Fox joined forces with the established and respected insurance and commercial litigation specialist, Yeldham Lloyd Associates to create our firm.

We are a specialist incorporated legal practice. We are focused on insurance, reinsurance and commercial litigation.

Our directors are recognised locally and internationally as among the best in their fields. They are supported by an experienced and talented team.

We are accessible, straightforward and responsive. We are about providing the best legal service at a reasonable cost.

For more information on our firm please visit www.ypol.com.au

DISCLAIMER

This paper was prepared by YPOL (Kathryn Budd).

This update is intended to provide a general summary only and does not purport to be comprehensive. It is not, and is not intended to be, legal advice.

LEVEL 2, 39 MARTIN PLACE
SYDNEY NSW 2000

DX 162 SYDNEY

T: +61 2 9231 7000

F: +61 2 9231 7005

WWW.YPOL.COM.AU

YPOL PTY LTD TRADING AS
YELDHAM PRICE O'BRIEN LUSK
ACN 109 710 698

LIABILITY LIMITED BY A SCHEME
APPROVED UNDER PROFESSIONAL
STANDARDS LEGISLATION. LEGAL
PRACTITIONERS EMPLOYED BY YPOL PTY
LIMITED ARE MEMBERS OF THE SCHEME