# Is it time for travel insurers to provide cover for consumers with mental health issues?

*Ella Ingram v QBE Insurance (Australia) Ltd*

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## Summary

In *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* Member Dea of the Victorian Civil and Administrative Tribunal (VCAT) determined the application of an exception to the general principle that it is unlawful to discriminate. The *Equal Opportunities Act 2010* (Vic) (EOA) and the *Disability Discrimination Act 1992* (Cth) (DDA) allows insurers to lawfully discriminate if that discrimination is based on actuarial or statistical data.

Ms Ingram's travel cancellation claim was denied on the basis that the mental health exclusion applied. Ms Ingram had no previous mental health issues at the time of taking out her policy with the Respondent, being QBE.

Ms Ingram claimed that QBE had contravened the EOA and the DDA in denying her claim.

QBE claimed that it was acting lawfully under the exception in the EOA and the DDA.

The determination centred on the finding that the Respondent's denial of the Applicant's travel insurance claim was unlawful, as it had been made without the requisite data. Both the exclusion and the relevant application of the exclusion were held to be discriminatory, and therefore in breach of the EOA and DDA.

Member Dea held that QBE had failed to show that it relied on statistical data when it refused Ms Ingram indemnity, and therefore QBE was unable to rely on the exception.

## Facts

Ella Ingram's travel insurance claim was denied by QBE after she was hospitalised with depression at age 17 and cancelled an overseas school trip on advice from her doctor.

Ms Ingram had no pre-existing mental health conditions when she took out the insurance.

QBE denied her $4,292 claim for travel expenses on the grounds of its general exclusion for mental health-related claims.

The applicant made the following claims:

1. That by including the mental illness exclusion in the policy, and so excluding people with a disability of mental illness from indemnity, Ms Ingram was treated unfavourably because of her disability.

This was said to be in contravention of section 44(1)(b) of the EOA.

2. That by refusing to indemnify her on the basis of her mental health condition, QBE treated her unfavourably because of her disability (the unfavourable treatment was QBE's refusal to provide her the service of indemnity under the policy).

This was said to be a contravention of section 44(1)(a) of the EOA.

On behalf of Ms Ingram, Victorian Legal Aid (VLA) advocated that insurers:

- disclose and explain the basis of mental illness claims denials, and
- consider a policyholder's individual mental health circumstances rather than imposing a general exclusion covering all mental health-related claims.

## The hearing

At the VCAT hearing on 29 October 2015 before Member Dea, Ms Ingram was represented by VLA.

Actuarial evidence was put forward in support of QBE's position, and the report drew from data obtained from the ABS's 2007 National Health and Wellbeing Survey.

Evidence was given that if cover for mental health conditions was included, such policies would generate insufficient profit after claims, costs, and commissions were paid.

Counsel for Ms Ingram submitted that the impact of removing mental health cover may cause some loss in the travel insurance business, but the impact on QBE as a whole would be limited.

In response, Counsel for the Respondent noted that QBE holds an Australian Financial Services Licence which requires it to comply with the financial services laws. Counsel submitted that there are limits on cross subsidisation under these laws which prevent the offsetting of losses in one business division against another business division.

Member Dea handed down her decision in December 2015.

## VCAT findings

Member Dea found that the Respondent had contravened section 44(1)(a) and (b) of the EOA as:

- the inclusion of the mental illness exclusion was a contravention of section 44(1)(b) as it was an act of discrimination in the terms on which goods and services were provided to Ms Ingram, and
- QBE treated the Applicant unfavourably by refusing to indemnify her because of her disability in breach of section 44(1)(a).

The member referred to Victorian equal opportunities and discrimination legislation; similar legislation applies in NSW.

The DDA makes it unlawful to discriminate on the basis of a disability, including mental illness, when providing goods or services, or in the terms and conditions of providing goods or services (DDA section 24(a) and (b))

However, the DDA includes an exception under section 46(2)(f ) which states that it is not unlawful to discriminate in relation to a policy of insurance if it is proven that discriminatory clause is based on actuarial or statistical data (or other relevant factors) on which it was reasonable for the insurer to rely. The EOA at section 47(1)(b) contains a similarly worded exception.

The abovementioned sections allow an insurer to rely on section 29A of the DDA which states that it is not unlawful to discriminate in the event that avoiding discrimination would impose an 'unjustifiable hardship' on the discriminator. Her Honour held that QBE had not proven that they would have suffered from unjustifiable hardship by paying Ms Ingram's claim, or from the entire removal of the clause.

The only actuarial evidence that was put forward by QBE was a report dated 31 August 2015, clearly having been prepared for this litigation and not being in existence when QBE made its decision in regards to Ms Ingram's policy. For this reason the report could not be relied upon under the relevant sections of the EOA or DDA. QBE accepted that it had no data on which they could rely in respect of the mental illness exclusion in the policy.

QBE could not rely on the statutory exception to their discriminatory act as they had not produced any evidence that their discrimination was based on actuarial or statistical data. As such, QBE had engaged in unlawful discrimination.

Member Dea at 275 of her judgment states: 'the decision to include the exclusion clause in the policy and to refuse Ms Ingram indemnity was not based on proper actuarial data or statistics or evidence which demonstrated it was justified.'

She held that QBE was to pay the applicant $4,292.48 for economic loss, and $15,000 for non-economic loss for the hurt and humiliation caused to the Applicant.

## Implications

Advocacy groups such as the Public Interest Advocacy Centre, Beyond Blue, and Mental Health Australia have long encouraged a change to the current approach of insurers. The change has arisen partly as a response to the fact that 45% of the community will suffer from a mental illness at some point in their life, with a higher percentage affected in certain age groups.

Given the findings of Member Dea, rather than seeking to exclude a large proportion of the market, the travel insurance industry may wish to develop a pricing approach to this increasingly common situation and offer customers cover for mental health claims which reflects the findings of their statistical and actuarial data. This may require insurers to actively update their data regarding mental health so as to be able to appropriately price the risk.

This position has been adopted in other jurisdictions, such as the UK, and appropriate risk pricing based on statistical data will ensure that Australian insurers are in a position to avoid possible discrimination issues, as well as remain relevant in an increasingly competitive and sophisticated market.

QBE may seek to appeal the decision on a question of law in the Supreme Court of Victoria.

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