

Raising Standards of Care - The Consumer Protection Act and the insurance industry¹

Introductory Remarks

I am delighted to have the opportunity to address you today on the new consumer legislation. The topic that I have chosen to deal with this afternoon is “Raising the standards of care – The Consumer Protection Act and the insurance industry”

John Kenneth Galbraith in his book ‘The Affluent Society’ proclaimed:

“With increasing well being, all people become aware, sooner or later, that they have something to protect.”

The insurance industry facilitates our need for protection and management of our risks. However it is an area in which a high level of protection of consumers is essential.

Important parts of insurance law and practice are rooted in doctrines which are perceived as being unfairly balanced against the individual consumer and inappropriate for consumer transactions. The insurance product is of necessity complex, consumers’ understanding of the product is low and it is often sold in ways which make it hard for the consumer to make comparisons.

It is imperative that in this environment consumers be given sufficient and accurate information to facilitate them in making informed choices on products and services.

The new consumer legislation is of immense significance. We expect that the application and enforcement of this new legislation will create a new business

¹ Speaking Notes for Address to the Annual General Meeting of the Insurance Institute. Michelle C Goddard, Chief Executive Officer, Fair Trading Commission. 12 March 2003

climate which gives protection to consumers but also assists law-abiding businesses who offer high standards of care.

I propose, this afternoon to provide a general overview of the new legislation before addressing a few areas in the Consumer Protection Act that should be of direct and pivotal importance to participants in the insurance industry.

Overview of the Consumer Protection Act

The Consumer Protection Act came into force on 3rd January 2003 together with the Consumer Guarantees Act. These pieces of legislation work together with the Fair Competition Act to promote consumer welfare by

- ❖ Protecting consumers from unfair selling and contractual practices;
- ❖ Ensuring increased safety of goods; and
- ❖ Increasing competitiveness in the domestic marketplace.

The Fair Trading Commission is responsible for the administration and enforcement of the Consumer Protection Act whilst the Consumer Guarantees Act is primarily enforced by individual consumers. I will not address the provisions of the Consumer Guarantees Act in this presentation but it is important to recognise that significant issues in respect of the rights of consumers in contracts are also addressed in the Consumer Guarantees Act which greatly strengthens the rights of consumers in consumer contracts and is made specifically applicable to contracts of insurance

The Consumer Protection Act has a wide and panoramic scope. It addresses the conduct of all persons supplying goods and services to consumers. The traditional methods of business through brick and mortar store fronts are covered as well as those transactions conducted in the electronic marketplace.

Fairness and safety are the cornerstone of the new legislation.

Fairness through provisions on unfair trading practices that deal with misleading and deceptive conduct by suppliers, regulation of terms in consumer contracts and the development of higher standards of care through industry codes.

Safety by reducing the level of unsafe products that reach the market, protecting consumers from unsafe goods after distribution by provision for compulsory and voluntary product recall and introducing a strict liability regime for manufacturers of defective products.

The Commission enforces the Consumer Protection Act and seeks to secure compliance with its provisions through responding to complaints and inquiries, observing market conduct and taking enforcement action where necessary. The agency also informs the community at large about the Act and the rights and responsibilities of businesses thereunder.

It is important to remember that whilst the Commission is a law enforcement agency enforcement of the Consumer Protection Act takes place through the courts. The Commission does not have powers to impose fines or other penalties for breach of the law.

I will now discuss the provisions of the Act that deal with unfair trading practices, terms in consumer contracts and the development of industry codes. These areas will have a significant impact on the operations of insurance companies.

Unfair Trading Practices

The Consumer Protection Act addresses a variety of misleading and deceptive trading practices.

There is a general prohibition on conduct that is, or is likely to be, misleading or deceptive.

Offences are created for making false and misleading representations about a variety of matters including price, quality, standard, history, uses and benefits, endorsement or approval, sponsorship, characteristics or suitability for a purpose. For example where the actual premium rates for a particular consumer or the availability of insurance cover depends on individual assessment this should be made clear when any indication of the premium or the method of determining it is given to the consumer. To do otherwise would leave the business open to the risk of breaching the Act.

Specific types of unfair practices such as dual pricing where more than one price is attached to goods and bait advertising where customers are lured into stores on the promise that special offer goods will be available are also controlled by the provisions in the Act.

It is clear that the coverage is of wide and significant import. Care must be taken by all businesses to ensure that their standards of practice and behaviour are consistent with the legislative requirements.

Representations

A variety of medium are used by businesses to transmit their message to consumers - radio and television advertisements, information provided by employees over the phone, informational flyers and other promotional information distributed directly to consumers, All of this conduct is covered by the trade practices provisions in the Consumer Protection Act – a representation is anything said about a service or product either orally or in writing - and the information therein must be clearly and accurately conveyed to the consumer.

The key is to ask yourself “What impression have I given of my offer” If the impression is not accurate then you risk breaching the Act.

Intent

It is important to note that intent is not relevant in establishing a breach of the Act so that even if there is no intent to mislead or for example if a sales representative unintentionally makes a false or misleading representation then that can still be a breach of the Act and leave the business subject to the imposition of penalties by the court.

Target audience

One has to consider the target audience for any promotion. This includes not just the “average” consumer but all consumers that are likely to be receptive to the promotion. Technically accurate information may create a different impression if not considered from the target audience’s point of view.

Industry jargon

Representations must be considered from a consumer’s perspective and the use of industry jargon is therefore best avoided. Consideration must be given as to whether statements that are clear to agents or employees are equally clear for consumers with limited knowledge about the area.

Overall impression created/fine print

Another matter that must be taken into consideration in developing promotional material is the overall impression created by the promotion.

Failure to reveal vital information could be misleading or deceptive and may breach the Act. Using fine print to correct an earlier false or misleading representation will be unlikely to protect a trader against action under the Act as fine print does not alter the overall impression created by bold text, colour and other elements used in the advertising

Penalties for breach of the Act are imposed by the courts and include fines on individuals of up to \$10,000 or two years imprisonment and fines for persons other than individuals of up to \$100,000.

Promotion of products and services is an integral part of attracting customers and retaining business. However it is important that representations made to the public are factual and that care is taken with promotions of goods and services.

Unfair Contract Terms

The provisions of the Consumer Protection Act introduce a radical, new approach to the construction and interpretation of contracts with individual consumers.

The Act regulates terms in standard form contracts, i.e. pre-printed, pre-formulated contracts that are not individually negotiated by consumers with suppliers. This would include terms in policy documents, proposal forms and renewal notices.

It applies to contracts with individual consumers and provides that contract terms in these types of consumer contracts should be fair and reasonable.

What is unfairness?

The new provisions provide that terms which “contrary to the requirement of good faith cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer” are unfair and not binding on the consumer.

There is an illustrative and non-exhaustive list as to the types of terms that would be considered unfair.

There is also a requirement that contract terms be plain and intelligible i.e. that best attempts be made to draft contracts in Plain English.

Terms that define what the consumer gets and how much the consumer pays are “core terms” which are not covered by the legislation unless they are unclear i.e. not plain and intelligible.

Whilst a term that is unfair is not binding on a consumer the other terms of the contract will continue to bind the parties once the contract is enforceable without that unfair contract term. The Court decides which terms are unfair.

Scope of coverage

One caveat or exclusion from coverage is that the provisions in the Act that unfair terms shall not be binding on the consumer do not apply to core terms that is any term which

“defines the main subject matter of the contract” or

“concerns the adequacy of the price or remuneration as against the goods or services sold or supplied’.

The only proviso is that the core terms in question must be in “plain intelligible language”.

Several questions can be raised about the applicability of the provisions to insurance contracts and the extent to which certain terms and exclusions in insurance contracts, which limit the insurer's liability can be regarded as ' core' terms of this kind. Whilst some cases may be necessary before we can be more specific about where the line may be drawn - the overriding principle that the contract must be in plain and intelligible language still applies and will be of fundamental application in this sector.

Plain and intelligible language not only refers to drafting contracts in clear, simple and unambiguous style but also addressee matters such as the use of double negatives, confusing layout, small font sizes and unsatisfactory qualities of print.

The definitions of words used must be clear, jargon avoided and key words given specific and clear definitions. What does “Unable to Work” mean in a disability insurance contract – the term may be interpreted very differently by the consumer and the company providing the insurance.

Additionally if there is any doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail. The effect is that the consumer will get the benefit of the doubt on the interpretation of these contracts.

Some examples of the types of terms that are considered unfair would be illustrative:-

Excluding oral representations - “complete property guarantee” including a contract term that potentially excludes liability for oral statements by stating that the written documents would be recognised as the complete description of the contract would be unfair. This type of term cannot be remedied and must be removed from consumer contracts.

Hidden Terms – Consumers must be made aware of contract documents and be given an opportunity to read and understand them prior to entering into the contract. Persons are often not given the actual insurance policy until after the policy has been sold and sometimes not at all. Similarly with renewal notices, terms in renewal notices that are significantly different must be highlighted to the consumer.

Rights of cancellation – Giving an unqualified right of cancellation to the insurer but denying a corresponding right to the insured would be considered as an unfair term.

Limiting or excluding rights of redress – Setting unreasonable deadlines or timelines for making claims, stating that if a claim is disputed and the insured person fails to commence legal proceedings within one year of a claim being

refused the claim would be extinguished are also unfair terms, void and unenforceable against the consumer.

Consumers can enforce these provisions directly as unfair terms will be void and unenforceable against them. The Commission is also empowered with the investigation and monitoring of the use of unfair terms and can seek injunctions to prevent continued use of the same.

Care must be taken to ensure the appropriate use of terms in consumer contracts:

- ❖ Legal advisers should read the contract and any associated documents before signing to ensure that the terms are not unduly skewed against the consumer;
- ❖ Print contracts in legible print, large font size;
- ❖ Use Plain English and avoid legalese or overly technical terms; and
- ❖ Offer consumers an opportunity to read the contract and any associated documents before signing it.

I have dealt extensively with some of the behaviour and conduct that is specifically prescribed and provided for in the legislation. Let me know turn to that area in which industry participants play a pivotal role in raising the standards of care.

Industry Codes of Practice

Self-regulation is ideal for establishing tailor-made solutions to specific industry problems and concern and clear authority is provided in the Consumer Protection Act for self-regulation through the development of mandatory and voluntary Industry Codes.

Codes of Practice are documents drawn up by industry groups or trade associations establishing levels of best practice, beyond legal requirements, that industry participants agree to follow. The provisions in Codes are in

addition to any existing legal obligations of Code members. They should not be seen as an easy way of avoiding government regulation and their development will require commitment and hard work on the part of businesses.

To ensure that Codes are effective they must

- ❖ Address specific consumer concerns and deal with real consumer problems;
- ❖ Arise after consultation with policymakers and consumers;
- ❖ Contain for the implementation and ongoing administration of the Codes;
- ❖ Be transparent and contain consumer/user representation;
- ❖ Cover a substantial amount of the industry involved;
- ❖ Allow for complaints handling and provide for a review mechanism of complaints handling
- ❖ Ensure that each industry participant has inhouse compliance procedures; and
- ❖ Contain effective sanctions for non-compliance with the Code

Several jurisdictions have used industry codes to develop a flexible yet appropriate framework for regulation of the insurance sector. In the United Kingdom the establishment of an Insurance Ombudsman, with the power to make decisions based on what was fair and reasonable, together with industry codes of practice and guidelines facilitated the development of a new consumer insurance climate.

Areas that could be covered by a General Insurance Code of Practice might include:

- a) Disclosure of information
- b) Wording of policy documents
- c) Content of promotional material
- d) Claims Handling
- e) Internal Dispute Resolution Procedures
- f) Training and Conduct of Intermediaries

A challenge for the industry is for it to develop and implement a Code that

- ❖ Provides imaginative and innovative solutions to consumer problems;
- ❖ Establishes standards of information relevant and useful to consumers to allow them to make informed choices and compare products;
- ❖ Promotes informed and effective relationships between consumers, insurers and agents; and
- ❖ Provides simple, inexpensive dispute handling scheme for the settlement of complaints.

Concluding Remarks

The new Consumer Protection Act has fundamentally changed the landscape in which we operate. Businesses need to develop compliance programmes and integrate the new obligations into the way in which they conduct business.

- ❖ Review contracts, policies, proposal forms for compliance with the Act
- ❖ Give prominent place to important exclusions in documents
- ❖ Address sales techniques and business practices; and
- ❖ Train and re-train agents and employees to ensure no misleading information is being given

It is in the long term interest of companies to provide consumers with clearer and simpler choices and we look forward to working with the insurance industry to ensure that through compliance with the Consumer Protection Act there is greater transparency and effective operation of the market.

I invite you to join the Commission as we seek to create this new business climate in which fairness and high standards of care are the hallmarks of all operations in the business sector.

I thank you.