



# Public & Regulatory Law Update

October 2008

## Ombudsman (Amendment) Bill 2008

In July 2008 the Ombudsman (Amendment) Bill 2008 (the Bill) was published. It will amend the Ombudsman Act 1980 (1980 Act) which established the Office of the Ombudsman and gave the Ombudsman the power to investigate complaints about administrative actions of many public bodies which adversely affect individuals or companies.

The Bill will extend the powers of the Ombudsman to cover a significant number of new bodies which, at present, are outside the remit of the Ombudsman and updates certain provisions of the 1980 Act. This means that the administrative actions of many public bodies, that were previously not subject to investigation by the Ombudsman, may now be subject to scrutiny. The Bill also sets out further criteria and procedures which are to apply to bodies covered by the legislation and increases the powers of the Ombudsman in respect of access to information.

In this regard, it:

- Provides that in making decisions on rights, benefits and so on, a public body covered by the Ombudsman must, consistent with its resources, deal with people fairly and in a timely manner.
- Sets out the criteria under which the Government can, after consultation with the Ombudsman, by an order which must be approved by both Houses of the Oireachtas, bring new bodies within the remit of the Ombudsman.
- Allows the Ombudsman to make a general recommendation, where relevant, to any of the bodies within the remit where, following an investigation, it is considered appropriate to do so.
- Provides that where the requirement to provide information to the Ombudsman is not met the Ombudsman can institute legal proceedings.
- Provides that the Ombudsman may refer any question of law arising in an examination or an investigation to the High Court.
- Increases transparency by bringing the 1980 Act in line with the Freedom of Information Act 1997.
- Provides protection for the title of Ombudsman.

As a result of the above, if the Bill is enacted, the applicable bodies need to ensure that they follow proper procedures and are aware of the fact that the Ombudsman will have more extensive powers in future, particularly in relation to accessing information that is relevant to a complaint.

## Financial Services Ombudsman: need to follow fair procedures

*Case: & E Davy trading as Davy v Financial Service Ombudsman and Enfield Credit Union [2008] IEHC 256*

**Background.** The Financial Services Ombudsman (Ombudsman) adjudicates complaints regarding the conduct of regulated financial services providers. If a complaint is upheld, the Ombudsman may direct the financial services provider to review, rectify and mitigate the conduct complained of and to change the practice relating to that conduct.



**Facts.** A complaint by a credit union that Davy's had mis-sold perpetual bank bonds to a credit union was upheld by the Ombudsman in January 2008. The Ombudsman ruled the bonds were unsuitable investments for credit unions and that Davy's did not advise the credit union adequately on the risks inherent in the bonds which later fell in value. As a result Davy's should buy back from the credit union, the three bonds at their original cost of €500,000. Davy's rejected the complaints made against it and insisted it had provided full and proper advice about the nature of the bonds and the risks involved. Davy's took judicial review proceedings to have the decision of the Ombudsman quashed.

**Decision.** The High Court ruled that the Ombudsman failed to follow fair procedures in the way in which he upheld the complaint against Davy's. The court held that the Ombudsman carried out his functions in good faith but quashed his decision and remitted the matter to him for it to be investigated again and set out the fair procedures to be followed. The court suggested that the Ombudsman in this case should hold an oral hearing. The court also stated that when investigating complaints against financial service providers both complainants and financial service providers must be treated equally.

**Comment.** The Ombudsman's website has updated its procedures for dealing with complaints as a result of this decision. However, on 26 August 2008 the Ombudsman announced that he is appealing this decision to the Supreme Court. The grounds for his appeal are not yet known.

## Risk equalisation scheme set aside

*Case: BUPA Ireland Limited and BUPA Insurance Limited v The Health Insurance Authority, Minister for Health and Children, Ireland and the Attorney General and the Voluntary Health Insurance Board [2008] IESC 42*

**Background.** Risk equalisation was the method adopted by the State to underpin the system of community rating which applies to the provision of private health insurance. The principle behind community rating is that everyone pays the same premium for health insurance regardless of age, gender or health profile. The purpose of risk equalisation is to equitably neutralise differences in health insurers' costs that arise due to variations in the health status of their members. Depending on the extent of the variation, risk equalisation may result in cash transfers from insurers with lower risk members to insurers with higher risk members.

**Facts.** BUPA challenged the validity of section 12 of the Health Insurance Act 1994 (1994 Act) and the validity of the Risk Equalisation Scheme 2003 (Scheme) made under section 12 of the 1994 Act on a number of grounds. Under the Scheme, VHI, the largest health insurer in Ireland, was to receive payments from BUPA and it was suggested, in the course of the proceedings, that those payments would exceed €40 million. Those payments were postponed pending the outcome of this appeal. In December 2006, BUPA announced it would leave the Irish market as a result of the mandatory risk equalisation payments and its business was then taken over by the Quinn Group.

BUPA argued that "community rating" meant community rating within a plan (that is, that each insured person within a given policy must be charged the same premium irrespective of their risk profile.) The respondents argued that the meaning of community rating contained in section 12 of the 1994 Act was the community which comprises the entire insured population in the private medical insurance sector.

**Decision.** The Supreme Court focused on the meaning of the term community rating contained in the 1994 Act. It found that the correct meaning to be attributed to the term community rating was the interpretation put forward by BUPA, namely that it was community rating within the plan or contract and not across the entire insured population.

As a result the court found that the Scheme was introduced on an erroneous interpretation by the Minister of Health and Children of section 12 of the 1994 Act. The introduction of the Scheme was therefore held to be ultra vires or outside the powers of the Minister for Health and Children.

**Comment.** The effect of this decision is to strike down or set aside the Scheme. It will be interesting to see the reaction of the Government to the decision, given its stated commitment to the principle of community rating.

### Head of Public & Regulatory Unit

Niall O'Brien, Partner [n.o'brien@beauchamps.ie](mailto:n.o'brien@beauchamps.ie)

**Beauchamps Solicitors** Riverside Two, 43-49 Sir John Rogerson's Quay, Dublin 2

Tel +353 (1) 418 0600 Fax +353 (1) 418 0699

Email [securemail@beauchamps.ie](mailto:securemail@beauchamps.ie) Web [www.beauchamps.ie](http://www.beauchamps.ie)

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