FEDERAL COURT OF AUSTRALIA

ACE Insurance Ltd, in the matter of ACE Insurance Ltd [2016] FCA 997

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| File number: | NSD 660 of 2016 |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 8 August 2016 |
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| Catchwords: | **INSURANCE** – application for transfer of general insurance business – application for partial dispensation of requirement for distribution of approved summary of scheme pursuant to s 17C(2)(c) *Insurance Act 1973* (Cth)  |
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| Legislation: | *Insurance Act 1973* (Cth)  |
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| Cases cited: | *AAI Limited, application under the* Insurance Act 1973 *(Cth)* [2015] FCA 452*American Home Assurance Company, in the matter of American Home Assurance Company* [2010] FCA 1499*Application of Gordian RunOff Limited under the Insurance Act 1973* (Cth) [2013] FCA 983*Application of Sompo Japan Insurance Inc. under the* Insurance Act 1973 *(Cth)* [2014] FCA 396*Calliden Group Limited in the matter of Calliden Group Limited* [2007] FCA 2019*Challenger Life Limited* [2004] FCA 618*HDI-Gerling Australia Insurance Company Pty Limited, in the matter of HDI-Gerling Australia Insurance Company Pty Limited* [2010] FCA 505*In the matter of GIO Personal Investment Services Ltd and AMP Life Ltd* [2000] FCA 1871*MMIA Pty Limited and QBE Insurance (Australia) Limited* [2008] FCA 1239 *Munich Reinsurance Company of Australasia Limited* [2004] FCA 1391*QBE Insurance (Australia) Ltd, in the matter of Division 3A of Part IIIA of the Insurance Act 1973 (Cth) & QBE Insurance (Australia) Ltd* [2015] FCA 1223*QBE Insurance Australia Limited, in the matter of QBE Insurance Australia Limited* [2012] FCA 112*Re Insurance Australia Ltd* [2004] FCA 524; (2004) 139 FCR 450*The Application of Commonwealth Life Ltd & Anor* [2003] FCA 501*Westport Insurance Corporation, in the matter of Westport Insurance Corporation* [2009] FCA 1357  |
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| Date of hearing: | 8 August 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords  |
|  |  |
| Number of paragraphs: | 44 |
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| Counsel for the Applicant: | Mr N Owens with Mr Mitchell |
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| Solicitor for the Applicant: | Clyde & Co |
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| Solicitor for the Australian Prudential Regulation Authority: | Ms S Neumueller of Australian Prudential Regulation Authority  |

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| **Table of Corrections** |  |
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| 4 October 2016 | The Medium Neutral Citation has been amended by capitalisation of the applicant company’s name as follows:ACE Insurance Ltd, in the matter of ACE Insurance Ltd [2016] FCA 997 |
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| 19 October 2016 | The case citation in [8] has been amended to read:*Calliden Group Limited in the matter of Calliden Group Limited* [2007] FCA 2019 |

ORDERS

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|  | NSD 660 of 2016 |
| IN THE MATTER OF ACE INSURANCE LIMITED (ABN 23 001 642 020) |
|  | ACE INSURANCE LIMITED (ABN 23 001 642 020)Applicant |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 8 AUGUST 2016 |

THE COURT ORDERS THAT:

1. The need for the applicant to comply with s 17C(2)(c) of the *Insurance Act 1973* (Cth) (“Insurance Act”) is dispensed with provided that the applicant complies with Orders 2 through 7 below.
2. The applicant, before the Scheme is released for public inspection under order 5 below, to cause a copy of the summary of the Scheme approved by the Australian Prudential Regulation Authority (“Approved Summary”) to be sent by pre-paid post or email to:
	1. each of the policyholders identified in the Final Policyholder Register as described in the affidavit of Andrew Robin Gourley sworn on 2 August 2016 (“Gourley Affidavit”);
	2. each of the brokers and agents as described in the Gourley Affidavit; and
	3. the National Insurance Brokers Association,

to the address or email address identified by the process described in the Gourley Affidavit.

1. The applicant, before the Scheme is released for public inspection under order 5 below, to cause a copy of the Notice of Intention to make the application as required under APRA Prudential Standard GPS 410 *Transfer and Amalgamation of Insurance Business for General Insurers* (July 2002) (in the form to be approved by APRA) (the “Approved Notice”) to be published in the following publications:
	1. the *Government Gazette*; and
	2. *The Australian*, being a newspaper circulating in each State and Territory in which an affected policyholder resides; and
	3. The following metropolitan newspapers:
		1. *The Sydney Morning Herald*
		2. *The Age*
		3. *The Canberra Times*
		4. *The Mercury*
		5. *The Advertiser*
		6. *The Northern Territory News*
		7. *The West Australian*
		8. *Courier Mail*
2. The applicant, once the Approved Summary has been sent in accordance with order 2 above and the Approved Notice has been published in accordance with order 3 above, to cause a page to be created on its website (accessible at www.chubb.com/au) that will contain a statement indicating that an application has been made to the Court for the confirmation of the Scheme and a link to the following documents:
	1. the Approved Notice, as described in the Gourley Affidavit;
	2. the Scheme, as described in the Gourley Affidavit;
	3. the Approved Summary, as described in the Gourley Affidavit;
	4. the Actuarial Report, as described in the Gourley Affidavit; and
	5. the Independent Peer Review, as described in the Gourley Affidavit,

such page to be available to the public until the conclusion of the public inspection under order 5 below.

1. The applicant to make a copy of the Scheme, Approved Summary, the Approved Notice, Actuarial Report and Independent Peer Review (“Scheme Documents”) available for public inspection from 9:00am to 5:00pm (local time) every day (except weekends and public holidays), for a period of at least 15 days at locations approved by APRA in each State and Territory in which an affected policyholder resides.
2. The applicant to provide a copy of the Scheme Documents on request to any affected policyholder free of charge.
3. Chubb to provide a copy of the Approved Summary to any new policyholders with their policy documentation, or to their brokers or agents to pass onto the policyholders (where applicable), for any new policies that are issued by Chubb after the policyholder notification process set out in order 2 has been completed until the effective date of the Scheme.
4. The legal costs of APRA be paid by the applicant, as agreed by the parties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GLEESON J:

1. The applicant (“ACE”) has applied to the Court for orders pursuant to the *Insurance Act 1973* (Cth) (“Act”) confirming a proposed scheme for the transfer of all of the insurance business of Chubb Insurance Company of Australia Ltd (“Chubb”) to ACE.
2. By interlocutory application filed 4 August 2016, ACE sought dispensation from the requirement of s 17C(2)(c) of the Act to provide all affected policyholders with a summary of the scheme approved by the Australian Prudential Regulation Authority (“APRA”) on certain terms (“dispensation application”).
3. The dispensation application was supported by an affidavit of Andrew Robin Gourley sworn 3 August 2016. After hearing submissions, I made the orders sought. These are my reasons for making those orders.

# Background to dispensation application

1. Both Chubb and ACE are Australian corporations authorised to carry on a general insurance business in Australia under s 12 of the Act.
2. Before 15 January 2016 (Australian time), Chubb and ACE were members of different corporate groups headed by The Chubb Corporation and ACE Ltd respectively. On that date, ACE Ltd acquired The Chubb Corporation, effecting a global merger of the two groups. Following the merger, ACE Ltd is now known as Chubb Ltd and the combined group of companies is known as the Chubb Group of companies.
3. According to ACE’s written submissions, the proposed scheme is “one component of the global reorganisation of the Chubb Group following the merger designed, in broad terms, to align what were two independent businesses into one”. Relevantly:
4. previously, the shares in ACE were held by ACE Australia Holdings Pty Ltd;
5. previously, the shares in Chubb were held by Federal Insurance Company;
6. on 1 April 2016, as an interim measure under the new structure, the shares in Chubb were transferred to ACE Australia Holdings Pty Ltd (now re-named Chubb Holdings Australia Pty Ltd); and
7. it is proposed that prior to the implementation of the scheme (assuming it is approved), the shares in Chubb will be transferred to ACE.
8. Thus, the proposal is that Chubb will become a wholly-owned subsidiary of ACE, which will be (as it already is) a wholly-owned subsidiary of Chubb Holdings Australia Pty Ltd, the shares in which will be owned by a foreign subsidiary of the Chubb Group.
9. Mr Owens submitted that the proposed scheme is an “intra-group” scheme, which will not involve any real change in the claims handling process of Chubb or any difficulty in a claim being referred onto the correct insurer as a result of the proposed scheme: cf *Calliden Group Limited in the matter of Calliden Group Limited* [2007] FCA 2019 (“*Re Calliden*”) at [62]; *MMIA Pty Limited and QBE Insurance (Australia) Limited* [2008] FCA 1239 at [24].

## Business to be transferred under the proposed scheme

1. The business is comprised of a portfolio of insurance contracts which have been underwritten in Australia since January 1981, initially as a branch of Vigilant Insurance Company and from April 1989 as Chubb. Chubb has mainly underwritten financial lines insurance (including directors’ and officers’ insurance and professional indemnity insurance), marine insurance, public and product liability insurance, property insurance, accident and health insurance, consumer credit insurance, travel insurance and house owners/householders insurance.
2. The business is grouped into the following four segments:
3. Global Brokers Unit, which operates through six large international insurance brokers (Aon, Marsh, JLT, Willis, Gallaghers and Locktons).
4. Independent Brokers Unit, which operates through other, generally smaller, brokers (including “cluster” or “networks” of brokers such as Steadfast and Austbroker).
5. Bulk-Booked Schemes, through which standardised cover is offered to a homogeneous group of individuals, for example, industry based groups, with individual underwriting, issuance and claims settlement authority being delegated to the broker or agent managing the scheme.
6. Direct business, being business conducted by Chubb directly, without the involvement of a broker or agent.

## Chubb’s claims analysis

1. If ACE were required to notify all policyholders who were issued policies since 1981 (assuming they could be identified), the notification task would impose a very significant burden which would not necessarily promote the objects of the Act. Chubb’s appointed actuary has conducted a claims analysis which shows that the likelihood of claims is low (less than 1%) after two years for short tail business and six years for long tail business. A copy of the analysis is annexed to Mr Gourley’s affidavit.
2. Long-tail classes (policies for which specific losses may not be known for some period and for which claims can take significant time to report and settle/close) includes most liability (for example, public and products liability policies) and professional risks (for example, directors and officers and professional indemnity policies).
3. Short-tail classes (policies where claims are usually made during the term of the policy or shortly after the policy has expired) include most property, personal accident and marine cargo policies.
4. Based on the claims analysis, ACE sought to limit its obligation to notify affected policyholders to policies issued:
5. since 1 January 2009 for long tail policies; and
6. since 1 January 2014 for short tail policies (“selected periods”).

## Chubb’s policyholder records

1. Chubb’s policyholder records are found in a computer system known as “PRISM”.
2. A policyholder register has been compiled in the manner set out in Mr Gourley’s affidavit. It includes only policyholders falling within the selected periods. There are 49,225 policyholders listed on the policyholder register. Of these policyholders, there are 36,385 policies for which Chubb has apparently valid email or postal addresses. Mr Gourley estimated that the policyholder register records the contact details of approximately 25% of the policyholders of the business, being policyholders for whom policies were issued within the selected periods.
3. In relation to the Global Brokers Unit and the Independent Brokers Unit business, Chubb does not have any direct contact with the policyholder, and all policyholder information that is recorded in PRISM in relation to policies written through those two business units is provided by the relevant broker or agent. Frequently, no direct contact information relating to a policyholder is provided: rather, the details are simply stated to be “care of” the broker.
4. In relation to the Bulk-Booked Schemes business, it is frequently the case that no policyholder contact information is supplied. Typically there is simply a “bulk book” of premium supplied monthly, although in some cases, policyholder bordereaux consisting of policyholder names (not contact details) are supplied.
5. Policyholder names and contact details would ordinarily be included in PRISM where the business has been conducted by Chubb directly.
6. In all cases, whatever policyholder information is entered into PRISM is current as at the time the policy is issued but is only updated if some event occurs that would make it necessary to do so (for example, if a claim is lodged and a new address is provided). In other words, there is no general process by which Chubb updates policyholder contact details.
7. I accept Mr Owens’ submission that there is very little that could practically be done to check whether policyholder information contained in PRISM is current and accurate. However, to the extent that PRISM does not contain policyholder information because such information was only ever in the possession of the relevant broker, it is possible that notification could be achieved with the cooperation of that broker.

## Efforts to increase notification of proposed scheme through brokers

1. Chubb has written by email to each broker for which it was able to identify contact details (some had ceased to do business, for example) and asked the broker if it would:
2. undertake to provide a copy of the Scheme summary to each affected policyholder for which it had records; or
3. provide Chubb with contact details for each affected policyholder for which it had records.
4. Of the brokers that have responded, different brokers have chosen different options (with some proposing a very slightly modified version of the first option, whereby Chubb would provide a list of policyholder names to the broker for the broker to notify using the policyholder contact details recorded on the broker’s system).

## The proposed process for notifying affected policyholders

1. As put in ACE’s written submissions, the critical omissions from the notification will be:
2. any policyholder whose policy was issued before the “cutoffs” of 1 January 2009 for long tail policies and 1 January 2014 for short tail policies;
3. any policyholder whose contact details are only held by the broker or agent through whom their policy was written and where:
	1. Chubb did not have email contact details for that broker;
	2. the broker did not respond to Chubb’s request for assistance in notifying those policyholders; or
	3. the broker had informed Chubb that it would provide Chubb with policyholder contact details, but did not provide Chubb with any policyholder contact details;
4. any policyholder whose contact details, whether on PRISM or in the records of a relevant agent or broker, are incorrect or out of date.
5. In an effort to mitigate the effect of these omissions, ACE proposed to:
6. send a copy of the scheme summary to the National Insurance Brokers Association;
7. publish a notice in major national, State and Territory newspapers and the Government Gazette; and
8. publish a notice on the Chubb website.

# Legal Framework

1. Section 17C of the Act provides:

(1) In this section:

***"affected policyholder "*** means the holder of a policy affected by a scheme.

***"approved summary "*** means a summary approved by APRA.

(2) An application for confirmation of a scheme may not be made unless:

(a)  a copy of the scheme and any actuarial report on which the scheme is based have been given to APRA in accordance with the prudential standards; and

(b)  notice of intention to make the application has been published by the applicant in accordance with the prudential standards; and

(c)  an approved summary of the scheme has been given to every affected policyholder.

(3)  Without limiting the provision that may be made by the prudential standards for the purposes of paragraph (2)(b), the notice referred to in that paragraph must include, in relation to each body corporate affected by the scheme, details of the place and time at which an affected policyholder may obtain a copy of the scheme.

(4)  An affected policyholder is entitled, on the person's request, to be provided by the company with one copy of the scheme free of charge.

(5)  The Federal Court may dispense with the need for compliance with paragraph (2)(c) in relation to a particular scheme if it is satisfied that, because of the nature of the scheme or the circumstances attending its preparation, it is not necessary that the paragraph be complied with.

1. The expression “affected policyholder” refers only to a holder of a policy being transferred under the scheme, that is, it does not include the holders of policies issued by the transferee company: *Re Insurance Australia Ltd* [2004] FCA 524; (2004) 139 FCR 450 (“*Re IAL*”) at [19]; *QBE Insurance Australia Limited, in the matter of QBE Insurance Australia Limited* [2012] FCA 1127 (“*Re QBE*”) at [3]. Thus, for the purposes of this application, “affected policyholders” are policyholders of Chubb and not policyholders of ACE.
2. Of course, as ACE’s submissions acknowledged, the interests of policyholders of ACE will be a relevant consideration on the ultimate question of whether the scheme should be confirmed.
3. The granting of a dispensation under s 17C(5) is a matter of considerable importance and should not be regarded as something to be allowed as a matter of course: *Re QBE* at [16]; *Munich Reinsurance Company of Australasia Limited* [2004] FCA 1391 at [4]. In *The Application of Commonwealth Life Ltd & Anor* (“*Commonwealth Life*”)[2003] FCA 501 at [8], Sackville J said, in connection with an application for dispensation under s 191(5) of the *Life Insurance Act 1995* (Cth):

Clearly enough, the policy underlying the statutory requirement, when read in conjunction with s 191(2)(b), is to give every affected policyholder a summary of the scheme and, an opportunity, if he or she so desires, to make submissions to the Court in respect of any application for confirmation of the scheme. A right to be heard in relation to a proposed scheme may be of little value if a person does not know of the proposal.

1. The principle stated by Sackville J has most recently been approved in the context of applications for dispensation under s 17C in *Application of Gordian RunOff Limited under the Insurance Act 1973* (Cth) [2013] FCA 983 at [16]; *AAI Limited, application under the* Insurance Act 1973 *(Cth)* [2015] FCA 452 at [22]; *QBE Insurance (Australia) Ltd, in the matter of Division 3A of Part IIIA of the Insurance Act 1973 (Cth) & QBE Insurance (Australia) Ltd* [2015] FCA 1223 at [23].
2. The discretion to make dispensation orders is a general one and the provision does not specify the criteria that the Court is to apply in determining whether “the nature of the scheme or the circumstances attending its preparation warrant” the making of proposed orders: *Re QBE* at [16].
3. The fact that additional steps will be taken to draw the scheme to the attention of affected policyholders has been held to favour the granting of a dispensation under s 17C(5) in several cases, including *In the matter of GIO Personal Investment Services Ltd and AMP Life Ltd* [2000] FCA 1871 at [18]; *The Application of Commonwealth Life Ltd & Anor* [2003] FCA 501 at [6] and [10]; *Challenger Life Limited* [2004] FCA 618 at [5]; *Re Calliden* at [62]; *Westport Insurance Corporation, in the matter of Westport Insurance Corporation* [2009] FCA 1357 at [44]-[46]; and *HDI-Gerling Australia Insurance Company Pty Limited, in the matter of HDI-Gerling Australia Insurance Company Pty Limited* [2010] FCA 505 at [43]-[44].

# APRA’s position on dispensation application

1. APRA supported the dispensation application. Ms Neumueller, who appeared on the application on behalf of APRA, informed the Court that APRA is presently looking at the confirmation of the proposed scheme favourably. She confirmed that APRA considered the proposed orders to be suitable to notify affected policyholders.
2. The attitude of APRA to the dispensation application is significant: cf *QBE* at [18]. APRA is the prudential regulator of general insurance businesses in Australia and, consequently, has an important role in ensuring that the interests of policyholders are protected. By s 17E of the Act, APRA is entitled to be heard on the application for confirmation of the scheme.

# Reasons for seeking dispensation

1. ACE identified the following three bases upon which it seeks dispensation from the requirement of s 17C(2)(c):
2. Chubb’s records in relation to policyholder information are neither complete nor necessarily accurate. While Chubb will take reasonable steps to ensure that policyholders are in fact notified, there can be no guarantee that the notification will be complete or, in individual cases, effective.
3. Because a significant proportion of Chubb’s business was “intermediated” (or written through a broker or other agent), the primary point of contact for many policyholders in relation to their policies is their broker or agent, and the only person with contact details for the policyholder may be the broker. In those circumstances, it may be desirable either for the notification to be given by the relevant broker or agent, or for the broker or agent to provide Chubb with contact details. But, to this extent, the process is largely dependent upon the cooperation of brokers and agents.
4. The cost and effort involved in notifying policyholders where there is only a very small prospect of a claim being made is disproportionate to the benefit that would be obtained by doing so.
5. For the reasons set out below, the evidence of Mr Gourley satisfied me of the correctness of each of these three propositions.

## Reasonable steps have been taken to identify contact details for affected policyholders

1. I was satisfied that ACE has taken all reasonable steps to identify affected policyholders who were issued policies within the selected periods. I accept that there are no additional steps that could reasonably be expected to produce any better information in relation to the identification of policyholders and their contact information. That is, I accept that the best information available to Chubb is that contained on PRISM, and the information on PRISM will be supplemented or updated, where possible, by the brokers or agents who might have superior information.

## Policyholders unlikely to make claims

1. In support of the proposed notification of policyholders to whom policies were issued in the selected periods only, Mr Owens of counsel referred to *Re IAL* at [26], where Lindgren J reasoned:

The period of insurance which last expired, expired on 4 October 2001. In order for a NSW CTP policy to answer to a claim, the motor accident would have to have occurred by that date. While it is possible, it is unlikely that many claims will yet be made arising out of such motor accidents. It would be excessive to require the approved summary of the scheme to be given to some 72,500 policyholders in order to protect any beyond the approximately 130 referred to, against whose policies claims may yet be made.

1. In *American Home Assurance Company, in the matter of American Home Assurance Company* [2010] FCA 1499 at [9] to [11], Emmett J stated:

[9] The effect of the dispensation sought is that AHAC will not send relevant material to policyholders for whom it has not been able to identify the name or current contact information. I am satisfied that in relation to the policyholders, whose name or current contact information cannot be identified, that AHAC has performed reasonable searches and made reasonable inquiries in order to obtain current contact information.

[10] Further, AHAC will not send the approved scheme summary to the holders of expired policies who are unlikely to report a claim in the future. As to that second category, AHAC undertook an actuarial analysis of the historical claims reporting patterns for each class of its business to identify those holders of expired policies who are most likely to notify a claim in the future. Mr Ian Reed, an actuary, has identified the time lags after policy expiry in which 95 per cent of claims would be reported for each class of AHAC’s Australian business. AHAC will send a copy of the approved scheme summary to the holders of expired policies that expired sufficiently recently, such that the effective date of the scheme will fall within the expiry lag period so identified. Mr Reed’s evidence indicates that in excess of 70,000 such policy holders have been identified.

[11] I am satisfied that there would be minimal utility in attempting to notify the holders of other expired policies, for several reasons. First, the holders of unexpired policies that were not identified by Mr Reed are very unlikely to report a claim after the effective date of the scheme, since such policies expired a relatively long time ago, having regard to the claims reporting tail of the relevant class of insurance business in which those policies are characterised. Secondly, because of the age of the policies, it is likely that the contact details recorded in AHAC’s systems will not be current. Thirdly, because AHAC has been conducting insurance business through its Australian branch since 1959, there are likely to be large numbers of such expired policies. AHAC would incur significant costs in sending a copy of the approved scheme summary to such a large number of policyholders, without any likely material benefit.

1. In *Re QBE,* dispensation orders were made which relieved the applicant from notifying policyholders who were highly unlikely to make a claim, based on an actuarial analysis.
2. In *Application of Sompo Japan Insurance Inc. under the* Insurance Act 1973 *(Cth)* [2014] FCA 396, there was evidence that about 98% of claims were reported within three years of policy expiry. At [25], Yates J concluded:

Based on Mr Tuinauvai’s evidence, especially in relation to the short-tail nature of the Nippon Express policies and the claims reporting patterns and retention rates in respect of the other policies, it seems very unlikely that the Policyholder Notification List does not contain, overwhelmingly, the names and addresses of most affected policyholders. I am satisfied that little practical utility is likely to be achieved by requiring Nipponkoa to locate and analyse archived material with a view to ascertaining the existence of others who might be additional affected policyholders. The steps proposed for notification are likely to bring forth any objection to the scheme that is based on viable objective grounds.

# Conclusions

1. Based on the evidence provided, I was satisfied that the proposed regime for notification of affected policyholders will be likely to lead to notification of a very large number of affected policyholders, sufficient to bring forth, in all likelihood any objection to the scheme that is based on viable objective grounds.
2. On that basis, and taking into account APRA’s support for the dispensation orders, I was satisfied that it was not necessary that there be compliance with s 17C(2)(c) and that it was appropriate to make the orders sought.
3. In particular, I was satisfied by the claims analysis that it is reasonable for the notification process to be restricted to notification of policyholders within the selected periods, and that it would be unduly burdensome to require ACE to take any additional steps to notify affected policyholders of the proposed scheme.

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| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 18 August 2016