

WEstjustice

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By email: InsuranceConsultations@treasury.gov.au

Financial System Division
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Dear Manager

Extending unfair contract terms laws to insurance contracts – Exposure draft legislation

Consumer Action Law Centre, Financial Rights Legal Centre, and WEstjustice welcome the opportunity to comment on the proposed extension of unfair contract terms laws to insurance contracts, specifically the:

- Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019—Exposure Draft (**Exposure Draft**);
- Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019—Explanatory Memorandum (**Explanatory Memorandum**); and
- Draft Regulation Impact Statement – Extending the protection from unfair contract terms (**draft RIS**).¹

There is a big ‘fairness’ problem in insurance. People often make insurance claims when they are at a low ebb, and can face shocking outcomes and no recourse under current laws when insurers rely on unfair terms. For too long, insurers have had special treatment under the law. Unlike virtually every other industry operating in consumer markets, insurers are not subject to unfair contract terms (UCT) regime in the *Australian Securities and Investments Commission Act 2001* (Cth). Insurers continue to rely on unfair contract terms to maintain their profitability and have consistently pushed back against reform.

The case for action is irrefutable, with ongoing stories of harm and endless enquires recommending the extension of UCT laws to insurance.²

We strongly support the Government’s move to implement the important and long overdue extension of UCT laws to insurance. In particular, we support the Government’s commitment to implement the specific recommendation

¹ Consultation documents available at: <https://treasury.gov.au/consultation/c2019-t372650>.

² A list is available at page 5-6 of the draft RIS.

of Commissioner Hayne in the Financial Services Royal Commission (**Royal Commission**) Final Report on the definition of 'main subject matter'.³

This reform can finally level the playing field.

A fair insurance regime will prevent disputes (rather than seeking to rectify them), increase trust, increase competition and provide for more efficient regulation. Most importantly, it will give Australians a better chance of a fair outcome from their insurance when they need it the most.

One of the key lessons from the Royal Commission was that industry lobbying for loopholes and exemptions over the years has watered-down and complicated our financial services laws to the point where they don't serve consumers. It appears this lesson has been lost on parts of the insurance industry. We note with disappointment and concern the ongoing scare tactics and threats of 'rising premiums' and 'withdrawing cover' by recalcitrant parts of the insurance industry that would rather fight sensible reforms with specious arguments rather than get on with making their contracts fair.

Given the loss of trust, and the number of people abandoning insurance, these loopholes and exemptions must be fixed, and caving to industry scaremongering must be avoided.

This submission:

- strongly supports Option 3 identified in the RIS as the only acceptable option;
- strongly supports the narrow definition of 'main subject matter' in the Exposure Draft;
- recommends that unfair contract terms be prohibited, not just voidable, with civil pecuniary penalties applying;
- recommends that a Court may make orders other than voiding the unfair term, such as preventing the insurer from relying on the term;
- recommends that the third party beneficiary provisions be amended to close the effective loophole for some group insurance, such as life insurance through super, employer-sponsored policies and complimentary travel insurance on credit cards;
- recommends that authorisation forms that allow for insurers to access a consumer's medical information be brought within the definition of the contract for the purpose of unfair contract term laws; and
- recommends the establishment of a Federal Insurance Monitor, similar to those found in NSW and Victoria, to ensure insurance companies do not exploit consumers through disproportionate, unreasonable or unjustified increases in premiums on the basis of changes brought by the extension of unfair contract term protections and other reforms to insurance.

Our comments are detailed below.

Information about our organisations is available at **Appendix A**.

³ Recommendation 4.7.

Regulation Impact Statement

The RIS outlines three policy options:

- Option 1 – maintain the status quo
- Option 2 – apply UCT laws to insurance contracts, with a broad definition of main subject matter
- Option 3 (preferred) – apply UCT laws to insurance contract with a narrow definition of main subject matter.

We strongly agree that Option 3 is the preferred option, and Treasury's reasoning. In our view, it is the only acceptable option, and the only option that will implement Commissioner Hayne's specific recommendation in the Royal Commission Final Report (Recommendation 4.7).

We have had the opportunity to briefly review the disappointing submission by the Insurance Council of Australia to this consultation.⁴ In our view, nothing in the submission warrants any reconsideration of the Exposure Draft legislation by Treasury. We would be happy to meet with Treasury to respond to any arguments raised in industry submissions.

Main subject matter

We strongly support the narrow definition of 'main subject matter' in the Exposure Draft.

The scope of the 'main subject matter' exemption in relation to insurance contracts will be a critical element in the effectiveness of this reform. This definition will play a key part in determining the extent to which the insurance industry reviews and improves its contract terms, and the effectiveness of the regime for a person who pursues a dispute against an insurer based on an unfair term in the contract.

Disappointingly, some elements of the insurance industry have continued to argue for the main subject matter to be defined as broadly as possible in order to exempt the majority of contract terms from review under UCT laws, which would render the regime largely ineffective.⁵

Bringing most of an insurance contract within the scope of the regime via a narrow definition does not mean any term in the contract will be void. This will simply ensure that insurers have a legitimate basis for most policy terms, including their conditions and exclusions. The question for an insurer when drafting a policy clause would be—is this reasonably required to protect our legitimate business interests? The answer would be clear through the underwriting process.

Further information on the importance of this definition and why a narrow definition is essential to effective UCT laws is available in Consumer Action's policy report *Denied*⁶ and our submission to Treasury's proposals paper.⁷

⁴ ICA, Submission to The Treasury, Extending Unfair Contract Terms to Insurance Contracts, 28 August 2019.

⁵ Ibid; <https://insuranceandrisk.com.au/extending-unfair-contract-terms-to-insurance-contracts/>.

⁶ Consumer Action Law Centre, *Denied: Levelling the playing field to make insurance fair*, February 2018, page 27-8: <https://consumeraction.org.au/denied-levelling-the-playing-field-to-make-insurance-fair/>.

⁷ Submissions to The Treasury, *Extending Unfair Contract Terms Protections to Insurance Contracts: Proposals Paper, June 2018*: Consumer Action Law Centre, 24 August 2018: <https://consumeraction.org.au/submission-extending-unfair-contract-terms-protections-to-insurance-contracts/>; Financial Rights Legal Centre and Redfern Legal Centre, August 2018: https://financialrights.org.au/wp-content/uploads/2018/08/180824_ExtendingUnfairContractTerms_Submission_FINAL.pdf.

Remedies

Prohibit unfair terms and apply civil penalties

While we are very supportive of Government bringing insurers in the UCT regime, it is clear that the UCT regime as a whole must be bolstered by making unfair terms illegal and applying civil penalties. Now is the time to fix this problem economy-wide for all types of consumer contracts, including insurance.

The Australian Competition and Consumer Commission (**ACCC**) has recommended, most recently in its Digital Platforms Inquiry,⁸ that the *Competition and Consumer Act 2010* (Cth) be amended so that unfair contract terms are prohibited, not just voidable, and that civil pecuniary penalties apply. The ACCC states that this would more effectively deter businesses from leveraging their bargaining power to include unfair terms in their contracts in the first place. The same should apply to the unfair contract terms regime in the ASIC Act.

By making unfair contract terms illegal, ASIC would be able to seek civil pecuniary penalties when a term in a contract is declared unfair and void by the court, and issue infringement notices for contract terms that are likely to be unfair.

RECOMMENDATION 1. Unfair contract terms should be prohibited, not just voidable, with civil pecuniary penalties applying.

Other orders

A Court should be able to make orders other than voiding a term, such as a declaration that the insurer cannot rely on the term. Clarification in the amending legislation may be needed.

It is important for the UCT regime to provide fair outcomes for consumers. In some cases, that may mean that voiding the unfair term produces an unfair result for the consumer, for example where it means that the policy benefit is not paid in full.

Voiding an unfair contract term can lead to unfair outcomes where the voiding undermines the effect of a contract in part or in whole. Insurance contracts are made up of a complex array of conditions, exceptions, inclusions, exclusions and definitions. Voiding a term may unintentionally lead to the contractual house of cards falling, causing the insured to not receive the benefit of the contract. It is therefore preferable that courts be able to make other orders, such as re-writing a term, to provide a more appropriate and just outcome in all of the circumstances.

We note that under the existing UCT regime a Court can make a range of orders it thinks appropriate if a party tries to rely on a term which has been declared unfair. These include injunctions, compensation and redress to non-party consumers.

RECOMMENDATION 2. Amend the Exposure Draft to clarify that a Court may make orders other than voiding the unfair term, such as preventing the insurer from relying on the term.

Third party beneficiaries

We strongly support the inclusion of third-party beneficiaries within the UCT regime, so that the person impacted by an unfair term in a group insurance policy can get redress.

⁸ ACCC, *Digital Platforms Inquiry – Final Report*, June 2019, p 25-6:
<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

However, we are concerned that the Exposure Draft will effectively carve out many types of group insurance from the operation of the UCT laws.

The Explanatory Memorandum states at para 1.41:

The definitions of consumer and small business (section 12BF), tests of unfairness (section 12BG of the ASIC Act) and definition of standard form contracts (section 12BK of the ASIC Act) continue to relate to the parties to the insurance contract, not third party beneficiaries. This means that while third party beneficiaries can bring actions, the actions will only be successful if the tests of unfairness (section 12BG of the ASIC) and standard form contracts (section 12BK of the AISC Act) are met with reference to the parties that negotiated the contracts, not the third party beneficiaries.

For example, a contract for insurance purchased on a group basis by a large superannuation trustee would likely not be covered by the regime. A superannuation trustee would be unlikely to meet the definition of a small business or consumer, and is likely to have significant bargaining power in negotiating such contracts so the contract would not meet the definition of a standard form contract.

Similarly, banks and some employers are unlikely to meet this definition of small business. This means people who are third party beneficiaries under life or total and permanent disability insurance provided through superannuation or employer-sponsored policies, and 'complimentary' travel insurance offered with credit cards by banks will be effectively carved out of the UCT regime.

We acknowledge some of the policy justifications about excluding insurance through superannuation. Super funds do not have a lack of bargaining power. Trustees also owe statutory and common law obligations to act in members best interests. We also appreciate the tension within the trustee obligation to meet the best interests of members and to weigh the collective interest versus the individual, which may complicate the application of the unfairness test if something that's arguably unfair for an individual might be justified at a collective level.

While we appreciate these issues, our position remains that the UCT regime should cover insurance through superannuation. If the system was working as it should, this may not be needed. However, the system has not been working. The Productivity Commission has reported a raft of serious problems with life insurance in superannuation.⁹ These included:

- unnecessary, duplicate, inappropriately bundled and 'zombie' policies,
- 'extremely complex and incomparable policies',
- problems for members dealing with funds in relation to insurance,
- poor application of risk premiums, and
- little or no tailoring of policies to member cohorts.

This is the stark reality for the many people who rely on life, TPD and/or income protection insurance to support them and/or their families if they are struck by tragedy. The stakes are too high and the failures of existing protections too obvious to leave this to the market and existing laws. Both have failed people. Over 12 million people are covered by life insurance in superannuation.¹⁰ This sizable group of people require more protections from the unfair operation of insurance policy terms. For more information on our concerns about group insurance in super, see our submissions to Treasury's proposals paper.¹¹

Some of these issues should improve with the passage of the member outcomes legislation. This will mean that, from December 2020, trustees will have to show the regulator on an annual basis how they are meeting this duty,

⁹ Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness—Draft Report Overview*, April 2018, pp 21-22.

¹⁰ Ibid p 20.

¹¹ Above n 7.

including how their insurance product is meeting the best interests of cohorts of members.¹² However, if the best interests' duty is actually a higher duty, then super trustees have nothing to fear from the fairness test in the UCT regime.

To the extent there are additional protections in the superannuation context, there are none for the group insurance policies negotiated in other contexts.

For example, complimentary travel insurance offered by banks with credit cards would likely be outside the operation of the UCT laws. This can cause harm when people rely on the complimentary insurance and then do not purchase stand-alone travel insurance. These group policies can be riddled with unfair and unexpected terms and exclusions, particularly as Trustees and other group insurance providers seek to cut costs and restrict coverage. In the context of credit card providers which offer group travel insurance, we are not convinced that their status as a sophisticated purchaser means that terms of the product purchased will be fair. This is because the credit card provider is primarily interested in offering the complimentary insurance as part of its marketing, rather than being interested in whether the consumer will be effectively covered for loss.

We are also concerned that maintaining an exemption or loophole where some forms of insurance are not subjected to the unfair contract regime gives rise to the real potential for regulatory arbitrage. As noted in the draft RIS, the Royal Commission Final Report recommended that the number of exceptions and carve outs in general law should be reduced.¹³ It is clear that carve outs cause consumer harm and can lead to unforeseen gaps. If Government is unwilling to address this in this legislative reform it needs to be addressed in the review and reforms arising out of the response to Recommendations 7.3 and 7.4 of the Royal Commission Final Report.

As a matter of principle, the unfair contracts terms regime needs to be applied consistently across all products. No consumer – including Australians whose only access to life insurance cover is via their superannuation fund – should be disadvantaged because of the way they have obtained insurance coverage.

RECOMMENDATION 3. Amend the third party beneficiary provisions so that there are no exemptions and loopholes for group insurance.

Medical information forms

The Parliamentary Joint Committee on Corporations and Financial Services (**PJCFS**) published a report on the Life Insurance Industry in March 2018.¹⁴ This report identified harm associated with the forms used by insurers to obtain authority from consumers to access their medical information. The PJCFS noted that, too often, the general authority included in these forms were broadly drawn, enabling access to all of the consumer's medical information, regardless of the nature of the life insurance policy purchased or the claim made.

A particular harm identified related to people who were reluctant to seek necessary treatment, particularly for mental ill health, due to concerns over life insurers having access to their full medical record and then using such information to limit or deny coverage of the claim. We agree with the PJCFS that "individuals should not have to trade off financial stability, which should be secured through life insurance, against their health".¹⁵

¹² APRA, *Prudential Standard SPS 515 Strategic Planning and Member Outcomes*, p 4:

https://www.apra.gov.au/sites/default/files/prudential_standard_sps_515_strategic_planning_and_member_outcomes_august_2019.pdf.

¹³ Draft RIS, p5; FSRC Final Report, Recommendation 7.4.

¹⁴ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance/Report.

¹⁵ *Ibid* [8.84].

Among its recommendations to deal with this concern was that, as part of applying unfair contract terms to insurance, authorisation forms for an insurer to access a consumer's medical information should be brought within the contract to allow for the application of laws on unfair contract terms.¹⁶ We support this recommendation.

RECOMMENDATION 4. That authorisation forms that allow for insurers to access a consumer's medical information be brought within the definition of the contract for the purpose of unfair contract term laws.

Price monitoring

We note with disappointment the ongoing scare tactics and threats of 'rising premiums' and 'withdrawing cover' by recalcitrant parts of the insurance industry as a result of these reforms.

Were insurers to follow through on such threats, this would be seen as a deeply cynical act by a sector that has relied on unfair contract terms to maintain their profitability.

Insurers should have been subject to the unfair contract terms regime since it established in 2010. Many insurers have enjoyed nearly two decades of collecting premiums on policies that had unfair terms, that were unlikely to pay out when people needed it. In our view, it is inappropriate for insurers to now pass on the costs of cleaning up their unfair policies to the very customers affected by them.

To monitor and deter price gouging by insurers, we recommend the establishment of a Federal Insurance Monitor, similar to those established in NSW and Victoria. The insurance monitor could be empowered to call upon insurers to provide details of any contract terms amended or removed, their impact on underwriting and costs either absorbed by insurers or passed on to existing and new customers.

The onus should be placed on insurers to back any such increases with proper assessments of risk including real health, actuarial or statistical data that are reasonable to rely on.

This would ensure that insurers do not exploit the introduction of the new laws by increasing premiums disproportionately or unjustifiably on the basis of changes brought by the extension of unfair contract term protections, or the other positive reforms to the insurance sector being progressed by the Government.

RECOMMENDATION 5. Establish a Federal Insurance Monitor, similar to those found in NSW and Victoria, to ensure insurance companies do not exploit consumers through disproportionate, unreasonable or unjustified increases in premiums on the basis of changes brought by the extension of unfair contract term protections and other reforms to insurance.

¹⁶ Recommendation 8.6.

Further information

Please contact Senior Policy Officer Cat Newton at Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



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WESTJUSTICE

Appendix A: About our organisations

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.