

28 August 2019

Manager  
Financial System Division  
Markets Group  
Treasury  
Langton Crescent  
Parkes ACT 2600

**By email:** [InsuranceConsultations@treasury.gov.au](mailto:InsuranceConsultations@treasury.gov.au)

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to Treasury's consultation on the exposure draft of the *Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019*.

As you will be aware, Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Our Superannuation and Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff working nationally within the team. At any one time we provide legal assistance to approximately 3500 to 4000 clients. Much of this work is assisting them with the complex and challenging processes involved in making an insurance claim under their superannuation scheme membership or retail insurance policy.

On a daily basis we witness the difficulties experienced by our clients when unexpected illness or injury forces them out of the workforce, and we also see the devastating impact of unfair decision making by life insurers.

**Maurice Blackburn believes that there is no good reason to have general and life insurance contracts exempted from the Unfair Contract Terms (UCT) rules.**

Maurice Blackburn is pleased to support and endorse the Exposure Draft of the Bill and its associated documents. We congratulate Treasury on its thorough and accessible consultation process which led to the development of the draft.

We believe the Bill as drafted would considerably improve the current circumstances for many consumers.

We believe that the extension of UCT to insurance contracts would enhance consumer protections which are not currently working adequately through existing legal frameworks:

- The utmost good faith provisions are not stopping insurance companies from developing contracts which severely disadvantage consumers.
- The Life Insurance Code of Conduct, which was introduced to bring consistency to the industry, is unregulated and thereby lacks the power to change motivations and behaviours.

To this end, Maurice Blackburn makes the following observations in relation to the Exposure Draft and the draft Explanatory Memorandum:

**1. Maurice Blackburn strongly endorses the adoption of Option 3 as described in the Policy Options section of the Regulation Impact Statement (RIS)<sup>1</sup>, namely:**

*Option 3 (preferred) – apply UCT laws to insurance contracts, including a narrow definition of main subject matter.*

We support a narrow definition, in line with existing unfair contract terms laws and insurance laws.

As noted above, Maurice Blackburn rejects Option 1, the status quo. It has been our consistent view that there is no good reason to have general and life insurance contracts exempted from the UCT rules.

We also agree with the principle expressed in the RIS<sup>2</sup> that:

*Option 3 will extend the UCT laws to insurance contracts in the same way as Option 2, but will include a narrow definition of main subject matter. This will result in an increased number of terms being subject to the fairness test under the law, thereby increasing the benefit to consumers and small businesses and also the likely impact on insurers.*

**2. Maurice Blackburn strongly supports the definition of ‘main subject matter’ that appears in the Exposure Draft of the Bill.**

We note that the Exposure Draft nominates the following definition of ‘main subject matter’<sup>3</sup>:

---

<sup>1</sup> <https://treasury.gov.au/sites/default/files/2019-07/c2019-t372650-ris.pdf>, p.6

<sup>2</sup> Ibid, p.10

<sup>3</sup> s.4 of schedule 1

*For the purposes of applying paragraph (1)(a) to an Insurance Contracts Act insurance contract, have regard to the main subject matter of the contract only to the extent that it describes what is being insured.*

This is in line with what we argued for in our submission to Treasury's initial 2018 consultation process<sup>4</sup> in 2018.

We note that this is also in line with recommendation 4.7 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), namely:

*The unfair contract terms provisions now set out in the ASIC Act should apply to insurance contracts regulated by the Insurance Contracts Act. The provisions should be amended to provide a definition of the 'main subject matter' of an insurance contract as the terms of the contract that describe what is being insured. The duty of utmost good faith contained in section 13 of the Insurance Contracts Act should operate independently of the unfair contract terms provisions.*

We further note that the implementation of this recommendation enjoys bipartisan support in the federal parliament.

### **3. Maurice Blackburn encourages Treasury to consider serious penalties for breaches of UCT legislation.**

We note, from the draft Explanatory Memorandum<sup>5</sup> that:

*If an insurance contract is subject to the UCT regime, a term in that insurance contract may be declared unfair and therefore void.*

While acknowledging that this brings insurance contracts in line with others covered by UCT provisions, Maurice Blackburn believes it would be beneficial to have clearly defined sanctions included in the Bill which outline the consequences for insurers that persist with using unfair terms in their contracts.

We encourage Treasury to consider including a range of sanctions which can be applied depending on the severity of the breach. This may include:

- Providing courts with options other than voiding the unfair term, once an unfair term has been established. This could include steps such as disallowing the insurer from relying on that term.
- The inclusion of civil pecuniary penalties for insurer breaches of UCT legislation.

We are of the firm belief that only serious consequences for blatant flouting of regulations will change corporate behaviour. Whilst actions such as voiding terms is useful in rectifying a situation for a consumer, it doesn't change the culture or wrongdoing which sought to exploit that consumer in the first place.

Financial penalties, or the threat of financial penalties, are a practical and effective means for achieving behavioural change.

---

<sup>4</sup> <https://treasury.gov.au/sites/default/files/2019-03/Maurice-Blackburn-Lawyers.pdf>, p.7.

<sup>5</sup> para 1.21

We believe that this recommendation is still in keeping with the overall tenor of the Bill. It aligns with the identified need for 'appropriate remedies' discussed on page 5 of the RIS, and the desire for 'appropriate avenues for recourse' described on page 6.

**4. Maurice Blackburn encourages Treasury to ensure that every insurance contract is covered by the provisions of the Exposure Draft.**

In our previous submission to Treasury in relation to UCT<sup>6</sup>, Maurice Blackburn argued that any move to remove exemptions for insurances from UCT legislation should include all insurance types.

In that submission, we argued that there should be no differences in the coverage of contracts for general insurance products and life insurance products.

We also strongly supported the position that that UCT protections should apply to third-party beneficiaries<sup>7</sup>.

We note that the Exposure Draft utilises the definition of third party beneficiaries as found in the Insurance Contracts Act<sup>8</sup>. Maurice Blackburn encourages Treasury to ensure that that definition is broad enough to capture all related parties.

Maurice Blackburn also encourages Treasury to satisfy itself that the provisions in the Exposure Draft appropriately allow for contracts related to group insurance arrangements such as insurances provided through superannuation funds, employer provided insurance policies and travel insurances provided as an added-on benefit of certain credit cards.

As mentioned earlier, Maurice Blackburn supports and endorses the Exposure Draft of the Bill and its associated documents. The suggestions above are intended to be read as potential improvements, rather than criticisms of what Treasury has put forward. We are grateful for the opportunity to participate in this thorough consultation process.

Maurice Blackburn again encourages Treasury to be wary of attempts by the insurance industry to secure carve-outs for certain terms, contract types and functions, through this consultation process. Now more than ever, the community is aware of the culture and misconduct which underpins corporate decision making.

Please do not hesitate to contact me and my colleagues on 03 9605 2792 or [bwhite@mauriceblackburn.com.au](mailto:bwhite@mauriceblackburn.com.au) if we can further assist with Treasury's important work.

Yours faithfully,



**Kim Shaw** (Enquiries: Brooke White – 03 9605 2792)  
**Principal Lawyer**  
**MAURICE BLACKBURN**

---

<sup>6</sup> <https://treasury.gov.au/sites/default/files/2019-03/Maurice-Blackburn-Lawyers.pdf>

<sup>7</sup> <https://treasury.gov.au/sites/default/files/2019-03/Maurice-Blackburn-Lawyers.pdf>, in response to Q24.

<sup>8</sup> Ref para 1.40 of the draft Explanatory Memorandum