

## Unfair contract terms – insurance contracts

### Travel insurance exclusion of cover for goods left ‘unattended in a public place’ as an unfair contract term

Treasury submission by Professor Paul Latimer, Swinburne Law School, Melbourne. This submission represents the views of the author alone.

#### *Executive summary*

*This submission highlights the potentially unfair use by insurers of the standard travel insurance exemption of cover for ‘unattended goods in a public place’ in the list of exemptions which usually run for several pages. The exemptions can be classified as unfair contract terms. This submission demonstrates failings in the handling of insurance claims based on unfair contract terms. The case law definition of ‘unattended goods’, set out in the Starfire case in 1962, states that the goods must be under observation so that the insured can prevent any unauthorised interference with them. Insurers confuse the Starfire test with the duty of the insured to look after their goods in a public place. The ‘unattended goods’ test provides cover for an insurer to exercise its power to reject a claim whether or not an insured has been in breach of its duty of care at common law. The Starfire test can be made to say what insurer wants it to say - the words of the exemption do not mean what they say. This submission recommends replacing the many standard exemptions such as the ‘unattended goods’ exemption with a plain English exclusion along the lines of ‘we will not pay a claim if you have been in breach of your duty of care to look after your goods’.*

I write as a legal practitioner (part time) and as a law academic who has carried out insurance and financial services research and publication for four decades,<sup>1</sup> originally at the forerunner of UTS, later at Monash Business School and more recently as an Adjunct Professor at Swinburne Law School in Melbourne and as a practising lawyer at a community legal service in Melbourne.

I write to give my strong support to the proposal to amend the *Insurance Contracts Act 1984* (Cth) (ICA) to allow the unfair contract terms (UCT) provisions in the Australian Consumer Law (ACL) and *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) to apply to insurance contracts regulated by the ICA.<sup>2</sup>

#### **Travel insurance exclusions give all power to the insurer - ‘We will not pay for ...’, ‘What is not covered’**

I write to provide a practical example of the unfairness of policy exclusions common in travel insurance. The power of the insurer is reflected in the one-sided negotiations that follow an insurance

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<sup>1</sup> Starting with, eg, Paul Latimer, *Cases and Text on Insurance Law Australia and New Zealand* (Butterworths 1977); Paul Latimer, ‘Insurance Law Reform’, *The Insurance Record of Australia and New Zealand*, Vol 4, No 2, 61 (March 1979); Paul Latimer, ‘Good Faith in Insurance Contracts’ (1980) 8 *Australian Business Law Review* 37; Paul Latimer, ‘Extra-Contract Recovery in Insurance Law’ (1980) 3 *University of New South Wales Law Journal* 381.

<sup>2</sup> Treasury, *Extending Unfair Contract Terms Protections to Insurance Contracts* (Proposals Paper, June 2018) at <https://treasury.gov.au/consultation/c2018-t284394>.

claim which are totally in the hands of the insurer. The insurer judges the claim, and advises whether or not the claim falls within the policy. This may involve providing legally incorrect advice to the insured that their claim is within an exclusion and that it is not covered by the policy. Only a determined insured may know of or be able to search the reported cases of the Financial Ombudsman Service (FOS),<sup>3</sup> the courts and tribunals which may show that similar claims have in fact been allowed on appeal from insurers. The FOS decisions show that a good number go in favour of the insured. The reported decisions may blow the cover of the insurer, and the insurer not disclosing the insured's good chances on appeal may constitute misleading or deceptive conduct, non disclosure and/or breach of its duty of good faith by the insurer.

'Conning' an insured out of its claim based on unfair contract terms is an unfair tactic which would be addressed if insurance were included in the ACL Part 2-3 and the ASIC Act Part 2 Division 2 Subdivision BA dealing with unfair contract terms (UCT).

I recommend that the exclusions should be reduced from several pages to a few plain English principles setting out the duty of care at common law. This would remove generations of case law which empower the insurer in its negotiations, and would help to balance the contract.

Exclusions in travel insurance continue for many paragraphs sometimes under the heading 'We will not pay for' or 'What is not covered'. A standard exclusion is that the policy does not cover the loss or theft of personal goods (property, items, hereafter 'goods) left unattended in a public place. On face value, this seems reasonable as it puts a duty of care on the insured.<sup>4</sup>

Travel insurance is over represented in insurance complaints. Complaints about travel insurance are reported to be 'reasonably high ... (s)ince 2004, around 17 per cent of general insurance complaints have been in relation to travel, despite the product accounting for less than eight per cent of the market'.<sup>5</sup> Financial Ombudsman Service (FOS) statistics show that 10% of complaints about domestic insurance concerned travel insurance.<sup>6</sup> Further statistics that over 60% of complaints resolve in favour of the insurer<sup>7</sup> - ie, on appeal, 40% uphold the claim of the insured.

Case law shows there is wide scope in the interpretation of the meaning and effect of goods being 'unattended in a public place', as discussed below. This is one-sided as it gives the power of interpretation to the insurer. Only the most determined insured will be able to challenge the insurer to beat this and to achieve payment for its claim for the loss or theft of goods left unattended in a public place.

### **Travel insurance for loss or theft of personal goods 'unattended in a public place'**

Travellers take out travel insurance to provide cover if things go wrong away from familiar surrounds, including the loss or theft of personal goods 'left unattended in a public place' due to momentary inattention, carelessness, distraction. There is no second chance when your bag is gone. Most insureds have the comfort of the protection of their travel insurance - until they make a claim. The stress and

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<sup>3</sup> At <https://www.fos.org.au/resolving-disputes/decisions>.

<sup>4</sup> Exclusions in mass-marketed policies with referenced to pre-existing medical conditions judged to be unenforceable are discussed by J C Campbell in 'Unenforceable Exclusions in Travel Insurance' (2018) 29 *Insurance Law Journal* 71.

<sup>5</sup> PricewaterhouseCoopers, *Review of Consumer Protection in the Travel and Travel Related Market*, Prepared for the Department of the Treasury, on Behalf of the Standing Committee of Officials of Consumer Affairs, (2010), 59 at [http://consumerlaw.gov.au/files/2011/03/review\\_protection\\_in\\_travel\\_industry.pdf](http://consumerlaw.gov.au/files/2011/03/review_protection_in_travel_industry.pdf).

<sup>6</sup> Financial Ombudsman Service Australia, *Annual Review 2016-17*, 76.

<sup>7</sup> PricewaterhouseCoopers, above n 5, 60.

disappointment caused by the loss may be magnified by the stress and disappointment which may result from dealings with the insurer.

The courts, tribunals and FOS regularly cite the UK Court of Appeal decision in *Starfire Diamond Rings Ltd v Angel*<sup>8</sup> almost 60 years ago as the authority on the meaning of goods ‘unattended in a public place’, with little research on its current standing. The test in *Starfire* was set out by Lord Denning MR:

‘there must be someone able to keep .. (the property, in this case, a car) .. under observation, that is, in a position to observe any attempt to interfere with it, and who is so placed as to have a reasonable prospect of preventing any unauthorised interference with it’.

‘Unattended’ in insurance law generally means abandoned. The *Starfire* test has developed into the current definition used in particular by FOS that unattended means leaving an item in a public place, leaving an item behind, forgetting the item or walking away from it, leaving an item at a distance where you are unable to prevent it from being unlawfully taken or damaged.<sup>9</sup>

Under the *Starfire* test, attended means under observation. Insurers appear to be either unaware of, or never disclose, the fact that a claim for goods that are unattended as reported in decisions of FOS, the courts and tribunals does not necessarily trigger the exclusion to rule out a claim. Variables now depend on the nature of the specific risk, the reasonableness of the insured’s conduct, the value of the goods, the surrounding neighbourhood and the degree to which the insured was able to keep the goods under observation.

### **Some claims are denied for loss or theft of personal goods ‘left unattended in a public place’**

Case law demonstrates that the *Starfire* principle of keeping goods under observation has been qualified to the extent that the requirement to keep goods under observation is no longer an absolute duty. The insured is under its common law duty of care. The onus is on the insured to take all adequate precautions to protect their personal goods as illustrated by cases such as the following, yet the test still gives the insurer the upper hand. The insurer may reject a claim for the loss or theft of unattended goods, if only for a moment.

‘Unattended in a public place’ cases include the rejection of ‘only for a moment’ cases such as a claim for bags held to be unattended which were in reach but which were stolen when the insured was distracted by someone asking for directions.<sup>10</sup> Is this really a breach of the insured’s duty of care? A claim was rejected for theft of a bag snatched from an airport trolley at Rome Airport while the insured was at the urinal, not in the cubicle.<sup>11</sup> A claim was rejected for the theft of a bag which had been left unattended at a railway station in India for a moment five metres away while the insured was buying a train ticket.<sup>12</sup> A claim was denied for rings missing from a public toilet.<sup>13</sup> A claim was

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<sup>8</sup> [1962] 2 Lloyds Law Rep 217 at 219.

<sup>9</sup> Other meanings of ‘unattended’ include an item not being on your person at the time of the loss or damage, an item being left with a person other than your relative or travelling companion, an item being left in a position where it can be taken or damaged without your knowledge including on the beach or beside the pool while you swim. Some policies in the UK define unattended as ‘not within your sight at all times and out of your arm’s length reach’.

<sup>10</sup> Treasury, *Unfair Terms in Insurance Contracts – Options Paper*, March 2010, <http://icareview.treasury.gov.au> para 8, p 2.

<sup>11</sup> FOS Case number 275934 (11 December 2012), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/275934.pdf>.

<sup>12</sup> FOS Case number 252294 (28 February 2012), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/252294.pdf>.

denied for the theft of one of three bags left unattended for three seconds fully in view two metres away while the insured was looking at a timetable at a bus stop.<sup>14</sup> The bag was at such distance that could not keep it under observation and stop it being taken.

Strong and unobjectionable decisions on goods not under observation include the insurer's rejection of claims for theft of

- a vehicle left unlocked and unattended with the keys on the floor while the insured was working in a nearby residence.<sup>15</sup> The claim was rejected for the theft of a bag containing jewellery worth about \$38,000 either stolen during the flight or left behind and taken by an unknown person. The bag had moved in flight, pocket, under empty seat and it was not under observation under the Starfire test.<sup>16</sup>
- a gift bag containing a mobile phone stolen at Sydney Domestic airport while the insured walked away 20 metres to a vending machine within view.<sup>17</sup>

### **Some claims are paid for loss or theft of personal goods 'left unattended in a public place'**

The words in a travel insurance policy appear strict when they say that the insurer will not cover a claim if the insured has left goods unattended in a public place. This indicates that the insured is in breach of its duty to take adequate and reasonable precautions to protect its personal goods in a public place.

Many appeals to the courts, tribunals and FOS have in fact resulted in claims being allowed for loss of unattended goods in a public place. These have included some claims for what can only be called extreme examples of goods being unattended, such as being unattended on the beach while the insured is swimming.<sup>18</sup> The obligation of due care by the insured is important, but it does not require the insured to take every conceivable action possible to prevent a loss.<sup>19</sup>

Case law now indicates that rejection by an insurer for a claim for loss of personal goods which were unattended in a public place, especially where the potential negligence of the insured is borderline, could be challenged as conduct which is in bad faith, which falls below standard and which can only

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<sup>13</sup> FOS Case number 264802 (20 June 2012), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/264802.pdf>.

<sup>14</sup> FOS Case number 23214 (19 December 2005), at <https://forms.fos.org.au/DapWeb/CaseFiles/GI/23214.pdf>, cited by Antony J Cordato, *Australian Travel and Tourism Law* (LexisNexis Butterworths 2006) at 485.

<sup>15</sup> FOS Case Number 209897 (22 November 2010), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/209897.pdf>.

<sup>16</sup> FOS Case number 201799 (19 August 2010), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/201799.pdf> cites star (the theft was not discovered till id had left the airport).

<sup>17</sup> FOS Case number 212512 (30 November 2010), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/212512.pdf>.

<sup>18</sup> FOS Case number 213774 (30 November 2010), at <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/213774.pdf>.

<sup>19</sup> FOS Case number 23579 (16 February 2006), at <https://forms.fos.org.au/DapWeb/CaseFiles/GI/23579.pdf>.

be enforced under the areas of modern law considered below. Why do insurers discourage an insured from lodging a claim which would stand a 50:50 chance of success on appeal to FOS and the courts?<sup>20</sup>

In fact, and despite the words in the exception of unattended in a public place, ids have had many wins for claims to be paid for loss or theft of goods unattended in a public place.

Claims have been upheld even if there has been ‘momentary inattention’ by the insured. For example, a husband standing with the bags at Milan airport while his wife went to the toilet was distracted for several seconds by a man holding a ‘distressed’ baby asking for directions. His wife’s handbag was stolen when the husband turned his back on the bags to give directions.<sup>21</sup> Rejection by the insurer was held to be too strict, narrow, unfair and unreasonable and denied the commercial purpose of the policy.

### **Claims procedure and non-disclosure by the insurer to the insured - the words in the exclusion do not mean what they say – and are interpreted by the insurer but not by the insured**

Claims procedure involves the insurer applying the terms of the policy to the facts of the claim.

It is easy for the insurance claims officer to quote the words to the id that your goods were ‘unattended in a public place’ and to reject a claim. A non-legally trained person would take the words at face value and would send out a standard form letter quoting those words with the result that the insurer has in some circumstances denied a claim that has succeeded at FOS or in the case law. This involves non-disclosure of current case law by the claims officer.

In fact, the case law above is an example that the words ‘unattended in a public place’ do not always mean what they say. There is extensive case law on ‘unattended in a public place’ from FOS, the courts in the UK and Canada. There is FOS and recent UK authority which qualifies the now-very-old Star case from the 1960s that FOS always cites.

Unfair rejection of a claim could be especially difficult for an insured who has been honest with the insured and has made full disclosure, and who would expect equal good faith from the insurer. Bad faith may encourage matching bad faith, and some insureds may make up a ‘story’ or exaggerate their claim to make sure that their claim would be successful.

### **Redress for the insured under modern laws should be enhanced with UCT legislation**

There are many areas of modern law to consider if a travel claim is rejected on the ground of leaving goods ‘unattended in a public place. One wonders why insurers sometimes spend hours of time and more than the amount of the claim in fighting it.

To start with, insurers are currently excluded by ACL s 63(b) from the consumer guarantees of due care and skill (s 60) and fitness for a particular purpose (s 61) in the ACL to provide services with due care and skill.<sup>22</sup> This is another deficiency in the law which deserves to be addressed. A harsh rejection would fall within the ACL consumer guarantees if s 63(b) were removed.

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<sup>20</sup> PWC, 60% of travel insurance disputes resolve in favour of the insurer, PWC, above n 5, 60.

<sup>21</sup> FOS Case number 23795 (28 February 2006), at <https://forms.fos.org.au/DapWeb/CaseFiles/GI/23795.pdf>, cited by Cordato, above n 14 at 485.

<sup>22</sup> Described in the context of travel and accommodation in Australian Consumer Law, *Travel and Accommodation – An Industry Guide to the Australian Consumer Law* (2013) at <https://www.accc.gov.au/system/files/Travel%20%26%20accommodation%20-%20an%20industry%20guide%20to%20the%20Australian%20Consumer%20Law%200.pdf>

Current legal solutions for unfair rejection for the insurer's reliance on an unfair policy exclusion include action for breach of the insurer's duty of good faith at common law, a breach of the insurer's duty of good faith under the ICA, misleading or deceptive conduct under the ASIC Act and/or the ACL, making a false or misleading representation under the ASIC Act and/or the ACL, breach the ASIC standard of financial services licensees to act 'efficiently, honestly and fairly' under *Corporations Act 2001* (Cth) s 912A(1)(a) and breach of the General Insurance Code of Practice (2014).

These are fallbacks in the absence of statute law declaring unfair contracts terms void.

### **Section 15 of the ICA which excludes *insurance contracts* but not *insurance conduct* from unconscionable and unfair contracts legislation should be repealed**

This submission recommends repealing s 15 of the ICA so that an insured can seek relief from insurance contracts under Commonwealth, State or Territory laws if the contract is 'harsh, oppressive, unconscionable, unjust, unfair or inequitable' - including the proposed expansion of the UCT provisions to include insurance - or for 'the consequences in law of making a misrepresentation'.

Criticism of insurance contracts is and has been ongoing. For example, the former Insurance Ombudsman<sup>23</sup> noted concern about policy terms 'best described as "rubbery" ... "open-ended" or vague exclusions ... (which) give the insurance company a huge discretion to apply the exclusion'.<sup>24</sup> National Legal Aid cited this in its submission on the earlier unfair draft expressed its concern about 'rubbery terms' in travel insurance.<sup>25</sup>

One reason for the enactment of s 15 was that at that time, State and Territory laws were and are still not uniform in the remedies they provide for harsh or unconscionable contracts. This is no longer the case with the now national ACL.

Rejection of insurance claims based on an unfair exclusion clause (an UCT) should no longer be tolerated and falls outside current community standards and expectations. The caselaw on s 15 distinguishes contracts (which are excluded from UCT) and conduct (which is subject to UCT legislation). Pengilley's words confirm that s 15 applies to conduct, not contracts.<sup>26</sup> It 'does not bar an action under another Act that provides for relief in respect of unconscionable conduct that does not involve the conclusion of a contract'.<sup>27</sup> Equally, in the words of van den Dungen, s 15 'prevents a party from seeking *judicial review* of a *contract* ... that is harsh, oppressive, unconscionable, unjust, unfair or inequitable. It does not ... prevent a party from seeking compensatory damages, or seeking a

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<sup>23</sup> Later merged into FOS.

<sup>24</sup> Insurance Ombudsman, *Annual Review 2006-2007*, cited by National Legal Aid, *Submission to Unfair Contract Terms in Insurance Contracts: Options Paper* (undated, estimate 2013) [http://icareview.treasury.gov.au/content/\\_download/submissions\\_options\\_paper/NLA\\_Submission.pdf](http://icareview.treasury.gov.au/content/_download/submissions_options_paper/NLA_Submission.pdf)

<sup>25</sup> National Legal Aid, *Submission*, above n 24.

<sup>26</sup> Warren Pengilley, 'Insurance Arrangements: Are They Exempt from Section 52 of the Trade Practices Act' (1998) 9 *Insurance Law Journal* 95 at 106.

<sup>27</sup> *Australian Competition and Consumer Commission v IMB Group Pty Ltd (in liq)* [2002] FCA 402, para 112, per Drummond J; also, Pengilley, above n 26.

remedy in respect of pre-contractual or post-contractual conduct, under legislation prohibiting unconscionable conduct'.<sup>28</sup>

Section 15 may not prevent an insured from suing for damages for breach of *contract* under the ASIC Act and the ACL for unconscionable *conduct* by an insurer during pre-contractual negotiations such as non-disclosure or ambiguous explanations of exemptions and unfair dealing with claims during the performance of a contract of insurance. Indeed, there are many reported pre-contractual insurance cases which do involve unconscionable conduct.<sup>29</sup>

This subtle distinction in s 15 between contract and conduct should be corrected with the repeal of s 15.

The insurance industry has held the line that s 15 sends complaints back to the ICA, but increasingly maintaining the exemption for insurance contracts has become untenable. Moves to extend the UCT regime to insurance have been anticipated since an earlier UCT Bill was introduced by the Rudd government in 2010.<sup>30</sup> There has been further momentum with reports from the Senate Economics References Committee<sup>31</sup> and the Australian Consumer Law Review in 2017.<sup>32</sup>

Insurers must also remember that there is growing case law to support adoption of an interventionist approach by the courts and tribunals to the interpretation of insurance policies to ensure that they give effect to the reasonable expectations of the insured.<sup>33</sup> In the words of Keeton, '(t)he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance

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<sup>28</sup> Peter van den Dungen, "Good Faith, Unconscionable Conduct and Imaginary Community Standards — Section 51AC of the Trade Practices Act and the Insurance Industry" (1998) 10 *Insurance Law Journal* 1 (italics in the original).

<sup>29</sup> See eg the IMB Case, above n 27, at para 115 (representations made for the purpose of inducing members of an Aboriginal community to enter into contracts of insurance ['Umbrella Financial Plans'] sold by the respondents; no evidence of statutory unconscionable conduct). In *Moss v Insurance Australia Ltd* [2004] HCA 1636 (no evidence of special disadvantage, no disabling condition, the insured had received legal advice on the day of the settlement).

<sup>30</sup> The proposed *Insurance Contracts Amendment (Unfair Terms Bill) 2013* (Cth) lapsed on the dissolution of the Commonwealth parliament for the 2013 election. The Bill would have added laws against unfair contract terms to the ICA for general insurance contracts (proposed s 14B). This would have brought insurance contracts in line with the unfair contract terms law. See, eg, Treasury, *Unfair Terms in Insurance Contracts: Options*, 2010, at <https://treasury.gov.au/consultation/unfair-terms-in-insurance-contracts>. The Explanatory Memorandum is at <https://www.legislation.gov.au/Details/C2013B00173/Explanatory%20Memorandum/Text>

<sup>31</sup> Senate Economics References Committee, *Australia's General Insurance Industry: Sapping Consumers of the Will to Compare* (2017), 65, Recommendation 11 (no mention of travel insurance), at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Generalinsurance/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Generalinsurance/Report)

<sup>32</sup> Australian Consumer Law Review, *Australian Consumer Law Review Final Report* (2017), 53, Proposal 10.

<sup>33</sup> eg *Equitable Life Assurance Society v Hyman* [2000] UKHL 39, [2002] 1 AC 48.

contracts will be honoured even though painstaking study of the policy provisions would have negated those expectations'.<sup>34</sup>

As stated in *Pegela Pty Ltd v National Mutual Life Association of Australasia Ltd*,<sup>35</sup> where there is an ambiguity in the terms of the contract, looking at the reasonable expectations arising from an objective reading of the terms is a relevant factor.' This does not involve any variation or extension to the principles of resolution of ambiguous contract terms. This is evident in the number of cases decided in favour of the insured on appeal to FOS, the courts and tribunals.

There is need for UCT laws in the ACL and the ASIC Act to apply to insurance contracts, so, in short, this submission recommends repeal of ICA s 15 to ensure that the law of unconscionability and UCT applies to insurance in all directions – negotiations, conduct, contracts, interpretation of contracts and claims.

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<sup>34</sup> Robert E Keeton, 'Insurance Law Rights at Variance with Policy Provisions' (1970) 83 *Harvard Law Review* 961 at 967; R E Keeton, 'Insurance Law Rights at Variance with Policy Provisions: Part Two' (1970) 83 *Harvard Law Review* 1281, cited by Julie-Anne Tarr, 'The Insured's Reasonable Expectations' (2001) 12 *Insurance Law Journal* 259; Y Q Han, *Policyholder's Reasonable Expectations* (Hart Publishing, 2016).

<sup>35</sup> [2006] VSC 507 at para [242].