

Review of options for dealing with unfair terms in insurance contracts

Submission to the Corporations and Financial Services Division of the Federal Treasury in response to the consultative paper released on 17 March 2010

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1. Introduction

PILCH welcomes the opportunity to submit to the Corporations and Financial Services Division of the Federal Treasury (**Treasury**) in response to the *Unfair terms in insurance contracts - Options Paper* released by the Hon Chris Bowen MP on 17 March 2010 (**Options Paper**).

We commend the Treasury on the initiative to undertake public consultation on options to address unfair terms in insurance contracts. PILCH urges Treasury to adopt and implement robust measures to ensure Australian consumers are better protected from the application of unfair contractual terms in the insurance sector.

PILCH strongly recommends adoption of Option A under the Options Paper as the most appropriate mechanism for introduction of an unfair terms regime to insurance contracts. PILCH endorses the submission of the Consumer Action Law Centre (**CALC**).

2. About PILCH

2.1 General

PILCH is a leading Victorian not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria; and
- ▶ increase the pro bono capacity of the legal profession.

2.2 PILCH's experience with insurance matters and consumer advocacy

PILCH facilitates referral of legal matters on a pro bono basis to the legal profession. In the last three years, PILCH has received some 40 referral requests related to unfair terms, or the unfair or unreasonable interpretation of terms, in insurance contracts - see, for example, the case studies at 2.3 below. PILCH has also received many applications for assistance in related financial services, consumer credit, telecommunications and energy services.

Based on this enquiry rate, and the nature of enquiries, PILCH has elevated consumer insurance disputes to an area of thematic concern for law reform and policy engagement. PILCH has worked closely with the Federation of Community Legal Centres on insurance issues, including through its membership of the Federation's Civil Law Working Group.

PILCH has also worked closely with CALC on consumer insurance disputes, and it has submitted and given evidence to the 2009 Insurance Code of Practice Review. Details of PILCH's other law reform activities, particularly in access to justice, are provided on its website: www.pilch.org.au

2.3 Case Studies

Case Study 1 - exclusion

In 2008, as a result of severe storm conditions, our client's fence and balcony fell down. The insurer rejected our client's claim, asserting that the damage occurred as a result of wear and tear rather than being storm damage. The client approached the then Insurance Ombudsman Service (Victoria) to complain about the insurer's rejection of the claim. The Ombudsman's investigation and report found that the policy did not in fact cover storm damage.

The client reasonably expected that storm damage would be covered by an insurance policy of the kind held and did not anticipate that the policy would exclude weather damage in its entirety.

Case Study 2 - terms interpretation

The insurer paid a landlord's claim for fire damage to the landlord's property caused accidentally by the tenant of the property whilst frying chips. The insurer then issued proceedings in tort against the tenant under the right of subrogation contained in the insurance policy.

The insurer appeared to accept that the damage was accidental as between it and the landlord, however, as between the insurer and the tenant, the insurer asserted negligence by the tenant. The case raised issues regarding the definitions of accidental and negligent damage contained in insurance policies of this kind and their application in tenancy related matters.

Case Study 3- exclusion

The insurer refused the client's request to transfer an existing home and contents policy over to the client's new address. The insurer stated that the request was being refused because the client's new address had no deadlocks. The client suffers from a mental disability. The client's mother subsequently complained to a manager in the relevant division of the insurer, who told her that the real reason that the insurer was refusing to continue the client's insurance was because the client was a tenant of the Ministry of Housing.

Whilst the insurer denies that the client's mother was ever told that the insurer has a policy of not granting insurance to public tenants, it is notable that the insurer's website will not give a quote to someone who states that they are a tenant of the Ministry of Housing and asks no questions about deadlocks.

Case Study 4 - enforceability of terms

The client successfully claimed against her insurance policy for the cost of repainting her house as a result of storm damage. However, the insurer did not provide alternative accommodation for the client whilst the house was being repainted as the insurance policy required. The client continued to live in the home whilst it was being repainted, and shortly thereafter was admitted to hospital due to severe respiratory difficulties. She now requires ongoing medical treatment for problems with her cardio and respiratory system.

The client cannot afford the cost of the medical tests and reports that she needs to show that her current medical condition is a result of paint inhalation and accordingly, the client has no legal avenues of redress available to her.

Case Study 5 - application of terms

The client noticed severe cracks emerging in the concrete slab and brick walls of her garage and reported this to her insurer. The client's insurance policy covers water damage, but does not cover movement, structural damage or faulty building works.

The insurer commissioned an engineer's report, which stated that the damage was caused by soil movement, inadequate structural footings and inappropriate storm water drainage (primarily from the

neighbouring property). An easement or easements substantially contributing to the problem had not been recorded on the title to the client's property. Quotes indicate that the problem will cost at least \$30,000 and potentially up to \$50,000 to fix. The insurer refuses to accept liability for payment of the full value of the claim on the basis that the Water Board failed to register the easement(s) and has offered only \$15,000 in full and final settlement of the claim.

The client is 62 years of age and on a disability pension.

3. Recommendation for Reform

3.1 PILCH Considerations

PILCH has carefully reviewed and considered the Options Paper and strongly recommends adoption of Option A. PILCH considers there are compelling arguments in support of that Option, and similarly, compelling arguments militating against the other Options, including:

- ▶ Greater consistency, clarity and comprehension for consumers across related products and markets.
- ▶ Greater consistency and reduced cost in application and regulation of unfair terms and in the development of legal interpretation.
- ▶ Reduction of 'carve-out' and 'special-case' exemptions as a matter of policy for unfair terms regulation.
- ▶ Achieving a key goal of the recently enacted unfair terms legislation (*Australian Consumer Law Bill*), which is to restore the balance in trading to ensure Australian markets can grow by the fostering of legislation that promotes *Fair Markets and Confident Consumers*.
- ▶ Consistency with the proposed consumer policy reforms contained the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*.¹
- ▶ Accord with the Senate Economics Committee, which foreshadowed that the key challenge in legislative reform - whether contained in the *Australian Consumer Law* or the *Insurance Contracts Acts* - would be to guarantee the 'equivalent level of protection'² to consumers in insurance contracts as any other consumer contracts (Recommendation 2 at [10.13]). Options B, C and D offend this recommendation in that they would necessarily seek to manipulate unfair terms legislation in order accommodate concessions for what the industry sees as the 'special' status of insurance.

¹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, April 2008.

² Senate Economics Legislation Committee Report, Trade Practices Amendment (Australian Consumer Law) Bill 2009, September 2009, p.68 Recommendation 2, 10.13

4. PILCH Endorsement of CALC Submission

PILCH has considered the opinions and recommendations expressed in the submission of the Consumer Action Law Centre dated 7 May 2010, headed 'Submission to Unfair terms in insurance contracts - Options paper', and endorses each of those opinions and recommendations.

5. Further Contact

PILCH welcomes the opportunity to further discuss this submission and its endorsement of CALC's submission. In particular, we would be pleased to participate in further consultation or to provide evidence in person to Treasury.

Please do not hesitate to contact Gregor Hupser at PILCH in that regard.