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LEGAL CENTRE

**Submission by the
Financial Rights Legal Centre
and Redfern Legal Centre**

Treasury

Extending Unfair Contract Terms Protections to
Insurance Contracts, Proposals Paper, June 2018

August 2018

About the Financial Rights Legal Centre

The Financial Rights Legal Centre (Financial Rights) is a community legal centre that specialises in helping consumer's 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. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

About Redfern Legal Centre

Redfern Legal Centre ('RLC') is an independent, non-profit, community-based legal centre with a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC recognises that the protection of financial and consumer rights is central to securing other rights and freedoms such as secure housing, effective education and social and economic participation. Since 1977, RLC has run a specialist credit and consumer law practice and targets our work towards vulnerable and disadvantaged consumers

Introduction

Financial Rights Legal Centre (**Financial Rights**) and Redfern Legal Centre (**RLC**) thank you for the opportunity to comment on the Extending Unfair Contract Terms Protections to Insurance Contracts, Proposal Paper.

Our centres have advocated for the removal of the exemption of unfair contract term protections in the *Insurance Contracts Act 1984* since the inception of the unfair contract terms regime 2010. Removing this unjustified anomaly from the law is well overdue. We therefore strongly support the Government's commitment to removing the exemption and strongly support the grand majority of proposals put forward in the Proposals Paper. These are sensible and effective reforms and Treasury deserve congratulations for its work.

We have been disappointed by much of the alarmist commentary and "sky is falling" rhetoric from the insurance sector in response to the release of the Proposals Paper. Talk of 'leaving the market,' 'disaster' and 'draconian laws' is wholly unjustified and unbecoming for a sector that has systematically lost the trust and confidence of consumers through decades of behaviour that has failed to meet community standards.

We expect Treasury and the Australian government to see these views for what they are: the last vestiges of a sector desperately holding on to an antiquated business model which maintains contracts filled with unfair terms and that fundamentally works against the consumer interest in a context of an immense imbalance of power.

We believe it is time for the insurance sector to step up and support the Government proposals. It is time for the sector to bring the consumer back to the forefront of their business and ensure that their products no longer include terms that are unfair.

We believe that the proposed model is largely balanced, fair and will achieve its stated intentions. In summary, the key elements we support are:

- Amending Section 15 of the *Insurance Contracts Act 1984*.
- Main Subject Matter should be defined narrowly as proposed
- The insurer's legitimate interest should be defined as being when the term reasonably reflects the underwriting risk accepted by the insurer in relation to the contract and it does not disproportionately or unreasonably disadvantage the insured.

The key elements we don't support and wish to see reconsidered and amended are as follows:

- The exclusion from review of the quantum of excess payable should only be allowed to the extent that the terms are transparent, upfront and clear.
- The remedy for a contract term found to be unfair should be that the insurer cannot rely on the term rather than voiding.
- Group insurance should be subject to unfair contract terms protections on the basis of well-documented conflicts of interest and not meeting their best interest duty.

- Consideration needs to be given to establishing 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.

Proposed Model

Applying the ASIC Act to insurance contracts

1. ***Do you support the proposal to amend section 15 of the IC Act to allow the current UCT laws in the ASIC Act to apply to insurance contracts regulated by the IC Act?***

Yes. We strongly support amending section 15 of the *Insurance Contracts Act 1984 (Cth)* (**IC Act**) to allow the current UCT laws in the ASIC Act to apply to (both general and life) insurance contracts

The Australian Consumer Law (**ACL**) commenced in January 2011 replacing and amalgamating 17 existing laws including new UCT provisions. However the UCT regime did not (and still does not) apply to insurance contracts because of Section 15 of the *IC Act* which excludes any Commonwealth, state or territory laws regarding contractual ‘unfairness’ from applying to contracts of insurance. This means that unfair contract term protections currently apply to every other contract an Australian consumer is ever likely to enter apart from insurance.

There have been a large number of government and independent reviews that have argued for the need to ensure that the Unfair Contract Term regime applies to insurance including the following:

- 2018 Parliamentary Joint Committee on Corporations and Financial Services inquiry into the life insurance industry
- 2017 Senate Economics References Committee’s inquiry into the general insurance industry
- 2017 Australian Consumer Law Review¹
- 2012 House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the operation of the insurance industry during disaster events.
- 2011 Natural Disaster Insurance Review
- 2008 Review of Australia’s Consumer Policy Framework

Unfair contract term laws were almost applied to insurance in 2013 following the introduction but lapsing of draft legislation following the 2014 Federal Election.

The original exclusion for insurance contracts was recommended by the Australian Law Reform Commission (**ALRC**) in its 1982 report on insurance contracts. The reasons cited by the ALRC were:

... difficulties associated with making a distinction between business and non-business contracts...

¹ https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

... the existence of a general power of review with respect to some insurance contracts but not others, depending on the State or Territorial law applicable to the contract in question, is inherently undesirable, and

... the doctrine of utmost good faith, especially when elevated to a contractual term, 'should provide sufficient inducement to insurers and their advisers to be careful in drafting their policies and to act fairly in relying on their strict terms.'²

These arguments clearly no longer apply.

The first argument no longer holds water given the distinctions already made under the current *Insurance Act* has not led to any particular difficulties. Even if any difficulties were to arise, they could be easily resolved by applying the laws to all. As the ALRC asked at the time:

If the general law of insurance is unfair to individuals, why is it not also unfair to individuals when they are in business? Most businessmen are not legal experts. Nor are they insurance experts. The cost to business of employing solicitors and brokers to avoid the difficulties to which existing law gives rise might well be reduced by a simpler and fairer set of rules applying to all insurance contracts.³

The second argument regarding differing jurisdictions is redundant due to the national application of the *Insurance Contracts Act*.

The third argument has self-evidently not held up well given unfair contract terms continue to arise alongside the existence of the common law and legislated duty of utmost good faith. The duty of utmost good faith has neither prevented the spread of unfair terms in insurance contracts nor has it provided the courts or external resolution schemes with any power to provide a remedy to consumers when an unfair term has been used.

Duty of Utmost Good Faith

The insurance sector has long held on to ruse that the duty of utmost good faith is a unique and powerful consumer protection that justifies the sector's exclusion from the unfair contract terms regime.⁴

An unfair contract term may be considered to be a breach of the insurer's duty of utmost good faith but is rarely challenged in that way as indicated by the Royal Commission Background Paper into General Insurance when it states:

Section 14 appears to have been underutilised. There have been surprisingly few reported cases on s. 14. Surprising because of the frequency of criticisms reported in the media of

² Page 32, Para 51, The Law Reform Commission, *Insurance Contracts*, Report No. 20 available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRC/1982/20.html?stem=0&synonyms=0&query=law%20reform%20insurance%20contracts>

³ *Ibid*, Page 14, Para 26.

⁴ The proposals paper details the broad argument at page 6.

*allegedly unfair insurance provisions and the UCT debate which has thrown up complaints about allegedly unfair provisions all of which could potentially be addressed by s. 14.*⁵

The reasons are in fact not so surprising. Sections 13 and 14 of the *Insurance Contracts Act* do not provide that an insurer is in breach of the duty of utmost good faith merely because of the fact that they wish to rely on a contractual term that is unfair.

Moreover, because external dispute resolution is compulsory, most insurance disputes are inevitably run through the Financial Ombudsman Service (FOS) and few disputes are therefore determined in a court of law. Those that do are settled. When a dispute is taken to the FOS, a service that is designed to be accessed without the need for a lawyer, the duty of utmost good faith is not raised. This is because the duty is virtually unknown to a non-lawyer and is virtually impossible for a non-lawyer to understand when they become aware of the duty. In our experience, consumers only ever become aware of the duty when it applies to their own conduct when the duty of utmost good faith is raised by the insurer. As a result, consumers do not argue on the basis of good faith at FOS and it is not commonly relied upon unless FOS itself identifies it, and even then it has rarely been applied as a basis for relief from an unfair term. FOS has struggled in determinations to deal with unfair contract terms due to the limitation in the *Insurance Contracts Act 1984* and the limited scope of the duty of utmost good faith. Consumer Action found in its report *Denied – Levelling the playing field to make insurance fair*, that FOS found the insurer in breach of the duty of utmost good faith in relation to an unfair contract term in three cases.

FOS' application of duty of utmost good faith in relation to unfair contracts terms is at best inconsistent and contrary. Determination 332704 states that the unfair contract term protections do not apply to insurance and that the Financial Service Provider (FSP) is:

*"therefore not relying on an 'unfair contract term' and is entitled to rely on the terms of the policy to deny the claim."*⁶.

Whereas Determination 201901 states that:

*"Section 13 and 14 of the Act provide me with authority to disregard a policy term or limitation if I am of the opinion that it would be contrary to the FSP's utmost good faith obligations to allow it to rely upon the relevant policy term or limitation."*⁷

The duty of utmost good faith has also not provided "sufficient inducement to insurers and their advisers to be careful in drafting their policies and to act fairly in relying on their strict terms."⁸ Consumer Action's *Denied* Report demonstrates that the cases where the duty of

⁵ Page 70 <https://financialservices.royalcommission.gov.au/publications/Documents/enright-paper-14.pdf>

⁶ Determination Case No. 332704, <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/332704.pdf>

⁷ Determination Case No. 201901, <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/201901.pdf>

⁸ Page 32, Para 51, *The Law Reform Commission, Insurance Contracts, Report No. 20* available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRC/1982/20.html?stem=0&synonyms=0&query=law%20reform%20insurance%20contracts>

utmost good faith arises with respect to an unfair contract term, lawyers are required. Only after long legal disputes involving lawyers do the insurers make offers. As Consumer Action states:

It goes without saying that litigation is not an accessible, affordable or quick way for people to pursue their consumer rights. Much of the case law on the DUGF involves sophisticated commercial parties. Non-lawyers do not know the duty exists, let alone how to enforce it. We are unaware of any significant case law involving an individual successfully pursuing an insurer. Litigation outcomes can also have a very limited effect on systemic problems that affect large groups of individuals. In this way it is ineffective and inefficient.⁹

The duty of utmost good is therefore:

- not generally known or understood by consumers seeking redress by themselves;
- not raised by insurers to inform consumers of their rights, only raised in the context of a consumers duty of utmost good faith to the insurer;
- only raised in disputes by lawyers; and
- largely reactive not proactive, in ensuring insurers draft their contracts appropriately.

These inherent and practical difficulties in pushing a dispute based on the duty of utmost good faith has in a sense created significant hurdles for consumers to enforce their rights.

We have also seen no evidence of any insurer changing a term after accepting a term did not meet the duty of utmost good faith. This has meant that there has rarely been any flow on benefit for other consumers who may face similar circumstances.

But even if consumers were able to access these rights in a more practical manner, the duty of utmost good faith is limited in substantive ways. As Consumer Action details:

- *the DUGF does not hold the insurer to account for policy terms which are harsh, oppressive, unconscionable, unjust, unfair or inequitable,*
- *the DUGF does not require an insurer to draft policy clauses 'fairly',*
- *the DUGF does not prevent an insurer from selling an insurance policy which is unsuitable, or which the customer does not understand.*

We would add that the duty of utmost good faith does not explicitly acknowledge the inherent imbalance of power between the contracting powers. Dealing with the imbalance of power between contracting parties is however central to unfair contract term protections.

Rebalancing the power between the parties under the unfair contract terms protections is actuated by the reversal of onus on to the party making the claim that a term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. The onus under the duty of utmost good faith largely remains on an insured to prove a breach of the duty of utmost good faith, perpetuating a system that disempowers an under-resourced disadvantaged insured.

⁹ Page 12, Consumer Action, *Denied – Levelling the playing field to make insurance fair*, February 2018 https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180111_Denied_Digital-Report.pdf

Further the application of the duty of utmost good faith is on an individual, case by case basis and cannot be applied widely or in a systemic manner.

Finally we note the difficulties with the duty of utmost good faith have been acknowledged by Parliament when they introduced 14A to provide ASIC the powers to take action against an insurer for breach of the duty of utmost good faith in relation to handling or settlement of claims. The rationale for introducing this amendment was that the duty of utmost good faith presented:

too great an expense for some parties and does not provide long-term solutions to systemic breaches of utmost good faith committed over time.

This equally applies to the duty of utmost good faith's applicability to unfair contract terms.

Pre-contractual disclosure

The Proposals paper puts forward other consumer protections that "ensure insurance policyholders are not negatively impacted by contract terms in certain circumstances" by pre-contractual disclosure, be it the existence of Standard Cover and Unusual Terms or Product Disclosure Statements.

In our view, these are both inadequate consumer protections.

Standard cover as enacted under the *Insurance Contracts Act* is a failure in terms of raising awareness of unusual terms in the minds of consumers. The central problem with the standard cover regime is that Section 35 of the *Insurance Contracts Act* acts as a "get out of jail." It states that the standard cover regime:

does not have effect where the insurer proves that, before the contract was entered into, the insurer clearly informed the insured in writing (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise).¹⁰

In other words, insurers don't have to "draw the insured's attention"¹¹ to the fact that they are providing less than standard cover – they just outline the cover in the Product Disclosure Statement and contract with nothing ensuring that the unusual term is highlighted or identified as less than standard cover.

Unfair terms are usually hidden away in the fine print of an insurance contract or Product Disclosure Statement and are rarely read or understood by a consumer when selecting coverage.

¹⁰ http://classic.austlii.edu.au/au/legis/cth/consol_act/ica1984220/s35.html

¹¹ The original vision for standard cover by the ALRC was one in which:

An insurer should be free to market policies which offer less than the standard cover. If it chooses to do so, it should have to draw the insured's attention to that fact and to the nature of the relevant diminution in cover. If it fails to do so, the contractual terms should be overridden to the extent to which they provide cover which is less than the standard. <http://www.alrc.gov.au/report-20>

With respect to Product Disclosure Statements, recently released research by the Insurance Council of Australia¹² that found that only between 19% and 26% (depending on the type of general insurance) used the PDS in their pre-purchase decision making and even fewer (3%-7%) used it as their main source of information. Further, while many consumers believed they were aware of the terms of their policy, actual tested comprehension levels were low in comparison to confidence levels.¹³ In short, insurers can offer less than standard cover simply by telling their customers in a document few read and even less understand.

It is also important to note that insurance contracts and Product Disclosure Statements are rarely if ever negotiable. They are standard contracts that cannot be amended other than by the insurer unilaterally. This means that if the contract contains unfair terms then the consumer must either accept this or go elsewhere. More importantly, there is no competition on this issue so it is likely that an unfair term may be in industry wide use.

Finally, we wish to note that the Government has supported a recommendation by the Senate Economics References Committee to initiate an independent review of the current standard cover regime with particular regard to the efficacy of current disclosure requirements.¹⁴

Rules limiting insurers from relying on certain terms

We acknowledge that there are rules under the *Insurance Contracts Act* that do void specific terms but these are limited in scope and specific to particular circumstances. They do not provide any ability to protect consumers from unfair contract terms that fall outside of these limited set of circumstances.

Recommendation

1. We strongly support amending section 15 of the IC Act to allow the current unfair contract term laws in the ASIC Act to apply to (both general and life) insurance contracts

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2. ***What are the advantages and disadvantages of this proposal?***

¹² Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures, Research Findings Report*, February 2017
http://www.insurancecouncil.com.au/assets/report/2017_02_Effective%20Disclosure%20Research%20Report.pdf

¹³ Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures Research findings Report*, February 2017, available at
http://www.insurancecouncil.com.au/assets/report/2017_02_Effective%20Disclosure%20Research%20Report.pdf

¹⁴ *Australian Government response to the Senate Economics References Committee report: Australia's general insurance industry: sapping consumers of the will to compare*, December 2018
<https://static.treasury.gov.au/uploads/sites/1/2017/12/p2017-t248756.pdf>

We note and endorse the three benefits of amending section 15 of the *Insurance Contracts Act* already listed in the Proposals paper, namely:

- *it will ensure that insureds are provided with protection under the same UCT laws which are already available to consumers in relation to other financial products and services. This will enable the courts, consumers, external dispute resolution schemes, and the regulator to take a consistent approach;*
- *it is consistent with the objective of the Australian Consumer Law that the UCT protections should be applied economy wide; and*
- *it will not negatively affect or create uncertainty regarding the judicial interpretation of the IC Act and its existing legal principles and consumer protections.*

Amending Section 15 of the *Insurance Contracts Act* and maintaining the *ASIC Act* as the primary legislation to enforce unfair contract terms across the economy including insurance is the simplest, most straightforward solution. It will ensure that there is consistency in application by regulators, a consistency in understanding by consumers and a consistency in jurisprudence,

Housing a unique set of unfair contract terms laws under the *Insurance Contracts Act* perpetuates the mistaken belief by the insurance sector that insurance is somehow a particularly unique creature that requires its own distinct laws. Bringing unfair contract terms in insurance within the *ASIC Act* sends the appropriate signal to the insurance sector that insurance contracts are no different from any other financial service or non-financial service contracts when it comes to basic consumer protections. Just as the *National Consumer Credit Protection Act* can exist addressing specific issues related to the unique issues relating to credit at the same time as being subject to unfair contract terms protections, insurance too can have its own Act addressing specific issues and be subject to the unfair contract terms regime in the *ASIC Act*.

Housing a separate unfair contract terms regime within the *Insurance Contracts Act* with its own language, terminology and drafting also may lead to gaming, loopholes or watering down of the application of the current unfair contract terms regime.

Insurance is not a special case and should not be treated as such. Insurance contracts are just another subset of standard form contracts given to consumers for the purchase of goods and services. While there are legitimate reasons for insurance companies to restrict cover in certain circumstances to contain their risk, there is no reason why these restrictions should not be subject to the same test as other consumer contracts. Where there is a term that clearly results in apparent unfairness and potential detriment it should be tested to determine whether it is *necessary* to protect the insurer's legitimate commercial interest. If it is found to be so, then the term will not fall foul of the law.

The proposal will also ensure that the regulator is in the position to effectively ban unfair contract terms, preventing other insurers from using the same term and disadvantaging other consumers in the same position.

3. What costs will be incurred by insurers to comply with the proposed model? To the extent possible, identify the magnitude of costs and a breakdown of categories (for example, substantive and/or administrative compliance costs in reviewing contracts).

Insurers have reportedly argued that premiums will increase when insurers pass on increased costs:

The Insurance Council of Australia said it would work through the proposed model with its members, but its initial view was that the reform would have “profound” implications for insurance contracts, the scope of cover and the pricing of insurance.

“If implemented, it would cause insurers to fundamentally review their contracts and reassess their pricing,” ICA chief executive Rob Whelan said.¹⁵

No evidence has been proffered to suggest that premiums will increase. Every other industry was subjected to unfair contracts laws upon its introduction and we did not see huge price increases to cover the costs of the new law.

We accept that there may very well be a cost to insurers to (a) examine their contracts to identify any potential unfair contract terms and (b) once identified, rectify those terms that are pre-emptively deemed by insurers to be potential found to be unfair. However, we would argue that any small cost incurred by insurers here would be justified to ensure that consumers are no longer subjected to unfair contract terms. This should be seen to be a positive public relations exercise by an insurance sector beset by issues of low consumer confidence and trust in the sector.

Further, any costs incurred through pre-emptively ridding insurance contracts of unfair terms is the very consequence government and consumers are expecting.

For insurers to subsequently pass the cost of examining their contracts on to consumers through increased premiums is unjustifiable. These costs should be absorbed by insurers as a cost of doing business and as a signal of good will for the years of not submitting their contracts to more ethical scrutiny.

For insurers to pass on the cost of any altered underwriting borne of removal or amendment of particular terms pre-emptively deemed unfair would be treating consumers with contempt. Any raised premiums will be seen for what it is – a cash-grab from an industry ripping off consumers by relying upon terms that have been unfair for years. Again we believe that as an act of good will, insurers must absorb these costs in order to boost confidence in the sector.

We would also note that it does not appear to us that cost increases have occurred in any other areas of the financial services industry following the introduction of unfair contract term reforms.

We have also heard the threat from the life insurance sector that some features will be withdrawn and that there will be less variety, making products more vanilla. We would posit that removing features and the restructuring of insurance products would be a deeply cynical act by a sector that has relied on unfair contract terms to maintain their profitability. If the

¹⁵ Richard Gluyas, Insurers claim on cost of reform, *The Australian*, 28 June 2018

insurance sector needs to change their insurance products to ensure fairness in their contract terms then these changes cannot come soon enough.

We therefore believe that given the threat by the sector to raise premiums, the government should consider establishing a Federal Insurance Monitor – similar to those established in NSW and Victoria – to ensure that insurers do not exploit the introduction of the new laws by increasing premiums disproportionately or unjustifiably. Such an insurance monitor would 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.

We also note that the insurance industry has previously argued that there would be the following costs:

Increased complexity of regulation due to difference in coverage between ACL and IC Act and costs associated with “dual pleadings”

Commercial uncertainty arising from potential ‘blanket’ banning.¹⁶

With regard to the first argument, insurers are subject to a number of different laws in addition to the *Insurance Contracts Act*. Section 7 makes this explicit:

It is the intention of the Parliament that this Act is not, except in so far as this Act, either expressly or by necessary intendment, otherwise provides, to affect the operation of any other law of the Commonwealth, the operation of law of a State or Territory or the operation of any principle or rule of the common law (including the law merchant) or of equity

Insurers have therefore managed up until now to deal with the “complexity” of being subject to more than one piece of legislation.

With respect to the second argument, we would respond that far from commercial uncertainty, blanket bans of unfair contract terms introduce commercial certainty. What better way to ensure that an insurer is meeting the law and not relying on ambiguity than simply complying with a ban on a particular term found to be unfair or order of terms used as examples in the legislation. Further the current case law, provision of examples and other guidance will provide a significant road map for insurers to follow, providing significant certainty and confidence that certain terms are not allowed.

It also goes almost without saying that there will be significant savings for insurers through decreased consumer complaints and disputes.

Recommendation

¹⁶ Page 9, *Unfair terms in insurance contract – Options Paper*, 2010
[http://icareview.treasury.gov.au/content/download/unfair terms options/unfair terms options .pdf](http://icareview.treasury.gov.au/content/download/unfair%20terms%20options/unfair%20terms%20options%20paper.pdf)

2. Consideration should be given to establishing a Federal Insurance Premium Monitor – similar to Monitors established in NSW and Victoria – to ensure that insurers do not exploit the introduction of new unfair contract laws through disproportionately or unjustifiably increasing premiums. Such an insurance monitor would 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.
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Other options for extending UCT protections

4. *Do you support either of the other options for extending UCT protections to insurance contracts?*
5. *What are the advantages and disadvantages of these options?*
6. *What costs would be incurred by insurers to comply with these options? To the extent possible please identify the magnitude of costs and a breakdown of categories (for example, substantive and/or administrative compliance costs).*

We do not support extending unfair contract term protections to insurance contracts by either enhancing existing *Insurance Contracts Act* remedies or introducing the existing unfair contract laws into the *Insurance Contracts Act*.

As we have argued above – insurance contracts should not be treated as unique, special or in any way different to other financial services contracts or any other non-financial service contract. It is arguable that the special treatment and exemption of insurance from the unfair contract terms laws has led or at least contributed to an unhealthy culture in which they believe they should by right be treated differently from other sectors. They should not.

Insurance contracts *are* unique in the sense that they are a contract that outlines a product or service that is different from other products or services but this can equally apply to all other products or services in the financial services sector and broader economy, each with their own unique sets of terms and conditions. There is nothing in the nature of insurance, not the risk nor the pricing structure that justifies it standing outside of protections afforded to consumers in their signing every other contract they will ever have to sign.

Insurance contracts can be complex but this is again true of many other contracts, particularly in financial services. Insurers should nonetheless be able to explain to the regulator or a Court in clear and persuasive terms why any particular term is necessary to protect their legitimate interests.

Creating a new and distinct series of unfair contract term protections under the *Insurance Contracts Act* (either by extending *Insurance Contract Act* remedies, or some way replicating unfair contract term laws in the *Insurance Contracts Act*), will inevitably lead to inconsistency in unfair contract terms protections for insurance contracts relative to all other consumer

contracts. Law and judicial precedent will, over time, inevitably diverge, leading to potentially different standards applying to consumers in different sectors. Different sets of case law and jurisprudence will be developed for different sets of unfair contract terms provisions. This will lead to confusion, complexity and difficulties for consumers and industry.

We note the Productivity Commission¹⁷ had made a strong argument in its original review of the consumer policy framework, that generic laws should be established with industry specific laws used only to address additional issues specific to a particular an industry. That approach is being proposed in the current paper and is in our view appropriate.

Recommendation

3. We do not support extending unfair contract term protections to insurance contracts by either enhancing existing *Insurance Contracts Act* remedies or introducing the existing unfair contract laws into the *Insurance Contracts Act*.

Proposed Tailoring of UCT Laws for Insurance Contracts

Main Subject Matter

7. *Do you consider that a tailored 'main subject matter' exclusion is necessary?*

We agree with the Proposals Paper that for the sake of certainty and clarity, the main subject matter be given a tailored definition for insurance contracts. The Paper states that

the definition is less clear in the context of insurance contracts; in particular, it could be possible for the main subject matter of the contract and the contract to be construed as effectively being the same thing. This interpretation would be inconsistent with the intention behind of the UCT laws.

We are keen to ensure that the original intentions of the unfair contract term laws are applied to insurance contracts and not in any way watered down or construed in a way that limits scope against consumer interests.

Further, given competing arguments regarding narrow and broad definitions it is important for certainty's sake that this issue be settled before the extension of unfair contract term protections to insurance contracts rather than be left up to courts some time down the track.

8. *If yes, do you support this proposal or should an alternative definition be considered?*

¹⁷ Productivity Commission Inquiry, *Review of Australia's Consumer Policy Framework*, 30 April 2008. Report <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

The Proposals Paper states that:

It is proposed that the main subject matter of the contract will be defined narrowly as terms that describe what is being insured. For example, under a home and contents policy, terms excluded from review would include those which detail the insured property, such as the location and type of dwelling.

Financials Rights agrees strongly with this proposal.

The main subject matter of an insurance contract has been defined at common law¹⁸ and in legislation¹⁹ in narrow and precise terms as the thing being insured.

The intention of unfair contract terms laws is to strike a balance between the efficiency of using standard form contracts in the mass marketing of goods and services and the absence of bargaining power for consumers to negotiate the terms of the contract. To exclude, say, the scope of cover from being reviewable would exclude the majority of the terms of an insurance contract, which are all non-negotiable terms. Including scope of cover as part of the definition of main subject matter would therefore be fundamentally contrary to the purpose and intention of the unfair contract terms regime.

¹⁸ *Prudential Insurance Co v Inland Revenue Commissioners* (1904) 2 KB 658 at pp 662-663:

"The insured must have an interest in the subject-matter of the insurance, that is to say the uncertain event must be an event which is prima facie adverse to the interest of the insured."

CCH Limited, *Australian & New Zealand Insurance Commentary*. (2010), at [¶11-410] states:

*A contract of insurance offers protection against the consequences arising from the occurrence of an event specified in the contract (the risk --see ¶1-430). In effect, therefore, a contract of insurance insures the interests of the insured in the subject matter of the insurance: see *Castellain v Preston* (1883) 11 QBD 380, per Bowen LJ at p 397 (see also ¶1-195).*

The subject-matter of the insurance may be a physical item such as a house or a car; it may be a chose in action (which is a contractual or proprietary right enforceable by action) such as a debt, contractual right or licence; it may be a potential legal liability such as one road-user's potential liability to other road-users for damage or injury caused by the former's negligence; or, as in the case of life, accident or sickness insurance, it may be a person.

Wallaby Grip Limited v QBE Insurance (Australia) Limited [2010] HCA 9

*In insurance contract law an insurer promises to pay money to the insured if the circumstances stated in the policy exist. The insurer's promise may be equated with the cover provided by the insurance contract. The insured must prove such facts as are necessary to prove that the loss was covered by the contract, or as Bailhache J said in *Munro Brice & Co v War Risks Association Ltd*, the plaintiff must prove such facts as bring the claim within the terms of the insurer's promise.*

*Professor Malcolm Clarke in *The Law of Insurance Contracts* refers to three elements as ordinarily present in the circumstances necessary to the performance of the insurer's promise. The first is the insured event. Much may turn upon how it is described. The other two elements are the subject matter, which may be a class of persons, and the cause of the loss, usually referred to as the risk. The contract of insurance in this case identifies the insured event as the liability of the employer for injury to a worker arising at common law; the subject matter is workers, of whom Mr Stewart was one; and the risk was injury to a worker. Each of these elements was established. The question then is whether there is any other circumstance necessary to be established by Mrs Stewart before QBE could be said to be obliged to indemnify under the policy.*

¹⁹ IC Act sections 17, 44, 49 and 65.

It is the clear intent of unfair contract laws is to ensure that a term is reasonably necessary to protect the advantaged party's legitimate interest:

*The party advantaged by the term needs to provide evidence that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer, and that therefore the term was 'reasonably necessary'. Such evidence might include relevant material relating to a business's costs and structure, the need to mitigate risks, or particular industry practices.*²⁰

The industry has argued and will likely argue that this will create significant uncertainty for insurers. We would note that there is no other industry afforded the certainty sought by the insurance sector. This uncertainty is not unique.

The terms of an insurance contract setting out the risks covered ought to be reviewable under any unfair contract term laws. While there are legitimate reasons for insurance companies to restrict cover in certain circumstances to contain their risk, there is no reason why these restrictions should not be subject to the same test as other consumer contracts. We do not consider that this will lead to significant uncertainty as it does not open up a contract for negotiation of each term at the point of sale but simply ensures accountability that all terms of an insurance contract are not unfair. The terms setting out the risks covered can and most are likely to be considered terms that are reasonably necessary to protect the advantaged party's legitimate interests and it would be open to a court to find as such.

There will be a vast range of terms captured that are clearly not the main subject matter ie not the thing being insured and will not be immediately understood, or even conceived of by a consumer: exclusions and conditions, for example. These are precisely the terms which create the most complaints about unfairness. Including these terms within a broad definition of main subject matter will continue to leave consumers vulnerable to poorly worded and/or unnecessary exclusions and conditions. Even if consumers were aware of the nature and implications of all the exclusions and conditions when they entered an insurance contract (and we know from the Insurance Council of Australia's recent research²¹ among other sources that they are not), they are in no position to negotiate the scope of cover or the wording of these exclusions. This is the nature of standard forms contracts and the very reason why the unfair contract term laws were developed in the first place. This is the case in insurance and every other industry.

A broad definition would only serve the interests of insurers by decreasing the number of terms potentially able to be deemed unfair. Establishing a broad definition would maintain the

²⁰ Page 11, ACCC *Unfair Contract Terms – A Guide for Businesses and Legal Practitioners*, March 2016 <https://www.accc.gov.au/system/files/Unfair%20contract%20terms%20-%20A%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>

²¹ Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures: Research findings report*, February 2017, http://www.insurancecouncil.com.au/assets/report/2017_02_Effective%20Disclosure%20Research%20Report.pdf; The Senate Economics References Committee, *Australia's general insurance industry: sapping consumers of the will to compare*, August 2017 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Generalinsurance

significant imbalance in the parties' rights and obligations and would be contrary to the entire intent of removing the exemption under the *Insurance Contracts Act 1984*.

Furthermore, a broader definition of subject matter would open the door for some insurers looking to protect more of their contract terms from unfair contract terms review to redraft their contracts in such a way to ensure that more and more terms would fall within the purview of exclusions brought about by a broad definition. In other words, a broad definition will create a significant loophole for insurers to avoid the unfair contract terms in insurance regime. For example, a requirement that a policyholder must report an event to the police as part of the claims process might be reviewable under a broad definition, but a redrafted version which says the policy only covers events that have been reported to the police would mean that term is excluded from review that includes scope of cover.

A broader definition would also overturn the original intent of the unfair contract terms regime with respect to the burden of providing evidence that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer, and that therefore the term was 'reasonably necessary'. In other words, the onus will be reversed from the current unfair contract term laws and be placed on the consumer to show that a term has *not* been taken into account in the calculation of the premium in order for it to be reviewable in the first place. This is not something the consumer can possibly know, let alone prove.

We believe that the proposed approach to this issue is both more reasonable and one that captures the original intent of the unfair contract term protections.

Recommendation

4. For the sake of certainty, the main subject matter should be given a tailored definition for insurance contracts.
5. Financials Rights agrees strongly with this proposal that the main subject matter of the insurance contract should be defined narrowly as terms that describe what is being insured.

9. Should tailoring specific to either general or life insurance contracts also be considered?

For the same reasons above, the main subject matter of the life insurance contract should be defined narrowly as terms that described *what* is being insured. Life Insurance will cover the *life* of a person who is being insured.

The scope of the cover is subject to the exclusions included in an insurance contract that limit the circumstances in which coverage is provided. This is the same as a general insurance contract.

It needs to be remembered that despite terms relating to scope of cover being subject to the unfair contract terms strictures, there is nothing automatic about these terms being deemed unfair. They will need to meet the standard tests:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Consider blanket mental health exclusions. While it goes without saying that all insurance products offered by insurers will be influenced by an insurer's appetite for risk, it is critical that this risk profile be based upon proper assessments of this risk, that is, in the case of mental health, actuarial or statistical data that is reasonable to rely on, as per section 46 of the *Disability Discrimination Act 1992. (DDA)*. This would provide the basis of an argument for reasonable necessity. Anything less would be unfair.

We further note the concerns raised by the FSC relating to the UK experience²²:

Mr Nick Kirwan, Policy Manager at the FSC, drew the committee's attention to the difficulties experienced in the United Kingdom (UK) when unfair contract term provisions had been applied to life insurance. Specifically, the courts in the UK found that if one party was able to vary a contract (that is, increase the premium), then the other party had to have the right to cancel. The courts' interpretation was that the consumer had the right to cancel without a penalty. In addition, the court also decided that 'if the person's health had changed and they'd had a life insurance policy which they cancelled, they were suffering a penalty because they wouldn't be able to replace that insurance again'. Mr Kirwan was therefore of the view that if the government were to legislate for the removal of unfair contract terms from life insurance policies, the legislation would need to consider the UK experience and ensure that it does not result in significant premium increases.

The committee notes that this has resulted in life insurance policies in the UK now being offered with fixed premiums with terms of only up to 10 years. This experience may necessitate specific life insurance provisions deeming unilateral premium adjustments by an insurer be 'fair' for the purposes of unfair contract term provisions where clear motive is given to the insured that premiums may increase and how.

We accept that if this is the case then:

- a. an onus should be placed on the life insurer to back such increases with proper assessments of risk including real health, actuarial or statistical data that are reasonable to rely on; and
- b. such premium increases and the circumstances specified should be clearly explained to the consumer in a transparent manner, explicitly and specifically highlighted at purchase, renewal and at the time of any variations or premium increases

We discuss these issues further under the "Tailoring for specific insurance contracts" section below.

²² Page 38, para 3.36, Parliamentary Joint Committee on Corporations and Financial Services, Life Insurance Industry Report, March 2018

Recommendation

6. If unilateral premium adjustments by life insurers are not to be considered unfair in circumstances in which the premium increase is within the limits and under the circumstances specified in the policy, then:
 - a. an onus should be placed on the life insurer to back such increases with proper assessments of risk including real health, actuarial or statistical data that are reasonable to rely on; and
 - b. such premium increases and the circumstances specified should be clearly explained to the consumer in a transparent manner, explicitly and specifically highlighted at purchase, renewal and at the time of any variations or premium increases.
-

Upfront Price

10. Do you support this proposal or should an alternative proposal be considered?

The proposal being put forward is in two parts.

Consistent with the existing UCT laws, it is proposed that for insurance contracts, the upfront price will include the premium paid, or to be paid, by the insured and therefore excluded from review.

It is also proposed that the quantum of the excess payable under an insurance contract should be considered part of the upfront price and, therefore, excluded from review.

We support the first part. We do not support the exclusion of the quantum of the excess payable. We provide further details why below.

Recommendation

7. We support exclusion of the upfront price i.e. the premium paid, or to be paid, by the insured, but do not support the exclusion of the quantum of the excess payable.
-

11. Do you agree that the quantum of the excess payable under an insurance contract should be considered part of the upfront price and, therefore, excluded from review?

We do not support the quantum of the excess payable under an insurance contract being considered part of the upfront price and, therefore, excluded from review. Treasury must consider the reality of what “excess payable” refers to under current insurance contracting

practices and the application of complex, confusing and hidden additional excesses applied at claims time.

We note that the Proposals Paper refers to “excess payable” as a singular. However, we regularly see insurances with multiple excesses that are unclear, complex and have complicated structures.

Take the Woolworths Car Insurance as an example:

- Basic Excess: between \$500 and \$5000

Customers have the ability to adjust the basic excess. This is relatively clear from the quote page:

Your car quote

1 Choose your cover
Choose between Comprehensive or Drive Less Pay Less.

Cover start date: **10/07/2018**
Quote number: **248864290**

Annual Monthly

<p>Comprehensive ✓</p> <p>\$772.78</p> <p>per year incl. GST and Gov't charges</p> <p>Up to 13% Discount Included*</p> <table border="1"> <tr><td>Cover</td><td>Comprehensive</td></tr> <tr><td>Annual Kilometres</td><td>Unlimited</td></tr> </table> <p>See what's covered</p>	Cover	Comprehensive	Annual Kilometres	Unlimited	<p>Drive Less Pay Less</p> <p>\$415.09</p> <p>per year incl. GST and Gov't charges</p> <p>Up to 13% Discount Included*</p> <table border="1"> <tr><td>Cover</td><td>Comprehensive</td></tr> <tr><td>Annual Kilometres</td><td>1000km Edit</td></tr> </table> <p>See what's covered</p>	Cover	Comprehensive	Annual Kilometres	1000km Edit
Cover	Comprehensive								
Annual Kilometres	Unlimited								
Cover	Comprehensive								
Annual Kilometres	1000km Edit								

[See your quote breakdown, including Gov't charges](#)

2 Tailor your cover
Please note, making changes will affect the premium.

Change the agreed value ⓘ
Agreed value is how much you want to insure your car for.

\$3,150 \$5,850 **\$4,500**

Change the basic excess ⓘ
Basic excess is the amount you may be required to pay when you make a claim.

\$500 \$5,000 **\$500**

[See additional excesses](#)

3 Enhance your cover with optional extras

<input type="checkbox"/> Excess-free windscreen cover \$44.88 per annum ⓘ	<input type="checkbox"/> Roadside Assistance \$92.40 per annum ⓘ
<input type="checkbox"/> Hire car cover 10 days \$93.05 per annum ⓘ	<input type="checkbox"/> Hire car cover 20 days \$139.57 per annum ⓘ

^ Back to top and review my cover

Back Email quote **Buy Now**

Need help?
Call us on:
1300 482 451 Quote Enquiries
1300 641 327 Customer Support

What is Woolworths
DRIVE LESS PAY LESS?
[Click here to read more](#)

Winners of the
Outstanding Customer Satisfaction Award 2017

most PEOPLE'S CHOICE 2017

Figure 1: Woolworths Car Insurance Quote: 10 July 2018

There are however additional excesses not presented on this quote page. In other words, these excess are not presented *upfront* to the consumer. To see these additional excesses one must

click on the “See additional excesses” hyperlink: see *Figure 2: Woolworths Car Insurance Quote: 10 July 2018*. If clicked, which is unlikely, a consumer will see the following excesses listed:

- Age excess: -Under 21 years \$1,200
- Age excess: -- 21 - 24 years \$800
- Undeclared young driver excess \$800
- Learner driver excess \$800
- Inexperienced driver excess \$800

Customers do not have the ability to change these additional excesses.

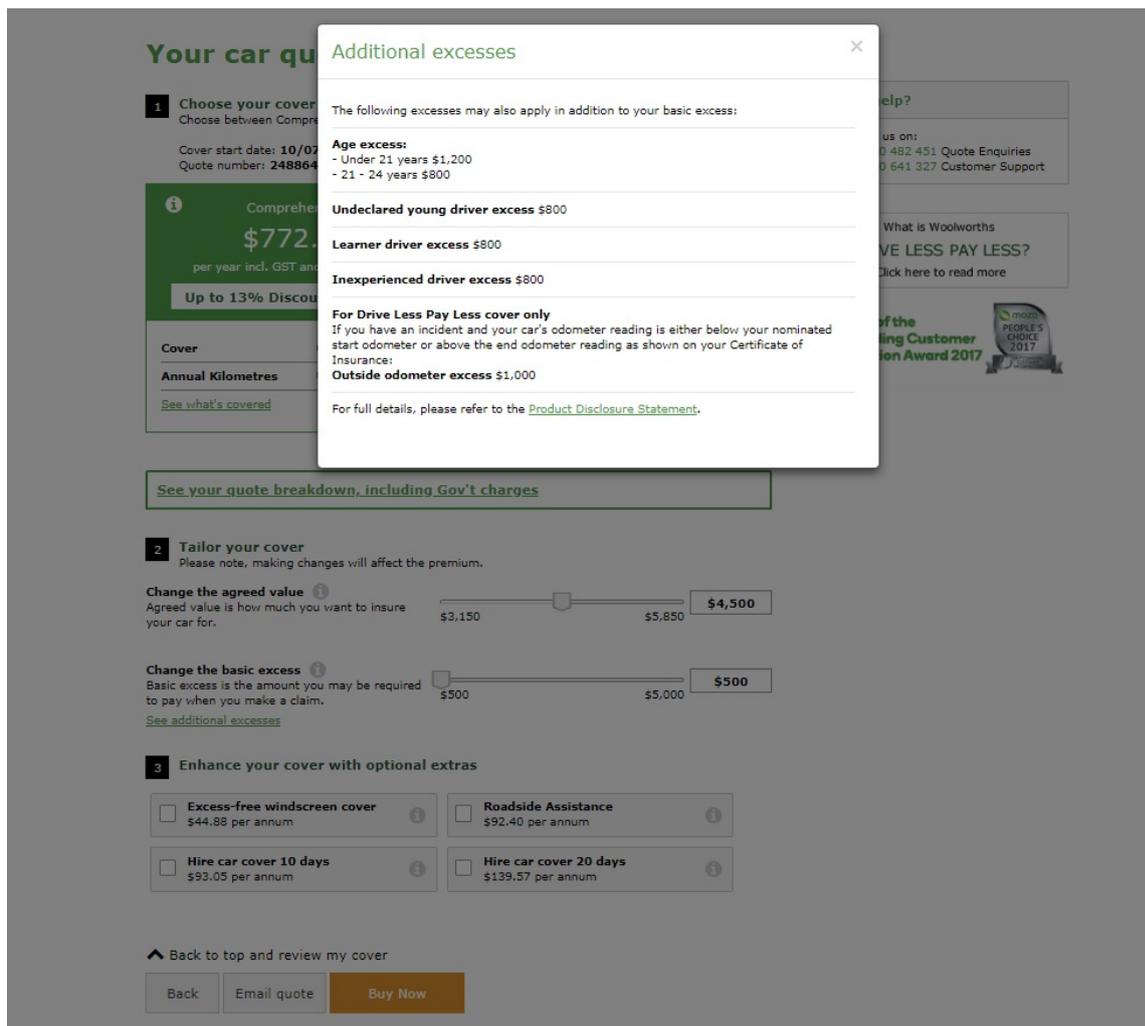


Figure 2: Woolworths Car Insurance Quote: 10 July 2018

As can be seen in the Woolworths additional excess section there is an Outside Odometer excess applying. The upfront explanation is:

For Drive Less Pay Less cover only

If you have an incident and your car's odometer reading is either below your nominated start odometer or above the end odometer reading as shown on your Certificate of Insurance:

Outside odometer excess \$1,000

This however is not enough for the customer to fully understand how the excess works. They must read the fine print in the product disclosure statement²³:

Your start and end odometer readings

When you choose Drive Less Pay Less cover, on your Certificate of Insurance we will show:

- *Your start odometer reading – this is your car’s odometer reading that you advise to us before you enter into your period of insurance; and*
- *Your end odometer reading – this represents the maximum odometer reading for your car during your period of insurance*

Your car’s start odometer reading will only be shown on your Certificate of Insurance for your first period of insurance. You have an obligation to ensure that the start odometer reading disclosed immediately before entry into the first period of your insurance policy was/is accurate. If you renew your policy with us, the start odometer reading will not be shown on your renewal Certificate of Insurance.

Outside odometer excess

The Outside odometer excess will apply, in addition to your basic excess and any other applicable excess(es) if an incident happens, and:

- *Your car’s odometer reading is either higher than the end odometer reading, or below the start odometer reading (if you are in your first period of insurance), as shown on your Certificate of Insurance; and/or*
- *Your car’s odometer is faulty or non-functional and you have not had it repaired; and/or*
- *Your car’s odometer has been replaced and your odometer reading has changed as a result, and you have not contacted us to update your policy details.*

The Outside odometer excess will be shown on your certificate of insurance.

Kilometre grace distance

If you have a claim and your car’s odometer reading exceeds the end odometer reading by no more than the number of kilometres (‘Kilometre grace distance’) as displayed on your Certificate of Insurance, we may at our sole discretion waive the Outside odometer excess.

This nuanced explanation continues for a further 2 pages of the Product Disclosure Statement.

Such complex and confusing excesses are not the exception to the rule. To demonstrate this, we provide just two further examples:

An NRMA quote highlights the Annual Premium with the excess below in a bar that can be changed.

²³ *Combined Product Disclosure Statement and Financial Services – Car Insurance, 15 January 2018*
[https://insurance.woolworths.com.au/content/dam/Woolworths/Insurance/Car/UsefulDocumentsCar/Woolworths Car Insurance PDS.pdf](https://insurance.woolworths.com.au/content/dam/Woolworths/Insurance/Car/UsefulDocumentsCar/Woolworths%20Car%20Insurance%20PDS.pdf)

Your car insurance quote

Thanks for all the details. Based on all your answers we have calculated the following cover for your car.

The screenshot displays a car insurance quote interface. At the top, a blue header bar contains the word "Comprehensive" with a question mark icon, and on the right, "Switch & compare all" and "cover levels" buttons. The main content is divided into two columns. The left column shows the "Annual Premium" as "\$819.69" in large blue text, with a note "Paying annually saves \$128.46" and a "Switch to Monthly" button. Below this is a small note: "All amounts displayed include GST and Stamp Duty." The right column shows "Discounts applied" as "60% No claim bonus" and a prominent green "Buy now" button. Below the button are logos for VISA, Mastercard, and BPAY, and a row of buttons for "Save", "Email", "SMS", and "Print".

Policy options

- Hire car
- Windscreen
- No claim bonus protection
- Any repairer

OR

Change your excess amount

Excess is the amount you pay at claim time. A higher excess will reduce your premium.

A horizontal scale shows excess amounts from \$0 to \$2,000 in increments of \$300. A blue callout box highlights the selected excess of \$1,000.

The excess you have selected is high compared to the insured value of the car. You may wish to consider a lower excess.

Additional special excesses may apply

Figure 3: NRMA Car Insurance Quote: 10 July 2018

However it states in fine print below the excess section that "Additional special excesses may apply" To read these special excesses the customer needs to click on the very small question mark icon next to the statement. Then in a pop window the site presents the additional excesses are shown.

Request Callback

Your car insurance quote

Thanks for all the details. Based on all your answers we have calculated the following cover for your car:

Comprehensive ⓘ Switch & compare all cover levels

All Excesses ✕

Excesses
Basic Excess: **\$1,000**

In addition to the basic excess, the following age excesses may apply when you make a claim.

Age Excess
If a driver under 25 years of age was driving the car at the time of an accident and no under 25 drivers are listed on the policy, an age excess of **\$1,600** applies.

Inexperienced Driver Excess
For drivers 25 years of age or over with less than 2 years' driving experience, an inexperienced driver excess of **\$400** applies if they were driving the car at the time of an accident.

Policy options:

- Hire car ⓘ
- Windscreen ⓘ
- No claim bonus protection ⓘ
- Any repairer ⓘ

OR

[Upgrade to Comprehensive Plus](#)

reduce your premium

The excess you have selected is high compared to the insured value of the car. You may wish to consider a lower excess.

Additional special excesses may apply ⓘ

Figure 34: NRMA Car Insurance Quote: 10 July 2018

There is fine print down the bottom of the page as well that presents the information:

OR

Not sure how much to insure for?

[Switch to Market Value](#)

- ✓ Accidental damage
- ✓ Theft or attempted theft
- ✓ Vandalism or a malicious act
- ✓ Storm, Fire, Flood, Earthquake, Explosion
- ✓ Tsunami

[Back & Modify](#)

Important information about this quote

Age Excess

If a driver under 25 years of age was driving the car at the time of an accident and no under 25 drivers are listed on the policy, an age excess of \$1,600 applies.

Inexperienced Driver Excess

For drivers 25 years of age or over with less than 2 years' driving experience, an inexperienced driver excess of \$400 applies if they were driving the car at the time of an accident.

About your Motor Insurance

[Product Disclosure Statement and Policy Booklet](#) which you should read before buying this policy. To view this PDF you will need [Adobe Acrobat Reader](#)

Terms of this quote

This quote is not a contract of insurance and does not provide you with any cover. This quote is valid for 7 days from the date it was generated.

[Back To Top](#)

Please refer to [Privacy & security](#) for details as to how we manage your personal information. Refer to [Terms of use](#) for details on use of this website.

© Insurance Australia Limited ABN 11 000 016 722

Insurance issued by Insurance Australia Limited ABN 11 000 016 722 trading as NRMA Insurance. When making decisions about the product you should refer to the [Product Disclosure Statement and policy booklet](#) available from NRMA Insurance.

Figure 5: NRMA Car Insurance Quote: 10 July 2018

However like Woolworths, the customer really needs to read the full explanation of these excesses in a separate booklet not available on the quote page, to fully understand what the excesses are and how they will work. Consumers are not directed to do this. The customer must know to scroll to the bottom of the page to find the “Product Disclosure Statement” and click on it.

From here the customer needs to look up both the Product Disclosure Statement²⁴ and also Premium Excess and Discounts Guides²⁵ both of which have a number of explanations of when an excess is expected and when it will not be expected. For example: You don’t need to pay

²⁴ *Motor Insurance – Product Disclosure Statement and Policy Booklet*, 27 July 2017
https://www.nrma.com.au/sites/nrma/files/nrma/policy_booklets/car_pds_0917_all.pdf

²⁵ *Motor Insurance Premium, Excess, Discounts & Helpline Benefits Guide*, 27 July 2018
https://www.nrma.com.au/sites/nrma/files/nrma/policy_booklets/car_ped_0917_all.pdf

excess if you crash with an At-fault driver up to \$5000 in total damage to your vehicle. But if it is above \$5000, you will need to pay the excess.²⁶

Budget Direct quote highlights the monthly premiums. Below this as a customer scrolls down is the Excess:

Budget Direct Quote #N8G153681 [Contact Us](#)

[< Back](#)

Your Gold Comprehensive Car Insurance Quote

Includes your 15%[^] discount QUOTE #N8G153681

MONTHLY PAYMENT	YEARLY PAYMENT BEST VALUE	FORTNIGHTLY PAYMENT
\$44.77 Incl GST & Gov. Charges Total annual payment price \$537.42 (one initial payment of \$44.95 and 11 payments of \$44.77)	\$470.11 Incl GST & Gov. Charges	\$20.68 Incl GST & Gov. Charges Total annual payment price \$538.12 (one initial payment of \$21.12 and 25 payments of \$20.68)
Continue >	Continue >	Continue >

[Edit your details](#) | [Buy by Phone](#) | [Save & Email Quote](#) | [Request Callback](#)

Adjust your excess
This is the basic excess you will pay if you make a claim [other excesses](#) may apply

\$850 ▾

[Live Chat](#)

Figure 6: Budget Direct Car Insurance Quote: 10 July 2018

Again to find out the full excesses due, the customer has to click on the other excesses hyperlinked in blue.

²⁶ Page 45 Motor Insurance – Product Disclosure Statement and Policy Booklet, 27 July 2017

Excesses

Basic excess	\$850	Window glass only	\$650
--------------	-------	-------------------	-------

Additional excesses

Drivers under the age of 21	\$600	Drivers between the age of 21 and 24	\$500
Drivers who haven't held a full Australian licence for at least 2 years	\$500	Unlisted drivers	\$600

This quote is valid until 09/08/2018, is subject to meeting the insurer's underwriting criteria and may change due to other factors such as driver's history of offences, suspensions or claims and age or licence type of additional drivers, or residential status. This quote is based on market value, this is the reasonable cost to replace your car with one of the same make, model, age and condition as your car at the time of the loss or damage. It does not include any allowance for warranty, stamp duty or transfer costs. ^Online Discount [Terms & Conditions](#) apply.

Legal Live Chat 

Figure 7: Budget Direct Car Insurance Quote: 10 July 2018

We also note that when a Quote is emailed to the customer (see Figure 8) only the basic excess is quoted. There is no listing of additional excess nor any mentor or direct link to these excesses

on Repairs* guarantee* Service - Your choice of phone or online

Quote looks good?

Or want to change something? It's easy.

Quote Summary

Date	10 July 2018
Quote Reference	#N8G153681
Total Annual Price	\$471*
Cover	Gold Comprehensive
Vehicle	Toyota Yaris
Basic Excess	\$850
Quote valid to	10 August 2018

Call Us
 Our friendly contact centre staff are here to help, call **1800 112 871**
 With your Quote #N8G153681
Mon-Fri: 8am – 10:30pm AEST
Sat: 8am – 5pm AEST

[View your Saved Quote](#)

Figure 8: Budget Direct Car Insurance Quote: 10 July 2018

We present these examples above to demonstrate a number of points.

Firstly the excess payable is not usually one single excess. The excess payable is regularly made up of multiple, complex excesses at different rates, so that it is not clear what the quantum of excess actually is upfront.

Secondly, the “basic excess” may be highlighted upfront but additional excesses are rarely if ever highlighted. This emphasising of the “basic excess” over all applicable and potential excesses is misleading. There is very little transparency with additional excesses, largely invisible to consumers. A customer must search for them and know to click on a number of links and know to read further documents to find out the full information and potential excess quantum.

Thirdly, the circumstances in which an excess is payable are not straightforward and are structured in complicated ways so that it is not clear upfront when an excess will be paid. To understand the way the excesses work, the customer must go digging in the Product Disclosure Statement (or other documents).

We therefore cannot support the exclusion of quantum of “excess” from review when there is no transparency with respect to the price. The upfront price payable under an insurance contract should be clearly known by the consumer. As can be seen above, excesses are structured in multiple complex layers and are regularly hidden, obscured, invisible or not

highlighted. When read, these excesses are hard to comprehend and full of legalese. The excess payable is therefore far from upfront when people go to purchase insurance.

We would argue that the creation of multi-structured excesses, hidden or obscured from consumer could be considered an unfair practice in itself.

We note that under section 46K of New Zealand's *Fair Trading Act 1986* the upfront price:

*means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but **only to the extent that the consideration is set out in a term that is transparent.** (emphasis added).*

If quantum of excess is to be excluded in the Australian context then upfront price needs to be similarly qualified – that is, only to the extent that the term is transparent. We would argue that that quantum of excess is not currently transparent and that the above qualification to the definition of upfront price could ensure greater transparency.

Otherwise insurers will continue to game the system and exploit a loophole in the law.

Recommendation

8. We cannot support the exclusion of quantum of excess from review where these are not part of the upfront price payable under the contract and clearly known by the consumer. One possible way to address the issue is to ensure that the definition of upfront price be qualified in similar terms to section 46K of the *Fair Trading Act 1986* (NZ) to allow exclusion of upfront price but only to the extent that the terms are transparent.

12. Should additional tailoring specific to either general or life insurance contracts also be considered?

No. Again there is no difference between a general insurance contract and life insurance contract that is material for the purposes of defining either the upfront price or excess. As above, we do not believe excess in life insurance should be excluded from review.

Standard Form Contracts

13. Is it necessary to clarify that insurance contracts that allow a consumer or small business to select from different policy options should still be considered standard form?

14. If yes, do you support this proposal or should an alternative definition be considered?

For the sake of certainty, we believe it may be necessary to clarify that insurance contracts which allow a consumer or small business to select from different policy options, including but not limited to excess amounts, riders, sum insured amounts and policy exclusions, should be considered standard form.

As we have stated above, retail insurance contracts and Product Disclosure Statements are never negotiable. They are standard contracts that cannot be amended other than unilaterally by the insurer. This means that if the contract contains unfair terms then the consumer must either accept this or go elsewhere. While the terms of the contract may take some general adjustments for personal circumstances in a general sense the specific characteristics of the insured are not taken into account to negotiate a contract.

Recommendation

9. Insurance contracts that allow a consumer or small business to select from different policy options, including but not limited to excess amounts, riders, sum insured amounts and policy exclusions, should still be considered standard form.

Meaning of Unfair

15. Do you consider that it is necessary to tailor the definition of unfairness in relation to insurance contracts?

16. Do you support the above proposal or should an alternative proposal be considered? For example, should the approach taken in New Zealand's Fair Trading Act be considered?

We believe that it may be necessary to provide further clarity and guidance to insurers and consumers with respect to the definition of unfair. In considering in the form and content of this clarity we believe that the following principles should be met:

- The meaning of unfair should lead to a consistency of jurisprudence and application in order that insurers are not treated any differently from other sectors;
- The onus of proof should be squarely on the shoulders of the insurer not the insured - at all steps of any definition (be it in one, two or any number of steps);
- The meaning of unfair must incentivise insurers to ensure that contract terms accurately and transparently reflect risk as has been the case for other industries
- Terms that disproportionately or unreasonably disadvantage the insured are unfair
- Common industry practice cannot be deemed a legitimate business interest

The current formulation under section 12BG of the ASIC Act 2001 states that

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

This test should remain. However there is a justifiable need to clarify what legitimate interests are with respect to insurance.

It will likely be argued by insurers that their legitimate interest will be met where an insurance contract term reflects the underwriting risk accepted in relation to the contract. Whether this is in fact the case is arguable, however the reality is there is a reasonable likelihood that this will be found to be the case by courts.

The risk with this then is that insurers will simply redraft their underwriting guidelines to ensure that any and every impact upon the insured (no matter how disproportionate or unreasonable) will be captured. Ensuring that a term reasonably reflects the underwriting risk accepted by the insurer in relation to the contract *and* doesn't disproportionately or unreasonably disadvantage the insured will therefore be a necessary anti-avoidance measure.

In other words the proposal will incentivise insurers to ensure contract terms accurately and transparently reflect risk rather than incentivising insurers to redraft their underwriting guidelines to reflect contracting that disproportionately or unreasonably disadvantages the consumer.

Maintaining a legitimate interests test remains consistent with the current wording and objectives of current unfair contract terms protections. Providing guidance on how this can be met simply limits the potential to expand the word "legitimate" to cover any and all scenarios and undermine the intent of the law.

We believe that the proposal, if instituted should make clear that the onus of proof should be on the insurer not the insured to prove that a term is:

- reasonably necessary in order to protect the legitimate interests
- the term reflects the underwriting risk and that
- the term does not disproportionately or unreasonably disadvantage the insured.

We believe it may be necessary for ASIC or a new Federal Insurance Monitor (as proposed above) to develop a guidance to ensure that insurers take the responsibility to prove that the term reasonably reflects the underwriting risk seriously and provide the necessary documentation and evidence, when and where required.

We also note that ASIC should be provided with the necessary powers to investigate an unfair term prior to a declaration or determination, and require insurers to provide them with the necessary documentation and evidence supporting a claim that the term meets the insurer's legitimate interest and reasonably reflects the underwriting risk accepted.

Providing a list of terms that must be taken to be terms that are reasonably necessary to protect the legitimate interests of the insurers, as the NZ law does, reverses this onus, that is, the consumer must prove that a term is not reasonably necessary. This is not something the consumer can possibly be resourced to know, let alone prove.

We would also seek a clarification of the current unfair contract term laws to ensure that common industry practices can have no bearing on the concept of unfairness, at all. We note that the current ACCC Unfair contract terms guide²⁷ states

The party advantaged by the term needs to provide evidence that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer, and that therefore the term was 'reasonably necessary'.

Such evidence might include relevant material relating to a business's costs and structure, the need to mitigate risks, or particular industry practices.

Simply because the entire insurance industry acts in a particular way does not mean that the term is reasonably necessary or fair. The current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has demonstrated very clearly that there are any number of common industry practices which do not meet community standards and are unfair.

Recommendation

10. With respect to the meaning of unfair, the insurer's legitimate interest should be defined as being when the term reasonably reflects the underwriting risk accepted by the insurer in relation to the contract and it does not disproportionately or unreasonably disadvantage the insured.
11. ASIC should be empowered to investigate unfair terms and request appropriate and necessary documentation.
12. ASIC should develop guidance for industry on their expectation relating to the processing of unfair terms claims and the documentation expected to be maintained and provided.

17. Should tailoring specific to either general or life insurance contracts also be considered?

No.

Terms that may be considered unfair

18. ***Do you consider that it is necessary to add specific examples of potentially unfair terms in insurance contracts?***
19. ***Do you support the kinds of terms described in the proposal or should other examples be considered?***

²⁷ p. 11, ACCC, Unfair contract terms – A guide for businesses and legal practitioners, <https://www.accc.gov.au/system/files/Unfair%20contract%20terms%20-%20A%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>

Yes, we believe it is preferable to provide a non-exhaustive list of examples specific to insurance contracts that may be unfair. This will provide guidance to both industry and consumers as to the types of terms to be on the look out for. The examples will also provide some realistic 'meat' to the theoretical 'bones' to assist people to query whether other terms could potentially be considered unfair.

We support the inclusion of the terms listed in the paper at pages 8 and 18:

- *terms that allow the insurer to require the insured to pay an excess before paying the claim;*
- *terms that prevent an insured from making a disability claim if they were not diagnosed with the disability prior to leaving work; and*
- *terms that allow a claim to be denied on the basis of a blanket mental health exclusion...*
- *terms that permit the insurer to pay a claim based on the cost of repair or replacement that may be achieved by the insurer, but could not be reasonably achieved by the policyholder;*
- *terms which make the insured's ability to make a claim conditional on the conduct of a third-party over which the insured has no control; and*
- *terms in a contract that is linked to another contract (for example, a credit contract) which limit the insured's ability to obtain a premium rebate on cancellation of the linked contract.*

Other terms that we point to which should be considered for inclusion include:

- a term that requires the consumer to pay any costs incurred for the investigation of a claim if the claim is withdrawn or refused by the insurer. Such a term is both a significant incentive for the insurer to investigate every case and delay payouts. It also acts as a significant disincentive to make a claim when the policyholder knows that they could be up for the cost of an investigation.
- terms that significantly limit the liability for 3rd parties seeking damages against the insured at fault party: such as providing a \$1500 maximum limit when liability commonly is covered up to \$20 million.
- terms that severely limit the form of policy cancellation to being in writing and being signed, "unless agreed by us" rather than accepting cancellation over the phone, via email or electronically. Limiting cancellation to the provision of notice in writing "unless agreed by us" and retention of "reasonable administrative costs" that are not specified unreasonably disadvantages the consumer and causes enormous difficulties to consumers trying to cancel a policy. This can negatively impact cooling off rights.
- terms that permit the insurer to make an arbitrary decision to exclude coverage if they do not agree and do not have to base this on the facts or evidence before them.
- automatic renewal of a fixed-length contract where the deadline to cancel is unreasonably short. This is considered an unfair contract term in the UK. In Australia, ASIC last year reviewed six insurers' car insurance renewal practices. They found that:

"consumers were not always clearly informed by insurers, when first purchasing the policy, that it would automatically renew unless the consumer advised otherwise. In most cases consumers were only informed about the automatic renewal practice in

the product disclosure statement (which may not be received by the consumer until after the insurance is purchased) and renewal notice.”

The law does not prevent insurers from automatically renewing insurance policies and in some cases consumers seek this feature out, however by structuring the sales and disclosure practice in such a way that does not fully inform consumers of this renewal practice unreasonably advantages the insurer. Where consumers inadvertently find themselves insured twice, they struggle to obtain a refund for the full premium and are often limited in only recovering 50% of the overpaid premium on the basis that both insurers were “on risk”.

- medical definitions that are out of date, no longer meet medical standards and are never able to be met. We point to the ABC 7:30 report on a life insurance claim being rejected on the basis that MLC would only pay out if a patient had been intubated in intensive care with a tube down their throat for 10 days. The patient in the report had had this for 7 days and therefore his claim was not paid. The average for intubation is 4 days. This clearly is unfair and a definition that is simply impossible to meet. In a sense life insurance is providing illusory cover. We also provide the following case study:

Case study- Melanie’s story - C144046

Melanie was diagnosed with a brain tumour and her doctor removed the tumour. She made a claim on her trauma premiere policy that she had with her Insurer. The insurance was arranged by an advisor some 11 years previously. It was sold to her as something that would cover her if she got ill and she paid the \$300 monthly premiums with that in mind.

The Insurer initially advised her she was entitled to a full payment under the policy, but later rejected the claim because of the way the tumour was removed. It was removed through the nose and not by a craniotomy. The policy wording covers a craniotomy. Melanie’s policy is 11 years old and the medical definitions are out of date. Today 98 per cent of brain tumours are removed through the nose and there is no need to make a patient undergo a craniotomy.

As a result of the tumour she suffered from Cushing’s Disease which is caused by a change in Melanie’s hormone levels. It is a severe case because the tumour was undiagnosed for so long. Melanie was a self employed personal accountant. She had regular clients that she did work for at home. Now she cannot work and she is being supported financially by her family. Her father is paying her mortgage and making her car repayments.

Financial Rights obtained from her specialist a report confirming that the medical definitions are out of date (i.e. impossible to meet the definition). The insurer reviewed the matter and decided to pay the claim outside of the policy terms. The amount she was paid is significantly less than she expected and was initially advised.

Source: Financial Rights Legal Centre

- travel insurance: a term that defines unattended baggage as where the stolen baggage was within reach, but the insured was distracted at the time of the theft, asking for, say, directions.
- car insurance: a term that denies a claim under a no-fault comprehensive motor vehicle policy due to a failure to take 'all precautions to avoid the incident'.
- home insurance: a term that excludes a claim by a landlord when the tenant burned down the home, because of an exclusion in the contract for damage caused by an invitee.
- caravan insurance: a term that states that the insurer will not pay for third party damage if at the time of the accident or immediately before the accident, the caravan was attached to the registered vehicle.

Recommendation

13. The unfair contract terms regime should provide a non-exhaustive list of examples specific to both general and life insurance contracts that may be unfair.

20. Should tailoring specific to either general or life insurance contracts also be considered?

Examples should be provided specific to both life and general insurance, but note that many of the terms described above could apply equally to general and life insurance policies.

Remedies for unfair terms

21. Do you support the remedy for an unfair term being that the term will be void? Is a different remedy more appropriate (for example, that the term cannot be relied on)?

22. Do you consider it is appropriate for a court to be able to make other orders?

We believe that the remedy for an insurance contract term being declared unfair should be that the insurer cannot rely on the term. This is the more appropriate remedy for the reasons referred to in the proposals paper.

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.

Recommendation

14. The remedy for a contract term in an insurance contract term being declared unfair should be that the insurer cannot rely on the term.

23. Should tailoring specific to either general or life insurance contracts also be considered?

No.

Third-party beneficiaries

24. Do you consider that UCT protections should apply to third-party beneficiaries?

25. Do you support the above proposal or should an alternative proposal be considered?

We agree with the proposal that unfair contract term laws apply to consumer and small business who are third party beneficiaries under the contract, and supports ensuring that:

- the definitions of 'consumer contracts' and 'small business contracts' will include contracts that are expressed to be for the benefit of an individual or small business but who are not a party to the contract; and
- third-party beneficiaries would be able seek declarations that a term of a contract is unfair.

If they were not, then this would be a significant unjust outcome for third party beneficiaries – who are central to the nature of many insurance contracts.

Recommendation

15. We support the proposals that unfair contract term laws for insurance apply to consumer and small business who are third party beneficiaries under the insurance contract,

26. Superannuation fund trustees may have substantial negotiating power and owe statutory and common law obligations to act in the best interest of fund members. Do these market and regulatory factors already provide protections comparable to UCT protections such that it would not be necessary to apply the UCT regime to such products?

We acknowledge that superannuation funds have substantial negotiating power and owe statutory²⁸ and common law obligations to act in the best interest of fund members. This however has not been sufficient to protect consumer interests. We believe that group insurance must be subject to the unfair contract terms regime.

Despite a best interests duty, superannuation trustees have a series of fundamental conflicts of duty. Can retail Superannuation Trustees act both in the best interests and the best interests of their shareholders? Can a Superannuation Trustees act in the best interest of their membership as a whole and individual members at the same time?

We regularly see superannuation funds not acting in the best interests of their individual members all the time. Callers to the Insurance Law Service frequently report stories of superannuation representatives not actively ensuring that they are, for example, up to date with where the insurer is in the group insurance claims process, nor actively engaging with an insurer when there are significant delays. We also see behaviour from superannuation companies that do not align with the expectation that the super fund go into bat for their member. There are very few determinations at FOS (if any) based on a Superannuation Trustee disputing a decision on behalf of a member.

There are also fundamental conflicts of interest embedded in the nature of group insurance world, i.e. superannuation companies could save money by not engaging enough staff to advocate on behalf of member claims. They also regularly benefit in negotiating for cheaper group insurance by lowering the levels of coverage and accepting unfair contract terms. Superannuation Trustees would argue that this is in the best interests of their members by preserving higher levels of retirement income. But it significantly lowers the ability of member beneficiaries making a successful claim on a product that they pay for.

Superannuation trustees have made these conflicts of interest worse by instituting profit-sharing arrangements between superannuation trustees and insurers. ASIC reported to the PJC Life Insurance Inquiry that in a review of insurance and superannuation they had

issued notices to, approximately, 47 trustees ... we're looking in the region of about seven or eight that may have some form of arrangements that are called different things in different circumstances—essentially, it's profit sharing, premium sharing or some form of other arrangement between the insurer and the super fund. ... There's clearly a recognition by [Insurance in Super Working Group] that the arrangements haven't been as clear and tight as would be desirable and that it would be much better to come up with a cross-industry standard that says they ought to be applied only in a way that ultimately benefits members²⁹

It was expected that the Insurance in Super Working Group would address this in a Code of Practice. They did not.

²⁸ Section 52 of the *Superannuation Industry (Supervision) Act 1993*

²⁹ Fitzpatrick, PJC Committee

http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/896c9d2f-2646-4e8e-bb18-19ceee3972e3/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Corporations%20and%20Financial%20Services_2017_09_08_5514_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/896c9d2f-2646-4e8e-bb18-19ceee3972e3/0000%22

The Life Insurance Inquiry found a litany of further conflicts of interest and less than transparent arrangements between Superannuation trustees and Insurers.

“Firstly, there appears to be the potential for performance related pay, commissions, and fees to create incentives to upsell products that are not in the customers best interests.

Secondly...direct insurance occurs without the provision of financial advice. Consequently, some of the consumer protections associated with personal advice do not apply because there is no 'personal advice' from an adviser.

Thirdly, because direct insurance does not contain an intermediary in the form of an adviser, consumers may have an expectation that direct life insurance would be free from hidden fees, commissions and performance related pay.”³⁰

And further:

Other payments from life insurers to trustees and from trustees to life insurers are shown in Figure 5.2 for situations when a consumer becomes a member of a superannuation fund by choice. This appears to occur regardless of whether the customer sought personal financial advice.

It is unclear what the nature of these other payments are, how much they are, whether they are one-off or ongoing, to what extent they are deducted from a consumers super contributions and life insurance premiums, and whether there are any consumer protections in place...³¹

Finally the Committee found that:

Evidence to the committee, particularly from ASIC, indicates that a plethora of hidden payments including commissions, fees, performance-related payments, soft dollar benefits, and non-financial benefits exist within the various structures of the life insurance industry.³²...

The committee also notes that payments made from life insurers to trustees remain unregulated by conflicted remuneration provisions and can include payments arising from profit sharing arrangements that exist between trustees and life insurers in the provision of default insurance funded by superannuation guarantee contributions. The committee also notes that there is no transparency around other payments that may exist between life insurers and trustees including soft dollar benefits. The committee believes that given the compulsory nature of superannuation and the automatic provision of insurance, transparency around the exact nature of the value of these arrangements is critical for confidence in the superannuation system.³³

The Committee recommended that

³⁰ Para 5.17-5.19 page 69

https://www.aph.gov.au/-/media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en

³¹ Para 5.26-5.27 page 69

https://www.aph.gov.au/-/media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en

³² Para 5.85

³³ Para 5.107

*ASIC conduct a systematic review and risk assessment of all payments and benefits flowing between participants in each sector of the life insurance industry—direct, group, and retail—and inform the government of any regulatory gaps; and the government consider further regulation of payments between life insurance industry participants following the ASIC review.*³⁴

We believe that the above conflicts of interest and non-transparency that exists in the nexus between superannuation trustees, the insurance sector and beneficiary members is such that it is clear that the current regulatory environment does not protect consumers from the possibility of unfair contract terms arising. We therefore strongly recommend that the unfair contract terms regime applies to group insurance products, as it will to other general and life insurance products.

We would also note that if a carve out is provided to group insurance this would be excluding the grand majority of life insurance consumers – with 13.3 million lives covered by group insurance out of a total of 15.9 million covered (or 83%). For the grand majority of Australians this is the only way they can obtain life insurance cover.

We strongly believe that the unfair contracts terms regime needs to be applied consistently across all products. No consumer – particularly Australians whose only access to life insurance cover is via their superannuation fund – should be disadvantaged because of the way they have obtained life insurance coverage.

Recommendation

16. Group insurance should be subject to the unfair contract terms regime.

Tailoring for specific insurance contracts

27. Do you consider that any other tailoring of the UCT laws is necessary to take into account specific features of general and/or life insurance contracts?

28. Do you agree that unilateral premium adjustments by life insurers should not be considered unfair in circumstances in which the premium increase is within the limits and under the circumstances specified in the policy?

As we have described above, we think that if unilateral premium adjustments by life insurers are not to be considered unfair in circumstances in which the premium increase is within the limits and under the circumstances specified in the policy, then:

³⁴ Para 5.105

- a. an onus should be placed on the life insurer to back such increases with proper assessments of risk including real health, actuarial or statistical data that are reasonable to rely on; and
- b. such premium increases and the circumstances specified should be clearly explained to the consumer in a transparent manner, explicitly and specifically highlighted at purchase, renewal and at the time of any variations or premium increases.

With respect to the latter point, Financial Rights has heard from many consumers who are shocked and upset by the huge increases in their life insurance premiums as they age. These terms are regularly not spelt out to a consumer at purchase, and for all intents and purposes hidden amongst huge Product Disclosure Statements.

There is ample evidence about consumer problems with the premiums of poor value life insurance products such as funeral insurance. The 2015 ASIC Report into funeral insurance³⁵ found major problems with the design and distribution of these products. The report found that premiums increased steeply with age, with the structure of the policies creating the very real possibility that a consumer would pay more in premiums than the policy is worth. Consumers also drop the policy because of a lack of affordability before they ever get to claim. While 51.2% of consumers with funeral insurance were aged between 50-74, 50% of Aboriginal and Torres Strait Islander consumers with funeral insurance were under 20. Young people are extremely unlikely to need to rely on funeral insurance. This is also a product that becomes less valuable for consumers the longer they have the policy, with sales to these young consumers indicating significant problems with the distribution of products. Funeral insurance companies are preying on communities and selling products that are poor value, especially when compared with funeral bonds, pre-paid funeral options, some life insurance products or simple savings. Consumers often do not understand key features of the product including in particular, the increasing of premiums. Unfair sales tactics and unfair pressure are placed on vulnerable consumers, exploiting genuine concerns for the financial future of their families in the name of increasing sales.

Under the Life Insurance Code of Practice, Life Insurers have committed to providing

documentation that clearly explains ...

*h) a description of how the price you pay is structured, for instance whether the cover has stepped or level premiums or a single premium;*³⁶

However this is minimal information and does not go to the heart of what the consumer actually needs to fully comprehend what they are buying and the premium that they will be paying.

To be transparent, open and fair in their dealing with consumers, life insurers need to provide the following key information about their premiums:

- the maximum potential premium payable;

³⁵ ASIC Report 454, *Funeral Insurance: A Snapshot*, 29 October 2015 <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-454-funeral-insurance-a-snapshot/>

³⁶ Clause 3.4(h) of the Life Insurance Code of Practice

- a projection of the premium payable over time before a consumer makes the purchase;
- details on how much an annual premium will increase each year;
- disclosure as to whether that the total amount of premiums payable under the policy has the potential to exceed the benefit amount, if applicable; and
- where price or premium is referred to, they must give a realistic impression of the overall costs that a consumer would be liable for.

Life insurers rarely if ever provide this information leading to significant shock, upset and annoyance from consumers. Life Insurers should provide this information about premiums. Anything less than this leads to consumers being kept in the dark about what a life insurance product and its premiums actually involves.

Recommendations

17. If unilateral premium adjustments by life insurers are not to be considered unfair in circumstances in which the premium increase is within the limits and under the circumstances specified in the policy, then:
- a. an onus should be placed on the life insurer to back such increases with proper assessments of risk including real health, actuarial or statistical data that are reasonable to rely on; and
 - b. such premium increases and the circumstances specified should be clearly explained to the consumer in a transparent manner, explicitly and specifically highlighted at purchase, renewal and at the time of any variations or premium increases.

Transitional Arrangements

29. Is a 12 month transition period adequate? If not, what transition period would be appropriate?

30. Are the transition arrangements outlined above appropriate or should alternative transition arrangements be considered?

We believe that the 12 month transition period is reasonable. We believe that ASIC should engage with both life and general insurers as soon as possible to assist them with the process

as soon as possible as recommended by the Parliamentary Joint Committee on Corporations and Financial Services Life Insurance Industry report³⁷.

We also believe that the proposals to apply unfair contract term provisions to the following is also reasonable:

- **New contracts:** *New provisions will apply to all new contracts originally entered into on or after the commencement.*
- **Renewed contracts:** *If a contract that was originally entered into before the commencement is renewed, the new provisions will apply to the contract as renewed, on or after the day on which the renewal takes effect.*
- **Contract variations:** *If a contract was originally entered into before the commencement is varied on or after the day, the new provisions apply to the term as varied, on or after the day the variation takes effect. Other terms of that contract will not be made subject to the UCT provisions because of the variation, until such time as the contract is renewed.*

One issue we wish to note is the fact that if a term is found to be unfair and continues to be active in grandfathered contracts not subject to the unfair contract terms regime, the question is then raised as to whether an insurer will be acting in utmost good faith if they do not remove or amend the clause from these grandfathered contracts. The issue is not necessarily whether the term can be deemed unfair under the duty of utmost good faith rather the issue is whether an insurer with the explicit knowledge that a term is considered unfair (under the unfair contract terms regime) is acting in a way that is less than honest, by withholding this information from the insured and not acting to change those terms. We would argue that these policyholders have a right to know that their insurance contract features a term that has been found to be unfair. At the very least, the act of withholding this information could arguably be deemed an act of bad faith from the insurer, as could maintaining this term in these contracts with the full knowledge that it is unfair.

Recommendations

18. Consideration needs to be given to whether whether an insurer is acting in utmost good faith if they do not remove or amend a term that has been found to be unfair from grandfathered contracts.
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³⁷ Recommendation 3.2 of the Parliamentary Joint Committee on Corporations and Financial Services Life Insurance Industry Report, March 2018 states “The committee recommends that ASIC engage with life insurers to begin removing unfair terms from life insurance contracts as soon as possible.”

31. What will insurers need to do during the transition period to be ready to comply with the new UCT laws?

We strongly believe that insurers need to examine all their contracts for unfairness. An unfair contract terms regime should act as preventative measure to ensure that insurers meaningfully assess their underwriting risks and legitimate business interests when drafting policy terms. The regime is designed to encourage prevention rather than cure. It should act as an incentive for insurers to ensure that they comply with the law.

32. Should tailoring specific to either general and/or life insurance contracts be considered?

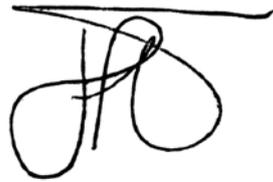
No.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on [REDACTED].



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