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20 April 2010

[VIA EMAIL – [ICAReview@Treasury.gov.au](mailto:ICAReview@Treasury.gov.au)]

Unfair terms in insurance contracts: Options Paper  
Corporations and Financial Services Division  
Department of Treasury  
Langton Crescent  
**PARKES ACT 2600**

Dear Sir/Madam

## **Unfair terms in insurance contracts – Options Paper**

Thank you for providing Suncorp the opportunity to comment on the Options Paper that has been released in response to the Senate Economics and Legislation Committee's findings in September 2009, in relation to the interaction between Section 15 of the Insurance Contracts Act (**ICA Act**) and the new Australian Consumer Law provisions.

Suncorp supports the introduction of unfair contract terms provisions into consumer protection law in general in Australia (as evidenced by submissions made on this topic to the Productivity Commission and Treasury) for non insurance related contracts.

However, in relation to insurance contracts, the ICA Act provides adequate and often pioneering (both nationally and internationally) consumer protection. The amendments to the Act which are currently before parliament are the next step in this evolution. Suncorp is of the view that given the existence of the extensive and insurance-specific consumer remedies available under the ICA Act, the unfair contract term provisions are neither necessary nor desirable in relation to insurance contracts.

It is important to note that Suncorp does not believe that it has unfair terms in its insurance contracts. To do so would be unjust to the consumer and out of alignment with Suncorp's stated purpose of "to help people build and protect their dreams". In making this submission we are instead primarily concerned with the possibility of the introduction of another layer of regulation for insurance contracts and the uncertainty and complexity that could result.

Please find the detail in regards to our feedback on the Options Paper attached. In summary, Suncorp believes that the ICA Act is working effectively and that little (if any) additional consumer protections would be achieved by introducing the Australian Consumer Law unfair contract terms provisions into insurance contracts, especially with the current amendments that are before parliament in relation to ASIC's powers under Section 11 of the IC Act and the extension of the duty of utmost good faith to third party beneficiaries. It is our view that overlaying an additional relief regime would create complexity and confusion, with no clear consumer benefit.

It needs to be recognised that the examples of 'unfairness' cited by various consumer representatives in response to the Senate Economics and Legislation Committee look to be issues associated with the application of terms (for which remedies are already available under Sections 13,14 and 54 of the IC Act) rather than the term itself being unfair. Avenues for ADR in this scenario are readily available free of charge for consumers. A decision made by the Financial Ombudsman Service is binding on the general insurer, in regards to that application, which provides the consumer a robust mechanism of redress. If the consumer disagrees with the decision, they can then continue to pursue action through the court system.

In terms of preference for the Options that are suggested under the Options Paper, Suncorp's strong preference is to maintain the status quo. The IC Act, including the proposed amendments made to ASIC's powers and the extension of Section 13 and 14 to third party beneficiaries, provides sufficient and effective consumer protection measures for consumers. As you will see from the attached response, there appears to be no other benefit to the consumer to inject more requirements (complications) in respect of insurance contracts.

However if as a result of this process it was felt that there are issues of unfair contract terms in the insurance industry that need to be addressed, then self regulation is Suncorp's preferred option. The General Insurance Code of Practice (**Code**) has proven to be a very effective mechanism to regulate general insurers. The latest review of the Code – which involved stakeholders from across government, agencies, consumer advocates and the insurers – will result in the enhancement of the protection offered by the Duty of Utmost Good Faith (Recommendation 9).

Suncorp supports the Insurance Council's submission in regards to this options paper

If there is any additional information you require, please contact Annabelle Butler (03 8520 1623) in the first instance, or Fiona Thompson (02 8121 1506).

Yours sincerely



Chris Cunnington

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Cc Fiona Thompson, Executive Legal Manager, General Insurance  
Annabelle Butler, Executive Manager, Public Affairs and Stakeholder Management , General Insurance

## **Suncorp's Response to the Unfair Terms in Insurance Contracts – Options Paper**

### **Question 1**

As stated prior the examples that were raised by the Insurance Law Submission to the Senate Economics Legislation Committee in relation to AAMI insurance policies were a matter of application rather than the terms itself.

Additionally, from an IDR perspective, less than 1% of consumers raise utmost good faith as an issue in disputes with their insurer. From Suncorp's experience with FOS, FOS have on occasion (2-3 times in the last 5 years), said that a Suncorp brand has bordered on breaching the duty, but we are not aware of any occasion where they have said that we actually have.

Due to the lack of IDR/EDR cases involving a breach of the Duty of Utmost Good Faith we conclude that this is not a serious issue for consumers. Further imposing an additional legislative regime on insurers will only provide complexity in relation to the application of law to an insurance contract without any real benefit to the consumer.

### **Question 2**

Corporations Act 2001 – Section 912A requirement for an Australian Financial Services Licensee to act “efficiently, honestly and fairly”.

Corporations Act 2001 – Section 912A(2)(a) - ADR Services – Australian Financial Services Licensees are required to be a member of an ASIC approved EDR scheme – plus to have an IDR scheme which complies with standards, and requirements, made or approved by ASIC.

General Insurance Code of Practice – recent recommendations (recommendation 9) will highlight the duty of utmost good faith. Compliance to the Code is monitored by FOS and industry compliance is reported publicly by FOS on an annual basis. Additionally, the AAMI business reports on its compliance to the Code within its annual Sustainability Report - please see [aami.com.au](http://aami.com.au) for a copy.

### **Question 3 - 8**

#### **Preliminary Impact Statement Assessment**

##### **Status Quo**

As stated, there appears to be little evidence of unfair terms in insurance contracts. However, if there were, FOS is able to apply various remedies and mechanisms that already exist within the Insurance Contracts Act, for example:

- Section 13, 14 Duty of Utmost Good Faith (which arguably goes beyond contractual matters, therefore providing greater protection than the question of whether a particular term is unfair or not).
- Section 53 restricting the right for an insurer to unilaterally vary the terms of an insurance contract to the prejudice of the insured (including price).
- Section 54 which limits the extent to which an insurer may refuse to pay a claim by reason of an act or omission of the insured. Additionally Sections 28, 31 and 56 limit an insurer's right where there has been failure by the insured to comply with the Duty of Disclosure, the making of a pre-contractual misrepresentation or a fraudulent claim.

- Section 58 requires a notice to be provided to the insured in respect of renewal insurance covers and provides for the cover to continue where that requirement is not met.
- Sections 59, 60, 62 and 63 limit circumstances in which an insurer can terminate or cancel an insurance contract.

The above list is not exhaustive, however application of these Sections (and others such as the requirements on insurers under the Corporations Act) appear to meet the legislative intent behind the Australian Consumer Law. Therefore there appears to be no reason to change the Insurance Contracts Act to build in unfair contract terms provisions as the protections are already there. Further imposing an additional legislative regime would just create complications without any real consumer benefit.

As stated previous in relation to the lack of use of Section 14 by consumers, Suncorp submits on its own evidence (from its IDR statistics) that it is rarely applicable. Cost should not be an issue for consumers as they have the FOS service readily available to them free of charge. Insurers under Section 912 (2) of the Corporations Act, the Code, and ASIC's RG 165, are required to inform the consumer of the IDR and FOS services, once a dispute arises. Therefore consumers are kept well informed of their rights to redress if they have an issue with a term.

**In conclusion, for the above reasons maintaining the status quo is Suncorp's preferred option.**

#### **Option A – Permit the unfair contract terms provisions of the ASIC Act to apply to insurance contracts**

One of our major concerns in regards to this option is around the remedies available under the ASIC Act (**Act**) and the potential for voiding of an unfair term. The Act allows for ASIC to apply for various orders for the benefit of non-party consumers, including "non-party redress", which includes the varying and avoiding of the term in other contracts. In an insurance situation this remedy provides for a great deal of uncertainty. The cost of an insurance contract is based on the risk of a claim being made and the potential cost if a claim were made. Although it is thought that the majority of terms of an insurance policy will be the "main subject matter" of the contract – including exclusions, and therefore outside of the unfair contract terms provisions; having any form of uncertainty attached to the cover means it will be more difficult for insurers to price risk accurately. Potentially this issue could also flow on to increases in premiums and adversely affect reinsurance arrangements. The latter of these is definitely a concern from a prudential insurance risk perspective. We suggest that Treasury seek advice from APRA on the likely prudential impacts of diminishing insurance contract certainty for their regulated general insurer institutions.

If as a result of this review it was determined that there is a need to build unfair contract terms provisions into insurance contracts, Suncorp's preferred option would be for this to be done by self regulation or as a last resort by enhancing the existing (insurance specific) remedies available within the Insurance Contracts Act.

**Therefore Suncorp submits that this is not a suitable option.**

#### **Option B – Extend the Insurance Contracts Act's remedies to include unfair contract terms provisions**

As already identified in the Options Paper, it is unclear why insurance contracts should be treated in a different manner from other "standard form" contracts in terms of what is the "main subject

matter” of the contract. This would create a misalignment between the unfair contract terms provisions of the Australian Consumer Law and would increase uncertainty for insurers in regards to the pricing of risk (as outlined above).

**Therefore Suncorp strongly opposes this option.**

#### **Option C – Enhance existing Insurance Contract Act remedies**

Whilst this option is more attractive than the two above, as stated previously there seems to be little need for this change.

We would, however, oppose any change being made to the onus of proof for Section 14. Such a move could impose a significant cost and administrative burden on insurers which cannot be justified given the lack of genuine evidence of unfairness existing in insurance contracts.

Therefore Suncorp opposes this option.

#### **Option D – Encourage industry self-regulation to prevent use of unfair terms by insurers**

The General Insurance Code is an effective mechanism for self regulation in the insurance sector. This can be demonstrated by the few systemic issues that FOS identifies through its administration of the Code on an ongoing basis.

Although the Code has already been strengthened by Recommendation 9 in relation to the Duty of Utmost Good Faith, Suncorp is open to re-examining the Code in the context of the Australian Consumer Law to ensure that the provisions of the Code fully reflect the concept of fairness.