

24 August 2018

Manager, Insurance and Financial Services Unit  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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

Dear Sir/Madam

## Unfair Contract Terms – Insurance Contracts

Suncorp Group (Suncorp) welcomes the opportunity to provide a submission in response to consultation on the *Extending Unfair Contract Terms Protections to Insurance Contracts* Proposals Paper (the Proposal).

Suncorp offers a range of financial products including general insurance, life insurance, banking and superannuation through various distribution channels. As such, the Proposal affects Suncorp and its customers in various ways.

Suncorp has previously advocated that Unfair Contract Terms (UCT) do not need to be extended to insurance contracts due to the already strong protections afforded by the *Insurance Contracts Act* (IC Act), particularly the duty of utmost good faith (UGF) provisions and section 54. However, if this reform is to proceed, it is essential it does not adversely impact the availability of affordable and accessible insurance products for our customers and the broader community. We want to ensure the reforms are workable, do not impose an unreasonable compliance burden, and do not result in the limitation of choice for consumers.

Suncorp takes the following position on key aspects of the Proposal:

**Method of Amendment** – Suncorp believes the most sensible option for extending UCT protections to insurance contracts is to introduce UCT into the IC Act and *Life Insurance Act*. Tailoring UCT protections to accommodate and reflect the specific features of insurance contracts will be necessary. For example, careful consideration will need to be given to how UCT protections interact with UGF (which is paramount in all insurance contracts) and prescribed contracts.

**Main Subject Matter** – Suncorp does not support the ‘main subject matter of the contract’ being narrowly defined to mean a term that describes what is being insured. Suncorp considers the ‘main subject matter of a contract’ should be consistent with the treatment in other jurisdictions, such as the European Union and UK, where it is defined to mean the terms which clearly define or circumscribe the insured risk and the insurer’s liability.

**Upfront Price** – Suncorp agrees that terms setting the upfront price of an insurance contract should be excluded from review under any UCT regime. This includes the excess, deductible, instalment payments, premium adjustments for changes in cover and any other in-built costs, and by extension any term which deals with when any of these are to be paid.

**Meaning of Unfair** – Suncorp submits that it is unnecessary to tailor the definition of unfairness to insurance contracts and the approach to unfairness taken in the ASIC Act and Australian Consumer Law should apply to insurance contracts.

**Examples of Unfair Terms** – Suncorp does not support examples of unfair terms being included in the IC Act (or any other legislation) dealing with UCT for insurance contracts.

**Remedies** – Voiding an unfair contract term should not be the only remedy. Suncorp supports, in principle, orders for other remedies depending on the circumstances.

**Transitional Arrangements** – Due to the nature of renewal cycles and reinsurance arrangements a 36-month transitional period for any UCT regime will be required to allow considered review of insurance contracts and implementation of any necessary changes.

In this submission we will also highlight the following:

- The importance of maintaining affordable and accessible insurance products;
- The important role of dispute resolution services to address customer complaints and decide on remedies;
- Case studies to highlight the unintended consequences of the Proposal;
- Recent industry reform including the General Insurance Code of Practice and the Life Insurance Code of Practice; and
- The risk of implementing reform before the outcome of the Royal Commission and the impact of creating a confusing and conflicting regulatory environment.

Finally, more detailed feedback on the Discussion Questions can be found at **Appendix A**.

### **Affordable and Accessible Insurance Products**

The community's ability to transfer risk onto insurers is a critical component of Australia's financial system. A key strength of the insurance industry in Australia is its accessibility and affordability. Australia's general insurance industry sells over 80 per cent of its retail insurances directly. This allows the industry to sell products on a mass scale which enables efficiencies in the market that are not realised elsewhere. Customers can easily phone an insurer or go online and take out a policy to protect their most important assets. Products like home, car and travel insurance are built for everyday needs, and are generally understood by consumers. This has kept the market competitive and, importantly, affordable. While improvements to the industry are welcome, it is essential that any further requirements on insurers that may be imposed by the proposed UCT reform does not put this successful model at risk.

We also note the Government's original Proposal Paper on the proposed Design & Distribution (DDO) regime commented that most classes of general insurance can be classified as 'simple', and agreed that general insurance is better understood by customers.<sup>1</sup>

Compared to general insurance, life insurance is more complex and not as well understood by customers. As such, and because every customer's circumstances are different, insurers promote affordability and accessibility through a range of coverage options and purchasing channels – including no-advice direct products, retail products sold through financial advisers, and group insurance products.

While most Australians insure their homes and cars, underinsurance has long been a concern in a life insurance context. In 2015, the median level of life cover in Australia met just 61 per cent of basic needs, income protection met only 16 per cent of needs, and total and permanent disability cover met only 13 per cent of needs.<sup>2</sup> Affordability and accessibility of life insurance products are key to resolving this issue. Further, consumers tend to focus on the cost of premiums when purchasing insurance, more so than the scope of coverage.<sup>3</sup> It is important that the proposed UCT reform does not exacerbate the problem of underinsurance through an increased level of uncertainty for insurers that necessitates higher premiums or a reduction in coverage options.

<sup>1</sup> Page 11, Design and Distribution Obligations and Product Intervention Powers Proposal Paper, The Treasury

<sup>2</sup> Rice Warner *Underinsurance in Australia 2015 report*. <https://www.smh.com.au/business/consumer-affairs/underinsurance-survey-finds-38-per-cent-of-families-have-no-life-insurance-20170518-qw7m34.html>

<sup>3</sup> ANZ Survey of Adult Financial Literacy in Australia October 2011, <http://www.anz.com/resources/f/9/f9fc9800493e8ac695c3d7fc8cff90cd/2011-Adult-Financial-Literacy-Full.pdf.pdf?CACHEID=f9fc9800493e8ac695c3d7fc8cff90cd>

Finally, the proposed UCT model appears to run counter to the Government's other priorities in financial services reform, including improving insurance affordability, financial inclusion, reduction in underinsurance and improved disclosure. As drafted, the Proposal has the potential to drive up costs, and may *reduce* consumer choice. If insurers cannot rely on terms that fundamentally set the structure and scope of an insurance contract then there will be pressure on claims costs, affordability and ultimately our ability to continue offering insurance products. A balance must be struck so that the proposed UCT reform does not undermine the strength of the industry that allows us all to transfer risk easily and efficiently.

## Dispute Resolution

When considering the calls for these reforms, it is important to remember that the vast majority of insurance claims are successfully processed every year. Further, there are strong dispute resolution mechanisms available when there are problems – both through insurers' own dispute resolution frameworks (as described in the ICA's *General Insurance Code of Practice* and the FSC's *Life Insurance Code of Practice*), and through independent external dispute resolution schemes (such as the Financial Ombudsman Service (*FOS*), which will shortly become part of the Australian Financial Complaints Authority (*AFCA*)).

In 2016/17 over 41 million<sup>4</sup> retail general insurance policies were sold, and 96 percent of retail insurance<sup>5</sup> claims were accepted. The remaining four percent were either withdrawn, were fraudulent or declined. Similarly, a 2016 ASIC report on Life insurance claims noted that, 90 per cent of life insurance claims are paid in the first instance, and 96 per cent in the case of death claims.<sup>6</sup> Additionally, only ~3 per cent of FOS claims in FY17 related to life insurance.<sup>7</sup> As with every industry, let alone an industry with such scale, there are cases of poor handling of claims, and as such the insurance industry has in place a strong dispute resolution framework to provide fair and balanced outcomes.

It is interesting to note that of the seven case studies published by the Consumer Action Law Centre (CALC) in their Report '*Denied*'<sup>8</sup>, the majority were resolved directly with the insurer or through FOS. Whilst, consumers may not always find dispute resolution an easy process, there have been important reforms to improve customer outcomes, including the establishment of the AFCA, proposed improvements to claims handling and complaints processes as part of the current review of the *General Insurance Code of Practice*<sup>9</sup> and the introduction of the *Life Insurance Code of Practice*, which includes claims and complaints handling processes.

The existing mechanisms and the availability of AFCA (which is intended to give a broader range of consumers access to external dispute resolution and which will have greater jurisdictional limits) must be taken into consideration when extending UCT protections to insurance contracts, so that a balanced approach for insurers and consumers is achieved.

Finally, while it is critical for insurance customers and insurers to have access to authorised dispute resolution services, there is potential for consumers to use the introduction of UCT regime as an opportunity to dispute adverse decisions in multiple forums (such as FOS/AFCA, state based tribunals and through the courts). This may result in inconsistent dispute outcomes for consumers and also increased complexity and confusion in respect of dispute resolution processes for insurers and consumers. Dispute resolution avenues available to consumers must be considered holistically when considering these reforms.

## Case Studies

The following case studies outline the potential unintended consequences of finding certain terms to be 'unfair' and therefore, not permissible.

These examples support why there needs to be a broader definition of 'main subject matter' and also why terms setting the upfront price and when it should be paid need to be excluded from review under any UCT regime.

<sup>4</sup> <http://codeofpractice.com.au/assets/documents/CGC%20Report%20-%20General%20insurance%20in%20Australia%202016-17.pdf>

<sup>5</sup> <http://codeofpractice.com.au/assets/documents/CGC%20Report%20-%20General%20insurance%20in%20Australia%202016-17.pdf>

<sup>6</sup> <https://download.asic.gov.au/media/4042220/rep498-published-12-october-2016a.pdf>

<sup>7</sup> <https://www.fos.org.au/custom/files/docs/fos-annual-review-20162017.pdf>

<sup>8</sup> [https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180111\\_Denied\\_Digital-Report.pdf](https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180111_Denied_Digital-Report.pdf)

<sup>9</sup> <http://www.codeofpracticereview.com.au/>

## Life Insurance – Guaranteed Acceptance

Traditionally, life and disability insurance products have used medical and financial underwriting as their primary form of risk mitigation. Depending on a customer's individual circumstances, insurers may apply loadings, limitations or other modifications to limit the risk but still offer cover to customers. Limitations may include an exclusion for claims resulting from a condition that the consumer had before the contract of insurance was entered into (a 'pre-existing condition'). For consumers with some medical or family history health issues, life and disability insurance cover may be limited, expensive, or not available. A customer in this position may be able to find a product with guaranteed acceptance, which allows customers who meet eligibility criteria to obtain cover without medical and financial underwriting.

The commercial sustainability of guaranteed acceptance products relies on the limitations contained within the policy, which may be in the form of a pre-existing condition (PEC) clause or a general limitation. The asymmetrical nature of knowledge in the case of guaranteed acceptance products favours consumers, who benefit from no requirement for initial underwriting in exchange for policies with specified limitations and exclusions. Limiting the certainty that insurers have with respect to general limitations and exclusions in guaranteed acceptance products puts the viability of these products at risk. If limitation or exclusions clauses cannot be relied upon, customers could take out a policy online as they fell ill, and insurers would be bound to pay the claim. In practice, insurers would need to substantially change pricing models and product design, or withdraw the products from the market, all of which exacerbates Australia's underinsurance gap.

## Payment of Excess

Upfront payment of excess is cited in the Proposal as being potentially 'problematic'.

Taking a home claim as an example, there are several ways that a claim can be paid and finalised. In the case of cash settlement, the excess is often deducted from the payout. In this case there is no room for fraud or avoidance of payment. If, however, the insurer resolves the claim by engaging a contractor to conduct the repair work, there is the possibility for the insured to fail to pay the excess unless receipt of the excess is tied to the commencement of repair work.

In the overwhelming majority of cases our customers will not seek to avoid payment, however it does occur. The term reduces this moral hazard, and the frequency of non-payment of excess. This in turn reduces claims and operating costs, as the insurer does not need to expend further resources on recovery action.

Suncorp acknowledges that not every customer is able to pay the applicable excess when they may need to make a claim, particularly after a natural disaster. That is why we have processes to identify customers experiencing financial hardship, and provide alternative methods of payment, including via instalment payments. We also have products specifically designed for people on low-incomes that don't require the payment of excesses. In addition, insurers will often make an immediate cash payment to customers who have just had their house damaged by a natural disaster to assist with food and supplies.

As with many of the terms raised as being unfair, concerns regarding upfront payment of excesses are properly addressed through improved claims processes, and will be assisted by the new General Insurance Code of Practice (with its particular focus on vulnerable customers and specific provisions regarding financial hardship). The answer is not to remove a term that prevents fraud and puts downwards pressure on claims costs, operating costs and assists with insurance affordability.

## Third Party Details

Another example used in the Proposal is the requirement to provide the name, registration and contact details of the at-fault driver in the event of a motor claim. It is important to clarify this term as it is not fairly represented in the Proposal.

In the case of Comprehensive Motor Vehicle Insurance, a customer should always be able to claim for damage to their vehicle regardless of whether they are able to obtain the details of the at-fault party. If, however, they cannot provide the details of the at-fault party, then the customer will typically be required to pay an excess. This is an important feature of motor policies and guards against moral hazard and fraud for two key reasons. Firstly, if a customer can obtain an at-fault driver's details it will enable the insurer to undertake recovery action and reduce costs. Secondly, it reduces fraudulent claims where a customer might allege that an at-fault driver caused the damage when in fact it was a single vehicle accident. While these cases might be infrequent, in order to keep premiums at a reasonable price it is essential that insurers can enforce these terms.

In the Consumer Action Law Centre's *Denied*<sup>10</sup> Report they provide an example of Uninsured Motorist Extension (UME). This is an innovative offer that insurers provide to customers who have *Third Party* Property Motor Insurance, and provides coverage for accidents where damage is caused by an uninsured at-fault party. Typically, an insurer will offer around \$5000 of cover. In the case of UME, insurers are pricing the product based on the insurer's ability to recover from the at-fault party, and as such the at-fault party's details are required. For most insurers this is clearly outlined in the policy documentation provided to customers.

Insurers understand the difficulties of obtaining this information particularly where road rage is involved and they will often only require registration details from the insured.

Again, this raises the question of the Government's priorities. Insurers could provide cover under UME extensions in cases where the insured cannot obtain the at-fault driver's details, however there would be an impact to premiums. Worse still, if a court were to find the term unfair then it is likely insurers would stop offering UME extensions all together.

## Recent Industry Reform and Codes of Practice

It is also important to note that the insurance sector is actively improving how it serves its customers through the Review of the General Insurance Code of Practice. The Revised Code, expected to commence from 1 January 2019, will include:

- Specific measures for customers experiencing vulnerability, including a requirement to have documented processes regarding financial hardship, and requirements to provide training on vulnerability to staff and service suppliers. There will be a new requirement to have a Family Violence policy, as well as best-practice guidance on family violence and for dealing with people experiencing mental illness.
- Mandatory standards for the use of investigators, more transparent claims handling, and an overhauled complaints-handling framework that builds on feedback from consumer advocates.
- New requirements to improve disclosure and transparency, including guidance for clarity of policy wording and year-on-year premium disclosure on renewals.
- The Code is intended to commence on 1 January 2019, with a two-year implementation period. The ICA intends to seek ASIC approval for the Code.

In addition, Suncorp has been proactively updating its Product Disclosure Statements (PDSs) to improve consumer outcomes, this includes:

- Offering free hire cars to not-at-fault drivers after accidents, and speeding up vehicle repair times by enabling use of quality recycled parts; and
- Reviewing our direct life insurance and travel insurance policies to provide coverage for mental health conditions.

The Financial Services Council (FSC) is also working on the second version of the Life Insurance Code of Practice which will seek to enhance product design requirements and claims management.

These measures will continue the industry's commitment to improving interaction with customers and reducing referrals to dispute resolution services.

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<sup>10</sup> [https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180111\\_Denied\\_Digital-Report.pdf](https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180111_Denied_Digital-Report.pdf)

## Timing and outcome of Royal Commission

As Treasury would be aware, the Royal Commission (RC) into Misconduct in the Banking, Superannuation and Financial Services Industry is scheduled to consider insurance matters in September 2018. The RC provides the opportunity to fully consider any issues within the industry methodically and objectively. In our view it would be premature to finalise any UCT protections for insurance contracts prior to publication and consideration of the RC's findings.

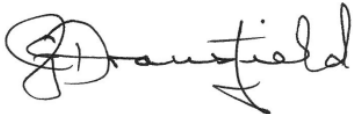
In addition, the Federal Government has continued to progress the development of the DDO and Product Intervention Powers (*PIP*) by releasing exposure legislation in December 2017 and re-releasing it in July 2018. It is still unclear how those reforms will interact with the proposed UCT protections in particular, whether a finding of an unfair term, will mean the insurer would need to reconsider their Target Market Determinations and other requirements of the DDO reforms. Again, those proposals appear to be pre-empting the outcome of the RC, despite its focus on distribution methods and customer outcomes. It is essential that there is harmony and consistency between the various reforms currently proposed and which may arise from the RC's recommendations (when made).

## Conclusion

Thank you for the opportunity to further contribute our views on this reform. At Suncorp we are consistently striving to improve customer outcomes and we would be happy to brief you in more detail on our processes.

Should you have any questions or require further information, please do not hesitate to contact Jonathan Davies our Senior Manager – Government, Industry and Public Policy on [REDACTED] or by email to [REDACTED]

Regards,



**Gary Dransfield**  
CEO Insurance  
Suncorp Group

**Appendix A** – Feedback and recommendations on discussion questions

## APPENDIX A: Feedback and recommendations on discussion questions

### **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?**

No. Suncorp believes that the existing UCT laws should be introduced into the IC Act and tailored to take into account the specific features of insurance contracts. If UCT laws in the ASIC Act were to apply to insurance contracts, without being tailored, this could create uncertainty to existing IC Act obligations and duties, particularly remedies.

Historically the IC Act was created to deal with the complexity of insurance contracts and to provide a bespoke regulatory solution, this recognises the unique nature of insurance contracts in contrast with basic banking and other financial services. Suncorp does not see value in changing that approach. It also has the advantage of ensuring uniform regulation of insurance contracts are contained within the IC Act. We also emphasise the importance of ensuring any UCT protections take into consideration the existing duty of utmost good faith (UGF) provisions under the IC Act, which has the potential to overlap with UCT protections. Clarity needs to be provided as to how, amongst other things, UGF and prescribed contracts (events and exclusions) sit alongside any UCT protections.

Similar arrangements would also be needed to be applied to the Life Insurance Act.

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

#### **Disadvantages:**

- Uncertainty for the insurer in relation to risk coverage:
  - The proposed test of what is an acceptable term is said to be an insurers legitimate interest is 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.'* It is not clear what will be considered as *'reasonably reflects the underwriting risk'* or *'disproportionately or unreasonably disadvantage the insured'*.
  - It is important to note that some of terms referred to as 'unfair' in the Proposal are relied on by the insurer in order to accept the underwriting risk and at the same time pass on benefits to the insured for instance, in the form of reduced premiums (compared to if that term was not present).
- Likely to lead to additional arguments from claimants that a term is unfair and cannot be relied on. This would result in:
  - More resources required for Internal Dispute Resolution (IDR) and AFCA;
  - A conservative approach taken by insurers resulting in reduced product offering; and
  - Inflationary pressures on premiums due to the potential voiding of terms that contain claims costs (refer to case studies).
- Significant impact on the insurer if a term is deemed unfair resulting in significant project and change costs.
- Problems for life insurance portfolios that implement pricing for average life expectancies and rely upon certain terms and definitions to manage costs around changing understanding of medical conditions and advances in technology.
- Increased compliance uncertainty around existing obligations, duties and remedies under the IC Act.

#### **Advantages:**

- May, to some extent, bring Australia in line with other overseas jurisdictions, however, we note the regimes in other jurisdictions (NZ, UK and Europe) are different in scope to that of the Proposal. The Proposal is arguably broader and more onerous in its current form.

**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).**

Reform to extend UCT to general and life insurance contracts could require insurers to rewrite Product Disclosure Statements (PDS). In the case of Suncorp this will cost approximately \$10 million for our mass general insurance brands (AAMI, Suncorp, GIO, Apia and Shannons) and an additional \$2m to capture all minor products. For our Life Insurance business this will cost in the range of \$1-2 million for our current on-sale products (24 products)

These costs include:

- Review and redrafting of policy documentation;
- Modelling of premiums;
- Reissue of PDS – postal costs;
- PDS reprint cost;
- System development and programming costs;
- Project resourcing;
- Operational impacts/costs due to training requirements; and
- Operational costs due to increased call volumes.

This does not include increases to claims costs as a result of a term being deemed unfair (refer to case studies). At this point we can't quantify what effect this might have on claims costs and premiums. In addition, there would be costs associated with reassessing the risk associated with a product and renegotiating reinsurance arrangements.

The nature of the costs for Life Insurance are not too dissimilar from General Insurance, however significantly more work is required if UCT provisions are extended to our 356 off-sale products.

**4. Do you support either of the other options for extending UCT protections to insurance contracts?**

If the reforms are to proceed, Suncorp supports the amendment of the IC Act to reflect the intent of the final legislated UCT proposal and a similar solution for Life Insurance.

**5. What are the advantages and disadvantages of these options?**

As per Question 2, the Government needs to ensure the new or amended legislation is practical and does not create inconsistencies between regimes.

**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).**

Refer to question 3 and the Case Studies in the body of the submission.

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

Yes, a main subject matter exclusion is absolutely necessary for the efficient operation of insurance contracts.

We note that the previous proposal for the introduction of a UCT regime into the *Insurance Contracts Act*, the *Insurance Contracts Amendment (Unfair Terms) Bill 2013*, included an exemption for the 'main subject matter' of an insurance contract, but did not include any definition of 'main subject matter'. The Proposal Paper does not explain why a definition of 'main subject matter' is now required, nor the basis for suggesting that a narrow definition should be required.



If there is to be a definition of 'main subject matter' in any legislation introducing a UCT regime for insurance contracts, Suncorp would not support a narrow definition of 'main subject matter' for the proposed exclusion. Rather than the proposed narrow definition, we strongly urge Treasury and the Government to model any definition of 'main subject matter' on the approach taken by the EU and in New Zealand.

The European Council Directive (93/13/EEC) on the treatment of unfair terms in consumer contracts includes the following exemption for insurance contracts:

*"...the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer"* (underline added)<sup>11</sup>

As identified in the underlined section above, the EU model acknowledges the unique nature of contracts for insurance, describing the subject matter in terms of risk and liability – concepts that are at the heart of the nature of insurance.

The New Zealand model also addresses the concepts of risk transfer, such as the recognition that terms that "identify the subject matter or risk insured against" (underline added) and those which "exclude or limit the liability of the insurer" are exempt from that regime on the basis that they are reasonably necessary to protect the interests of the insurer.<sup>12</sup>

We also note that the model adopted in the United Kingdom acknowledges that standard-form exclusions in insurance contracts are part of the main subject matter of an insurance contract.

As recognised by the EU, New Zealand and United Kingdom models, the scope of coverage provided determines the price for the coverage offered. Any measures that risk the enforceability of policy terms that define the scope of coverage provided would have significant implications for insurance pricing, and would jeopardise insurance affordability.

The Government's Proposal suggests that a narrow definition of 'main subject matter' should be adopted, suggesting that only a specific person or item – for example a house, a car, or an item of equipment – insured should be deemed to be the main subject matter of the contract. With respect, Suncorp suggests that this overlooks the nature and essence of insurance - *the transfer of risk*.

An insurance contract is not a contract for sale of an item, it is a contract for the transfer of *liability for risk to that individual or item* to the insurer. Accordingly, all terms that define the risk to be transferred should be considered to be terms that define the main subject matter of the contract – including the identification of the individual or item, the scope of the risks covered (such as death or trauma/serious illness in a life insurance context, or fire, theft, third-party liability in a general insurance context) and benefits payable. Crucially, terms that define the risks covered (and therefore transferred) will include the main insuring clause in a policy, policy definitions (such as medical definitions in life insurance policies), extensions of coverage and any exclusions or limitations.

As outlined in the Case Studies set out in the body of Suncorp's submission, adopting a narrow definition of 'main subject matter' could place many of the terms defining the risks transferred under risk. This would have significant negative implications for the future affordability and accessibility of insurance.

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

As outlined above in response to Question 7, Suncorp does not support the narrow definition that has been proposed, as it essentially results in almost all terms of the insurance contract being subject to the UCT regime.

<sup>11</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0013>

<sup>12</sup> [http://www.legislation.govt.nz/act/public/1986/0121/latest/DLM6410742.html?search=sw\\_096be8ed816f6496\\_subject+matter\\_25\\_se&p=2](http://www.legislation.govt.nz/act/public/1986/0121/latest/DLM6410742.html?search=sw_096be8ed816f6496_subject+matter_25_se&p=2)

Suncorp does not consider that the rationale for including a specific definition of 'main subject matter' in any legislation has been explained, nor the basis for the narrow approach proposed.

In the event that a specific definition of 'main subject matter' is to be included in any proposed reforms, Suncorp would support a definition that – as in the EU, New Zealand and United Kingdom models – acknowledges that the subject matter of an insurance contract is the transfer of risk, and that terms of an insurance contract that define the scope of the risk transferred and which are necessary to protect the insurers' interests should be outside the scope of any UCT regime.

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

Yes. Any terms which are excluded from the UCT regime should reflect the special characteristics of General Insurance and Life Insurance. For Life Insurance, the 'main subject matter' should encompass terms that define the scope, extent and timing of cover, as well as any conditions, limitations or exclusions.

As such, we support a broad definition of 'main subject matter' aligned with the EU model.

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

We agree that upfront price should be excluded from the Proposal. This includes the excess, any instalment payments, premium adjustments for changes in cover, discounts and loadings and any other in-built costs – such as fees and charges payable that have been transparently disclosed to the consumer at or before the time the contract was entered into.

We note this is consistent with the UCT regimes in NZ and the UK, where the upfront price is defined broadly.

**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?**

Yes. Excesses or other built in costs (e.g. cancellation fees) should also be considered part of the upfront price.

Currently, many customers are able to exercise a choice to increase their excess in order to decrease their upfront premium, helping with affordability of their insurance product. If the quantum of the excess was to be in scope of the UCT regime it would force insurers to remove this product feature from their offering.

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

Yes, we agree to the upfront price exemption being tailored for Life Insurance. For example, customers may select level or stepped premiums for certain life insurance products. Increases due to selecting a stepped premium should be considered as part of the upfront price.

In addition, Life Insurers should have the ability to unilaterally vary premium to reflect changes in risk for example, increases in a customer's age and smoking status, and also bearing in mind changes to medical technological advances and other factors that may influence pricing.

Also, in Life Insurance there is no excess, but there are waiting or no claim periods. As policies have been priced with built-in waiting periods, we consider that waiting and no claim periods should be part of the upfront price exemption.

**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?**

Provided the policy options meet the requirements for a standard form contract (i.e. the customer cannot negotiate the wording for the option), then they should be a standard form contract and subject to the UCT regime. However,

if the additional coverage (or exclusion) is a bespoke endorsement that has been negotiated with the customer, then the endorsement should only be caught by the UCT regime if it is a standard form contract. Clarity around this point would be beneficial.

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

As per Question 13.

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

No, we believe the existing definition of 'unfair' as outlined in the ASIC Act (s.12BG) is appropriate.

The proposed definition outlined in the proposal is problematic for a number of reasons, specifically:

- it is unclear what "underwriting risk" is intended to cover;
- it does not take into account other risks the insurer is exposed to; and
- that an insurer may pool its risks (e.g. in particular for life insurance purposes, where the life insurer must also consider the interest of other policyowner's of the statutory fund in pricing models.)

**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?**

As per Question 15.

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

As per Question 15.

**18. Do you consider that it is necessary to add specific examples of potentially unfair terms in insurance contracts?**

No. In our view the legislation needs to be principles based. We don't think examples should be 'hardwired' into the legislation as there is potential for them to become irrelevant or out of date. In addition, there would have to be 100 per cent agreement between stakeholders as to whether the term is deemed unfair for it to be included in legislation and doing this pre-empts judicial review. Further, a determination that a term is unfair can only be made taking into account the unique factual circumstances of an individual case.

**19. Do you support the kinds of terms described in the proposal or should other examples be considered?**

No. As per question 18 we do not support any examples in the legislation.

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

As per question 18 and 19.

**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)?**

We do not consider that voidance should be the only remedy, as this may make the matter unsustainable for the insurer or the insured. For instance, if a term was deemed void it could mean the contract cannot operate, and the customer could be left without cover. On this basis it is crucial that any legislation to implement these reforms ensures that a contract remains ongoing to the extent that is possible without an unfair term, but also that there are alternatives provided for where removal of the term would result in the customer losing cover.

In the UK, a range of different remedies are available for different type of goods and services. Remedies appropriate to different insurance arrangements should be considered.

It is likely that the alleged unfairness of a term in an insurance contract would only become an issue between an insurer and insured (or a third-party beneficiary) after a claim has been made (and even then, only where a claim has been wholly or partially denied). In circumstances where a claim has been denied on the basis of a term that is said to be unfair, addressing any unfairness is not just an issue of determining a term to be void and requiring the insurer to pay the claim. In this scenario, the insured would also have gained a benefit from the term, usually in relation to the amount of premium required to purchase the policy. In this regard, where an insurer is asked to pay a claim following avoidance of an allegedly unfair term, the insurer should be entitled to (so far as possible) assess what difference in premium it would have required if that term had not been present at the time of policy inception, and to take any difference into account if the claim is paid. Such an approach is consistent with existing provisions of the *Insurance Contracts Act*.

Further, and particularly in circumstances where consumers gain a benefit from the presence of the terms which consumer advocates and the Proposals Paper suggest may be unfair, it would be detrimental to other customers (many of which will not make claims) if a term was determined to be unfair and automatically void in all other contracts. In this regard Suncorp supports the Proposal Paper's suggestion that any declaration that a term is unfair should only apply to that individual customer's case. Any reforms must consider the effect on other policies in place, and must be prospective so that they do not have a detrimental effect on the coverage provided to other customers.

The Proposals Paper does note the ability of ASIC to seek orders regarding other consumers not a party to a specific contract but are impacted by an unfair term. Suncorp supports the role of ASIC, rather than the Courts, in overseeing the potential effect of an unfair term on the broader community, and in working with insurers to address any concerns identified while not adversely affecting the safety net that insurance coverage provides.

It is also important to consider the reinsurance implications of the application of the remedies. For example, if an exclusion for storm surge were to be found unfair, and voided, this would trigger renegotiation of reinsurance contracts and a likely increase in prudential requirements for the insurer.

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

Yes, provided the outcomes are commercially practicable and in accordance with long established insurance law principles.

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

As per Question 21.

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

Yes. We believe third party beneficiaries should have the same rights and obligations as the insured even though they are not party to the contract.

Careful consideration of existing provisions in the Insurance Contracts Act and Life Insurance Act is needed when drafting this aspect of the reform, as it is already contemplated.

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

As per Question 24.

**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?**

Yes. We consider that there are sufficient protections given that the trustee must act in the best interests of members. It is also not practicable to include Trustees under the UCT regimes, noting the Trustees are the policy holders (not generally consumers) and further, Trustees will generally have the power to negotiate the terms of the group insurance it will offer its members such that the insurance is not a standard form contract.

**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?**

As per previous responses.

**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?**

Yes, we agree. Life insurers should be able to increase premiums as considered appropriate in accordance with the terms of the *Life Insurance Act*. Policy terms defining the methodology for unilateral premium adjustments should be excluded from review.

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

No. We suggest a 36-month transition period would be more reasonable. This would accommodate the challenges of reviewing and redrafting PDSs and policy wordings as well as underwriting criteria and pricing in the current regulatory environment. In particular, if the scope of the UCT proposal is intended to apply to legacy life insurance contracts a substantial project will be required. Finally, it is important to consider the timeframes associated with reinsurance treaties which can range from 12 months to three years.

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

No. The changes should only apply to new general insurance contracts or life insurance contracts entered into after the transition date. It should also not apply to:

- variation/endorsements to existing contracts entered into before the transition date, including those that occur mid-term for a general insurance policy and all existing life insurance policies.
- general insurance policies which are renewed on the same terms as a policy entered into before the transition date.

We note in NZ, renewals and variations to existing contracts entered into prior to the commencement date of the NZ reforms in 2015, are not subject to the UCT regime. A similar approach should be adopted.

Within the transitional arrangements it is also important to explicitly deal with the application of UCT to legacy Life Insurance contracts and clearly define terms such as 'renewal'. For example, the instance of a life insurance customer paying a premium on a policy with guaranteed continuity of terms and conditions up to a defined age should not be classified as renewals.

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

Refer to question 3.

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

As per Question 30.