

From: Mark J. Cohen
To: [Insurance Consultations](#)
Subject: Extending unfair contract terms to insurance contracts
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The Manager
Financial System Division
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Treasury
Langton Cres
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Dear Manager

Extending unfair contract terms to insurance contracts

I refer to the Treasury's consultation paper on extending unfair contract terms to insurance contracts.

I note that I am a Legal Counsel at the Australian Financial Complaints Authority (AFCA), and have relevant market and regulatory experience of the operation of Insurance Contracts, and express opinions informed accordingly.

I stress that these are my personal views only and cannot be attributed to AFCA, unless and until it adopts them.

My submission is relatively brief and straightforward.

For the reasons that bodies such as the ACCC have already expressed on earlier occasions, I welcome the extension of unfair contract provisions found within subdivision BA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act, 2001* (the Act).

That having been said, I have come strongly to the view that the current forms of exemption of insurance contracts more generally from the operation of the Act, no longer is objectively defensible, if it ever was justified on policy or commercial grounds.

The examples which have come out of the Royal Commission into **Misconduct in the Banking, Superannuation and Financial Services Industry** of the failure of the insurance industry to cleave to its obligations, said to flow from the duties upon insurers to act with utmost good faith, only need be stated to illuminate the need for broader legislative reform.

That is to say, there is no good reason for insurance contracts to be insulated from the operation of provisions such as those found within subdivisions C, D & E of Division 2 of Part 2 of the Act dealing with unconscionable conduct, misleading or deceptive conduct, false or misleading representations, or the implication into insurance contracts of warranties of due care and skill.

All of these forms of breaches of proper conduct were disclosed by the Royal Commission to lurk within the breasts of at least some of the participants in the insurance industry in Australia, and the tangible risk in the future that such conduct may recur militates in favour of much more thoroughgoing reform than the mere extension of provisions dealing with unfair contract terms.

In short and in my view, it was not necessarily merely contractual terms which attracted most attention within the Royal Commission, but rather improper *conduct* in financial services which, regrettably, had no ready legislative normative standard or remedy and/or penalties available to those so sorely affected.

I commend to the Treasurer, and the Federal Government the adoption of such a simple programme of broad legislative reform of this type.

Kind regards
Mark J Cohen