

28 August 2018

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

By email: UCTinsurance@treasury.gov.au

Our ref: (KB - LitR)

Dear Manager

Unfair contract terms – insurance contracts

Thank you for the opportunity to provide comments on the extension of unfair contract term provisions to contracts of insurance.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

QLS also assists the public by advising government on improvements to laws affecting Queenslanders and works to improve their access to the law. We also assist legal practitioners to continually improve their services, while monitoring their practices to ensure they meet the high standards set for the profession in Queensland.

QLS's response to the Proposal Paper: Extending Unfair Contract Terms Protections to Insurance Contracts (paper) has been compiled by our Competition and Consumer Law Committee whose members have extensive experience and expertise in this area.

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?**

We support this proposal.

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

We support "unfair contract terms" laws (UCT laws) applying to insurance contracts. Currently, insurance contracts are the only consumer contracts we are aware of that are not subject to this regime. In our view, there is nothing special or unique about insurance contracts that justifies them being exempt from these laws. Further, we do not contend that the duty of

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“utmost good faith” provides consumers with comparable protection, or greater protection over and above the UCT laws.

- 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).**

QLS is not in a position to provide an answer to this question.

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

We support amending section 15 of the *Insurance Contracts Act 1984* (IC Act) to allow the current UCT laws in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to apply to insurance contracts, regulated by the IC Act.

We consider that amending this section will be more effective than enhancing existing IC Act remedies because it will ensure consistency in the way all consumer contracts are treated.

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

We refer to our answer in question 4.

- 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).**

QLS is not in a position to provide an answer to this question.

Proposed Tailoring of UCT Laws for Insurance Contracts

Given our response to question 2, that there is nothing special or unique about insurance contracts that justifies them being exempt from the UCT regime, we consider that the UCT regime should apply to insurance contracts, and that questions about what that means in practice should be left to be determined by the court, as has been the case for every other industry in Australia.

This position (that is, that the UCT regime should apply to the insurance industry in the same way it applies to other industries) is consistent with QLS's longstanding position that, wherever possible, laws should apply across the economy equally.

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

We consider that a “main subject matter” exclusion is necessary. Defining the main subject matter of an insurance contract narrowly means most terms in an insurance contract are likely to be caught by the UCT regime. This is consistent with the objectives of the ASIC Act and the Australian Consumer Law (ACL) that the regime apply as widely as possible.

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

We note the discussion in the paper that the insurance industry considers the proposed definition is too narrow. However, we are of the view that there should be consistency between the definition and its effect, and the objectives of the ASIC Act and ACL. We are also of the view that these decisions are ultimately one for the court to decide.

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

We support these amendments applying to all insurance contracts.

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

This proposal relates to terms setting the contract's upfront price. Excluding the upfront price from consideration by the UCT regime is consistent with how UCT laws have applied across other industries. On this basis, we do not object to the proposal, however, we refer to our previous comment that questions about particular terms should be ultimately determined by the court.

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?

As stated, we consider that what is, or what is not part of the upfront price should be determined by a court.

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

Again, we do not see any reason for these amendments not to be applied across all insurance 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?

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The question of whether a contract is a “standard form contract” is one for determination by a court when deciding whether UCT laws apply. In our view, it is reasonable for a court to consider to whether the consumer’s ability to select between different policy options would satisfy the requirements for a standard form contract, especially when the consumer has no ability to negotiate the terms which underlie whichever policy option they decide upon.

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

We refer to our answer to question 13.

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

For the reasons outlined above, we do not consider 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 do not consider it is necessary to tailor the definition of unfairness in relation to insurance contracts.

We note the New Zealand legislation sets out the types of terms which will be “reasonably necessary in order to protect the legitimate interests of the insurer” and that this is potentially broader than the proposal in the paper, that an insurer’s legitimate interest should be defined as, “*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.*” We say that it should be open to a court to determine terms will be unfair and which will reasonably necessary in order to protect the legitimate interests of the insurer.

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

We do not consider it is necessary to is necessary to tailor a specific definition to either general or life insurance contracts.

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

We refer to our answers above which recommend that these questions should be left to a court to determine, which is consistent with how UCT law are applied in other industries.

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However, it may be helpful to consumers, insurers and regulators if there was some guidance provided in respect of what will be “unfair” from the case law. These examples will not be exhaustive and the individual circumstances in each case will need to be taken into account.

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

The kinds of terms described in the proposal seem appropriate, however, reference should be made to the relevant cases on this point.

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

Again, we do not see any reason for these amendments not to be applied across all insurance contracts.

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)?

On the one hand, only allowing the Court to declare an unfair term void is consistent with how these laws are applied in other areas. However, that could have the effect of declaring the term in an insurance contract void when that term provides coverage which seems to go against the idea of the UCT regime to provide better protection for consumers. Therefore, we favour giving the Court remedies beyond declaring the term void.

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

As stated above, we consider it will be necessary for the court to be able to make other orders, rather than the term simply being declared void.

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

We refer to our previous comments on this point.

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

We have considered the practical issues relating to this proposal. On balance, we do not take issue with the protections applying to third-party beneficiaries.

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

We consider that UCT protections should be consistently applied.

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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?

QLS's view is that there should be consistency in the law. The UCT regime should apply across industry, with particular applications of these laws determined by a court on a case by case basis.

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?

QLS does not consider that there are presently grounds for other tailoring of the UCT laws to take account of features of general or life insurance policies.

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?

QLS considers that changes to premium made following disclosure of a fact not known at time of setting (or resetting) of any premium should not be unfair. However, we consider that particular questions of this nature should be determined by the court.

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

This period seems sufficient; however, advice should be sought from industry on this point.

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

Again we recommend that advice should be sought from industry on this point

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

QLS does not provide an answer to this question. However, we submit that comprehensive information and education be provided to consumers and industry.

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

We refer to our answers to questions 30 and 31.

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If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik by phone on [REDACTED] or by email to [REDACTED]

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ken Taylor', with a long horizontal stroke extending to the right.

Ken Taylor
President