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Manager, Insurance and Financial Services Unit
Financial System Division
The Treasury
Langton Crescent
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Dear UCT insurance secretariat,

Extension of unfair contract terms protections to insurance contracts

The ACCC is pleased to support the proposal to extend the unfair contract terms (UCT) protections to insurance contracts. As identified by the Australian Consumer Law Review and other reviews of the insurance industry, consumers and small businesses who are party to insurance contracts do not have access to the same rights and remedies as consumers and small businesses who enter all other standard form contracts. Instead, the *Insurance Contracts Act 1984* (IC Act) provides different and, in the ACCC's view, lower level protections. Extending the UCT protections to insurance contracts would provide consumers with clear and consistent protection. Since November 2016 UCT protections have covered small businesses and it is important that the extension of UCT protections to insurance contracts also covers small businesses that enter into insurance contracts.

The Proposals Paper appropriately indicated that the Australian Securities and Investments Commission (ASIC) would be the regulator tasked with enforcing UCT protections with respect to the insurance sector. Nevertheless, the ACCC maintains a key interest in this sector as we work closely with ASIC on consumer protection and small business issues, and enforce the UCT provisions under the Australian Consumer Law (ACL). It is on the basis of this experience that the ACCC provides this submission.

While we acknowledge that there may be some small implementation costs associated with extending UCT protections to insurance contracts, we consider that the benefits to consumers and small business of having the UCT protections apply to insurance contracts are likely to greatly outweigh those costs. In our experience, UCTs remain prevalent in standard form contracts and it is extremely important that UCT protections are extended to cover insurance contracts to prevent insurers from relying on such terms.

Consideration of UCT protections in the ACCC's Northern Australia insurance inquiry

In May 2017, the Australian Government directed the ACCC to undertake a wide-ranging inquiry into the supply of residential building, contents and strata insurance in northern Australia due to concerns about affordability and availability of insurance in the region. The ACCC's first interim report is due to the Treasurer by 30 November 2018. A second report is due in 2019 and a final report in 2020.

The inquiry is considering the competitiveness of markets, consumers' access to information, regulatory issues and the key cost components for insurance pricing, especially catastrophe risk. The inquiry is also considering the terms and conditions on which insurance is supplied.

In October 2017 the ACCC published an inquiry issues paper[1] that acknowledged the public debate about the potential repeal of the exemption from UCT protections for general insurance contracts. We invited stakeholders to comment on the impact of the exemption on the affordability and availability of home, contents and strata insurance. Several industry and consumer representative stakeholders addressed the topic in their responses.[2]

The Consumer Action Law Centre; Financial Rights Legal Centre and Legal Aid Queensland argued strongly that the exemption does not benefit consumers and that insurers should be required to ensure that their contracts meet the same basic commercial standards of fairness as other financial products. One insurer, Suncorp, urged caution, submitting that any changes to unfair contract terms protections need to be developed in consultation with industry. The Insurance Council of Australia submitted that it was exploring how unfair contract terms could be incorporated into the IC Act, and how to assist the government and regulators to develop an appropriate solution.

Remedies for unfair terms

As the Proposals Paper notes, the current remedy when a term is declared to be unfair, is that the term is void. The ACCC agrees with the Proposals Paper's conclusion that in some circumstances this remedy may not be appropriate and we support the ability of the court to make other orders. We note that under the ACL, a court can make other orders such as an injunction restraining a party from enforcing an unfair term and ordering compensation or non-party redress. To maintain economy wide consistency of UCT protections the orders that courts can make in relation to insurance contracts should mirror the orders that can be made under the ACL.

Extending UCT protections to insurance contracts is an important step forward in ensuring consumers and small businesses can remedy unfair terms, and providing consistent economy wide protection should be the primary goal of this process. However, as a secondary consideration, we note that for UCT protections to be most effective, the consequences of breaching them must be sufficiently serious to incentivise compliance. In addition to providing the court with discretion to make such other orders, the ACCC considers that the UCT protections under the ACL and the *Australian Securities and Investments Act 2001* (ASIC Act) would be more effective if an express prohibition against unfair terms in standard form contracts was introduced. An option for the regulator to seek civil pecuniary penalties against a business that breaches this express prohibition would provide a strong incentive for businesses to remove unfair terms from their contracts.

We note that a review of the ACL UCT regime is likely to commence in late 2018[3] and the ACCC will advocate for including an express prohibition, civil pecuniary penalties and infringement notices in that review. The ACCC will also advocate for the thresholds for small business to be reconsidered as part of the review. Any changes to the ACL UCT protections arising from that review should be mirrored in the UCT protections in the ASIC Act.

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[1] See https://www.accc.gov.au/focus-areas/inquiries/northern-australia-insurance-inquiry/issues-paper

[2] See https://www.accc.gov.au/focus-areas/inquiries/northern-australia-insurance-inquiry/submissions

[3] See Australian Government response to the Productivity Commission Inquiry into business set-up, transfer and closure, May 2017, page 5. Available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/Final-Government-Response.pdf

Other issues in the Proposals Paper

The Proposals Paper sought comments on a range of other issues. The ACCC does not propose to address all issues, but makes the brief comments below:

- In terms of the options presented for extending UCT protections to insurance contracts, we consider that the option of applying the current laws under the ASIC Act to insurance contracts is most appropriate. This approach provides consistent, economy-wide protection. However, the ACCC also supports adding examples specific to insurance contacts into the ASIC Act to provide greater clarity for both insurers and consumers.
- The exemption for the 'main subject matter of the contract' should be drafted and interpreted narrowly. A broad interpretation would circumvent the intent of UCT protections.
- It is appropriate for the 'upfront price' to include both the premium and the excess payable under an insurance contract.
- An insurance contract should be considered a standard form contract and covered by UCT protections even if the insured can choose from various options for cover. In the ACCC's view, selecting options from a pre-defined list is not akin to negotiating a bespoke contract and the resulting insurance contracts are still offered on a 'take it or leave it' basis. Therefore, they are standard form contracts.
- In considering the meaning of unfair, the Proposals Paper suggests that the legislation could provide that 'a term will be reasonably necessary to protect the legitimate interests of an insurer if it reasonably reflects the underwriting risk accepted by the insurer in relation to the contracts and it does not disproportionately or unreasonably disadvantage the insured'.[4] In the ACCC's view, it is preferable that the test for unfairness remains consistent for all standard form contracts to avoid confusion for consumers and businesses. We note that there are currently no other industry specific modifications to the test for unfairness under the ACL or the ASIC Act, which apply to all other sectors across the economy.

The ACCC strongly supports the extension of UCT protections to insurance contracts and appreciates the opportunity to contribute to this process. If you would like to discuss any issues raised in this submission, please contact Parnos Munyard, Director, Advocacy and Law Reform on [redacted] or [redacted]

Yours sincerely

Rod Sims
Chair

[4] Proposals Paper page 17