

Extending unfair contract terms protections to insurance contracts

Submission to The Treasury

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance is on record as supporting the extension of unfair contract terms (UCT) legislation to life and general insurance contracts.
2. Insurance is in many respects no different, from a consumer perspective, than most other financial services. That is, the contract terms offered are provided on a take it or leave it basis and there is a significant power imbalance between the negotiation positions of the parties. Given this, it is necessary to ensure that consumers are protected.
3. Historically, it has been said that the duty to act in the utmost of good faith as provided by s 13 of the *Insurance Contracts Act* (ICA) is sufficient to impose upon an insurer obligation to act fairly. However, as advocates who represent the interests of hundreds of thousands of consumers, we are in a position to say that s 13 of the *Insurance Contracts Act* does not in reality protect consumers in this way. That is so because most laypeople are not familiar with the duty of utmost good faith, and have no idea how that might apply to them or what remedies they might be able to seek.
4. The unfair contract terms legislation which was introduced in 2010 ought never to have excluded insurance contracts, and we have seen plenty of examples since 2010 where consumers would have greatly benefited from being able to rely on legislation of that sort in respect of insurance contracts.
5. It is in the interests of insurers and consumers to ensure that there is integrity in the insurance industry. The insurance industry should have no concerns about being required to provide insurance contracts which are fair and not unfair.
6. Section 15 of the *Insurance Contracts Act* currently acts in such a way as to prevent the consumer from being able to seek redress under any other Act.
7. The ALA provides the following answers to the questions posed in the proposals paper.

Other options for extending UCT protections

(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?

8. The ALA supports the amendment to s 15. As mentioned in paragraph three above, in reality a consumer's ability to rely on the duty of utmost good faith is relatively limited. Predominantly that is because an ordinary consumer does not (and cannot be expected to) understand the way that the duty of utmost good faith is to be applied at law.
9. Further, we believe it is far from clear that s 13 of the ICA would operate so as to prevent unfair contract terms, let alone provide the sort of remedies that would be available under unfair contracts legislation.
10. It has been said by industry that the s 13 duty of utmost good faith operates such that it would encompass a remedy to consumers for an unfair contract. That being the case, there is little lost by making it expressly clear, rather than relying on the interpretation of an implied obligation under s 13.

(2) What are the advantages and disadvantages of this proposal?

Advantages

11. Currently the statutory framework provides consumers with protection in respect of financial products, but not insurance. There has been no satisfactory explanation for why consumers should not be afforded the same protections in respect of insurance contracts.
12. In addition to this, the Courts have already provided judicial consideration of unfair contracts legislation as it operates with respect to other contracts. Accordingly, there is an existing body of law which can be called upon to understand how the legislation will be applied.
13. Trust in the insurance (and financial sector) has been significantly eroded in recent years and the introduction of protections in respect of unfair contracts will assist in restoring consumer confidence.

Disadvantages

14. Industry has indicated in the past that the introduction of laws of this sort materially changes the risk that had been insured, and that there would be a 'review of pricing' which would need to occur.

15. The ALA does not consider this to be a sensible reason not to proceed with the legislation proposed. The insurance industry believes that it will substantially increase their cost to offer contracts of insurance which do not operate unfairly. We would suggest that should be (if it isn't already) a part of the cost of doing business as an insurer.

(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).

16. As discussed in our answer to question two above, there will be some costs to insurers in terms of ensuring compliance with the laws.

17. It is the view of the ALA that such a cost may be offset by an increase in consumer confidence in the insurance industry. That is, if consumers have the confidence that the insurance cover they are offered will not be unfair, then consumers will be more likely to obtain insurance cover.

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

18. The ALA does not support the other proposed models. One of the benefits of including insurance in the existing unfair contracts laws is that it brings consistency to the way that laws operate for consumers in respect of financial products.

(5) What are the advantages and disadvantages of these options?

19. The disadvantage for consumers of the other options is that it will materially change the way in which the law operates in respect of unfair contract terms for insurance, as compared to other financial products. Again, given the fact of the existing body of law, there is simply no need to create further confusion for consumers as to the different regimes which may apply to different financial products.

(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).

20. Insurers would be best placed to answer this question, but we would respectfully submit that the cost involved is a necessary compliance cost.

Terms excluded from the UCT laws

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

21. The ALA does not support the exclusion of 'main subject matter'.

22. From a consumer perspective, if it were the case that a standard form insurance contract defined the main subject matter in such a way that was unfair (as that term has been considered in the body of case law) as to its operation towards a consumer, then it follows that it is in the interests of justice that any purported unfairness be capable of judicial consideration and/or remediation.

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

23. N/A

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

24. For the same reasons as above, we do not believe there should be tailoring for either general or life insurance.

25. We consider there should be one set of rules for all consumer financial products. We consider that it is in the interests of consumers to have a uniform set of principles to the largest extent possible.

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

26. We support excluding upfront price from being capable of review.

(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?

27. There have been examples in home and contents and general insurance products where an insurance excess is not effectively communicated to a consumer or is so complicated that an average consumer is not able to understand the quantum of the excess which they may become liable to pay in the event of a claim. If a contract requires an excess to be paid which is excessive and not readily understandable to a consumer at the time of entering into the policy, that should be capable of review.

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

28. No

Standard form 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?

29. We agree with this proposal. It would completely defeat the purpose of the unfair contracts regime if the regime excluded any contract where a consumer had options with respect to the coverage that they sought. The vast majority of policies allow consumer choice in respect of certain policy features, and allowing such a carve-out would completely undermine the unfair contracts regime applying to insurance contracts.

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

30. We support this proposal in its current form.

Meaning of unfair

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

31. We support the proposal as stated. That is, a term should be considered unfair if it is not reasonably necessary to protect the legitimate interests of the insurer.

32. The burden of proof should rest with the insurer to prove that the term in question was reasonably necessary to protect the legitimate interests of the insurer.

33. Importantly, insurers should not be allowed to merely point to existing industry practice to support the proposition that a term is not unfair.

(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?

34. N/A

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

35. No. We consider that whilst insurance contracts may have some different qualities compared to other forms of contract, it remains preferable to have an existing body of case law to objectively describe unfairness, and to that extent there should be no tailoring.

Terms that may be considered unfair

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

36. Yes. We believe that will assist everyday people as well as consumer organisations and the legal profession in understanding the issue.

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

37. Yes, we support the types of questions described.

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

38. No

Remedies for unfair terms

(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)?

39. The ALA believes that an appropriate remedy is that the term cannot be relied upon. Where a term is made void, that can cause possible problems with the interpretation of the remainder of the contract. So, for example a term may be unfair in the context of one particular aspect of an insurance contract but may still be reasonable with respect to another part of the same contract. To declare that term void altogether could present difficulties, and unintended consequences.

40. What is important is that where a term of the contract is unfair, an insurer shouldn't be allowed to rely on the offending unfair term to the detriment of the insured.

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

41. A court should be able to make orders to void a term or to prevent an insurer relying on the unfair term as the court considers appropriate in the particular case.

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

42. N/A

Third-party beneficiaries

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

43. The ALA believes that UCT protections should apply to third-party beneficiaries. Seventy percent of life insurance in Australia is sold through superannuation. Consumers are provided that insurance as third-party beneficiaries, and have no part in the bargaining of that policy.

44. If third-party beneficiaries are excluded from UCT protections that would exclude the vast majority of the life insurance market in Australia.

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

45. We do support the proposal as stated.

(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?

46. Trustees have fiduciary obligations at general law and pursuant to the *Superannuation (Industry Supervision) Act (SIS)*. Those obligations require trustees to have regard to the insurance cover being provided for the fund for the benefit of members.

47. However, where an insurer has provided an insurance policy to a trustee containing unfair terms, it is important that a fund member has recourse against the insurer. The member may, in certain circumstances, have causes of action available to them as against the trustee, but there are many circumstances in which that will not be the case and so a member ought to be able to avail themselves of remedies directly against the insurer also.

Tailoring for specific insurance contracts

(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?

48. N/A

(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?

49. The ALA recognises the need for insurers who provide long term insurance contracts (i.e. income protection, total & permanent disability (TPD) and life insurance) to be able to manage their risk exposure and to make unilateral premium adjustments across a class of insurance product, within reason. However, unilateral increases to premiums must be clearly spelt out in the policy or product disclosure statement (PDS) at the time of sale.

50. Further to the above, a unilateral premium increase should only be permitted across a class of insurance product and must not be directed to an individual policy holder. Indeed, a unilateral increase that was singled out to an individual policy holder would be a clear example of an unfair contract term.

Transitional Arrangements

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

51. It is anticipated that the UCT proposals should not require any, or at least minimal, re-pricing/underwriting

52. We believe that a 12 month transition period in this instance to be reasonable.

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

53. We believe the current proposed transition arrangements outlined are appropriate.

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

54. Insurers will need to undertake a stocktake of their current product offerings to ensure compliance.

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

55. No