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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,

We welcome the opportunity to provide feedback in relation to the Treasury's inquiry into extending Unfair Contract Terms protections to insurance contracts.

Please do not hesitate to contact me and my colleagues on [REDACTED] or [REDACTED] if we can further assist with the Working Group's important work.

Yours faithfully



**Kim Shaw** (Enquiries: Brooke White - )  
**Principal Lawyer**  
**MAURICE BLACKBURN**



**Maurice  
Blackburn**  
Lawyers  
Since 1919

Maurice Blackburn  
Lawyers submission to the  
Treasury Inquiry into  
Extending Unfair Contract  
Terms Protections to  
Insurance Contracts.

August 2018

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## **Introduction**

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Superannuation and Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team.

At any one time we provide legal assistance to approximately 3500 to 4000 clients. Much of this work is assisting them with the complex and challenging processes involved in making an insurance claim under their superannuation scheme membership or retail insurance policy.

On a daily basis we witness the difficulties experienced by our clients when unexpected illness or injury forces them out of the workforce, and we also see the devastating impact of unfair decision making by life insurers.

## **Our Submission**

Maurice Blackburn believes that there is no good reason to have general and life insurance contracts exempted from the Unfair Contract Terms (UCT) rules.

We are pleased to support Treasury's proposal for 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 are also pleased to add our voice to the many consumer advocates that support the introduction of a narrow definition of 'main subject-matter' which is in line with existing UCT laws and insurance laws.

We do not, however, agree with the Treasury proposal that excess payable under an insurance contract should be considered part of the upfront price.

Above all, we believe that the extension of UCT to insurance contracts would bring consumer protections which are not currently working adequately through existing legal frameworks. The utmost good faith provisions are not stopping insurance companies from developing contracts which severely disadvantage consumers. The Life Insurance Code of Conduct, which was introduced to bring consistency to the industry, is unregulated and thereby lacks the power to change motivations and behaviours.

Maurice Blackburn encourages Treasury to be wary of attempts by the insurance industry to secure carve-outs for certain terms, contract types and functions, should the extension of UCT become reality. Now more than ever, the community is aware of the culture and misconduct which underpins corporate decision making.

## Responses to the Proposals Paper 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?

Yes. Maurice Blackburn believes that there is no good reason to have insurance exempted from the generally accepted Unfair Contract Terms (UCT) rules.

Maurice Blackburn agrees with the sentiments expressed by CHOICE CEO Alan Kirkland, when he addressed the Parliamentary Joint Committee on Corporations and Financial Services (the PJC) during their inquiry into the Life Insurance Industry. He said:

*“.....protection from unfair contract terms is even more important in life insurance than in any other market. Consumers are currently protected from unfair contract terms in a gym contract, but not in a life insurance contract, and there is no justification for this. Practices such as relying on outdated or unfair medical definitions, or exclusions that mean that the average consumer would not get cover for a condition, for which cover is purported to be provided, would face much greater scrutiny if consumers had protection from unfair contract terms in insurance, as they do for every other product and service in the Australian market.”<sup>1</sup>*

Whilst Mr Kirkland’s remarks are specifically related to life insurance, our submission is that the same principles apply for all insurance products.

We submit that this perspective is in line with the recommendations of numerous inquiries:

- The PJC inquiry into the Life Insurance Industry<sup>2</sup>
- The 2008 Productivity Commission Review of Australia’s Consumer Policy Framework<sup>3</sup>
- The Senate Economics References Committee’s inquiry into Australia’s General Insurance Industry 2017<sup>4</sup>
- Consumer Affairs Australia and New Zealand’s review of the ACL<sup>5</sup>.

We further note Mr Kirkland’s observations that:

*“Insurance is the only product that has a carve-out from protections against unfair contract terms, and insurers—particularly life insurers—have demonstrated that they do not deserve that special carve-out”.<sup>6</sup>*

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<sup>1</sup> Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Life Insurance Industry, Friday 24 February 2017: p.10 Available via: [http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/c6452e9d-01cb-44ee-85bf-2946e87d7df1/toc\\_pdf/Parliamentary%20Joint%20Committee%20on%20Corporations%20and%20Financial%20Services\\_2017\\_02\\_24\\_4785\\_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/c6452e9d-01cb-44ee-85bf-2946e87d7df1/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/c6452e9d-01cb-44ee-85bf-2946e87d7df1/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Corporations%20and%20Financial%20Services_2017_02_24_4785_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/c6452e9d-01cb-44ee-85bf-2946e87d7df1/0000%22)

<sup>2</sup> Refer to Recommendations 3.1, 3.2 and 8.6

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/LifeInsurance/Report/b02](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance/Report/b02)

<sup>3</sup> See from page 33: <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf>

<sup>4</sup> See Recommendation 11:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Franchising/Terms\\_of\\_Reference](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/Terms_of_Reference)

<sup>5</sup> Refer Proposal 10: [https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL\\_Review\\_Final\\_Report.pdf](https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf)

<sup>6</sup> Ibid, p.10

Maurice Blackburn notes that the current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is, almost on a daily basis, uncovering cultural and behavioural issues within the broader insurance industry. We believe that now, more than ever, we have greater insight into the need for consumer protections across the finance and insurance sectors.

Maurice Blackburn has made no secret of its disappointment in the Life Insurance Code of Conduct which has been implemented to provide expectations as to what the insurance industry sees as acceptable behaviours. The industry has shown no appetite for leading such initiatives, and, in many cases, has fought to retain the current comfortable settings.

Maurice Blackburn sees the proposed amendment to 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, as a positive step toward enhanced consumer protections.

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

We believe that this course of action would have the following beneficial outcomes:

- i. It would become in insurers' best interests to review and rework their existing contracts to reflect the new requirements, and remove unfair terms – including reviewing 'the fine print' in their contracts. Given their apparent reticence to initiate such action, it would provide the necessary external stimulus to reposition their contracts through the lens of fairness.
- ii. We believe that requiring insurers to reposition their contracts through the prism of fairness would provide consumers with better, more transparent information from which to make informed decisions about insurance products. This would enable better side by side comparison, and thereby generate better competition within the marketplace.
- iii. In areas of contract law where UCT currently exists, the tests for fairness are already well established. It would generate a consistency of jurisprudence. The same laws apply to ALL consumer and small business contracts in the Australian economy. We resist the suggestion strongly that the UCT be "imported and modified" in to the IC Act.
- iv. In areas where UCT currently exists (being ALL consumer and small business contracts in the Australian economy) the rules are, by their nature, clearer than the concept of utmost good faith. In our experience, this makes it possible to clearly articulate the sorts of terms that are considered fair, and those that are considered unfair – and importantly to be able to make that distinction easily understood.

Maurice Blackburn submits that the proposed method for imposing an UCT regime on insurance contracts - through expanding section 15 of the IC Act to allow the current UCT laws in the ASIC Act to apply - is the better model than others discussed in the proposals paper:

- Proposals that there would be greater consumer benefit in amending or tightening the Life Insurance Code of Conduct are, in our opinion, inferior due to the voluntary and unregulated nature of the code.
- Proposals based around tightening or strengthening the utmost good faith test still leave inconsistencies across insurance contracts.

The fact that UCT applies across the financial services industry means that insurance will be brought into line with the wider industry – and that would invite consistency in the rules governing the whole industry.

Maurice Blackburn also notes that the proposal to expand section 15 of the IC Act appears to be supported by regulators. The Committee’s report on their inquiry into the Life Insurance notes:

*“ASIC supported extending unfair contract legislation to life insurance and was of the view that ..... the application of unfair contract terms to life insurance would be an important addition to the protections available for consumers”<sup>7</sup>*

### **3. What costs will be incurred by insurers to comply with the proposed model?**

Maurice Blackburn accepts that there would be costs incurred for insurers in converting policies to ensure compliance.

We are keen to ensure that frameworks exist to ensure that these costs are not unduly passed on to consumers.

Consumers should not bear the cost of insurers ensuring their contracts are fair.

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

No.

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

As mentioned above, the other options for extending UCT protections to insurance contracts have significant disadvantages.

Maurice Blackburn submits that maintaining the status quo is not a good option for consumers. We maintain that there is no good reason for insurance contracts to be exempted from UCT protections.

Current utmost good faith arrangements have not prevented the use of unfair terms in insurance contracts, nor has it provided courts or external resolution schemes with the power to provide a remedy if an unfair contract term is used<sup>8</sup>. It has, unfortunately, not created a level and fair playing field.

Further, CHOICE has noted that the jurisprudence around the utmost good faith clause is limited, and High Court case notes mainly apply in relation to honesty in the dealings and processes of the contract, not the fairness of the contract<sup>9</sup>.

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<sup>7</sup> PJC on Corporations and Financial Services Inquiry into the Life Insurance Industry Report, Chapter 3, para 3.34

<sup>8</sup> Financial Rights Legal Centre submission to the PJC Inquiry into Life Insurance, as cited in the Report into the Inquiry into Life Insurance, chapter 3, para 3.39.

<sup>9</sup> CHOICE submission to the PJC Inquiry into Life Insurance, as cited in the Report into the Inquiry into Life Insurance, chapter 3, para 3.40



**6. What costs would be incurred by insurers to comply with these options?**

No response to this question.

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

Yes. We consider that a tailored 'main subject matter' exclusion is vital.

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

We support a narrow definition, in line with existing unfair contract terms laws and insurance laws.

We agree with the characterisation of the narrow definition approach, as set out in the discussion paper<sup>10</sup>:

*“One approach is to provide a narrow definition which excludes from review terms that describe what is being insured, for example, a house, a person or a motor vehicle. A narrow definition would provide the most comprehensive scope for UCT protections. For example, policy limitations, conditions precedent to cover and exclusions that affect the scope of cover would not be considered part of the 'main subject matter' and would be open to review.*

*A narrow approach has been favoured by consumer group representatives on the basis that the broadest possible terms in insurance contracts should meet the fairness test.<sup>11</sup> General insurance industry participants have previously not supported this approach for different reasons, including that it may impact insurers' certainty of contract and have implications for the way insurers calculate risk.<sup>12</sup>*

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

No. We believe that any move to include insurances in Unfair Contract Terms legislation should include all insurance types. There should not be a difference for general or life insurance contracts. In other words, there is no case in our submission for 'special' versions of UCT for the insurance industry.

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

Maurice Blackburn believes that, in keeping with existing UCT laws, terms setting the contract's upfront price should be excluded from review.

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<sup>10</sup> Extending Unfair Contract Terms Protections to Insurance Contracts Proposals Paper, June 2018. p.14

<sup>11</sup> For example, see Consumer Action Law Centre (2018), *Denied: Levelling the playing field to make insurance fair*, pages 27-28.

<sup>12</sup> For example, see Insurance Council of Australia (2012), Submission to the Unfair Terms in Insurance Contracts Draft Regulation Impact Statement For Consultation.

We believe that for insurance contracts, the upfront price should only include the premium paid, or to be paid, by the insured (not the excess) and therefore cannot be challenged on the basis that it is unfair.

**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?**

No. We believe that excess should not be included in the upfront price. There are several reasons for this view:

- We are aware that some excesses are not upfront and transparent. It is important that consumers are aware which portion of what they are paying upfront is premium, and what is an additional loading for excess;
- They vary considerably across the market and are not always part of the initial 'offer'; and
- A consumer can choose from paying to have no excess to some degree of excess payment and therefore by its nature it is not appropriate for it to be included in the upfront fee.

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

No. We believe that any move to include insurances in UCT legislation should include all insurance types. There should not be a difference for general or life 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?**

Yes.

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

We agree with the proposal in the discussion paper:

*"It is proposed that, for insurance contracts, a contract can be considered as standard form even if the consumer or small business can choose from various options of policy coverage."<sup>13</sup>*

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

Yes. Further legislative guidance may provide clarity for courts, insurers and consumers in relation to whether a term is 'not reasonably necessary in order to protect the legitimate interests' of an insurer.

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<sup>13</sup> Ibid, p.16

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

In principle, we agree with the proposals noted in the proposals paper, namely that a term will be reasonably necessary to protect an insurer's legitimate interest 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 agree that underwriting risk cannot stand alone in determining whether a term is reasonably necessary in order to protect the legitimate interests of the insurer and that more is required to ensure that the test continues to have fairness as its touchstone.

Given the information asymmetry between insurer and insured, it is important that the rebuttable presumption in 12BG(4) of the ASIC Act continues to operate to ensure that the insurer bears the onus of proof with respect to such a test.

Maurice Blackburn does not believe that the New Zealand Fair Trading Act is an appropriate alternative model. Our understanding of that scheme is that it is too heavily weighted in favour of the insurer to satisfy the desired outcomes for consumers. We are concerned about the number of carve-outs that the industry has been able to negotiate under the scheme, and that disclosure rules strongly favour the insurers' definition of reasonableness.

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

No. We believe that any move to include insurances in UCT legislation should include all insurance types. There should not be a difference for general or life insurance contracts.

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

Yes.

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

We agree that the list of examples of unfair terms which currently appears in UCT legislation should be enhanced by the addition of examples specific to insurance. To this end, we agree with the addition of the kinds of examples listed in the discussion paper<sup>14</sup>, namely:

- terms that permit the insurer to pay a claim based on the cost of repair or replacement that may be achieved by the insurer, but could not be reasonably achieved by the policyholder;
- terms which make the insured's ability to make a claim conditional on the conduct of a third-party over which the insured has no control; and
- terms in a contract that is linked to another contract (for example, a credit contract) which limit the insured's ability to obtain a premium rebate on cancellation of the linked contract.

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<sup>14</sup> Ibid, p.18

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

No. We believe that any move to include insurances in UCT legislation should include all insurance types. There should not be a difference for general or life 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?**

Yes. We support the current UCT provision that if a term is declared unfair, that the term will be void.

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

Yes.

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

No. We believe that any move to include insurances in UCT legislation should include all insurance types. There should not be a difference for general or life insurance contracts.

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

We strongly support this proposition. Maurice Blackburn represents around 2500 to 3000 claimants per year and the vast majority of those claimants are subject to default cover by way of superannuation fund membership.

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

We support the proposal in the discussion paper, namely:

*“It is proposed that the UCT laws will apply to consumers and small businesses who are third-party beneficiaries under the contract. Specifically:*

- *the definitions of 'consumer contracts' and 'small business contracts' will include contracts that are expressed to be for the benefit of an individual or small business but who are not a party to the contract; and*
- *third-party beneficiaries would be able seek declarations that a term of a contract is unfair”<sup>15</sup>*

**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**

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<sup>15</sup> Ibid, p.21

**comparable to UCT protections such that it would not be necessary to apply the UCT regime to such products?**

No. Maurice Blackburn submits that current market and regulatory protections are not working. This is evidenced through:

- i. Superannuation fund trustees have a fiduciary duty to their members, as set out in s52 of the SIS Act. As the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is illustrating on a daily basis, superannuation fund trustees – and in particular the trustees of retail funds – are often compromised in their decision making around their duty to ensure the best interest of the fund member is paramount. In other words retail fund trustees are subject to the obligation to act in their members' best interests at the same time as acting in the best interests of their shareholders. This conflict does not exist in relation to the trustees of industry funds.
- ii. As outlined elsewhere in this submission, the duty of utmost good faith is not working to protect members of super funds in their dealings with insurers
- iii. As outlined elsewhere in this submission, the Life Insurance Code of Conduct is not working to protect the interests of fund members.

We have seen examples of decision making by trustees that do not appear to be in the best interest of the members:

- Trustees accepting a slide toward 'junk' insurance policies, characterised by unreasonable thresholds and definitions. For example, some insurers began adopting the term 'incapable ever' or 'unable ever' instead of 'unlikely' to provide a threshold for whether a claimant might ever work again. We are aware of one policy which lists 115 occupation categories, which are all assessed under the highly onerous Activities of Daily Living test. This is contrary to the Superannuation Industry (Supervision) Act 1993 Act permanent incapacity definition for early release.
- Trustees accepting policies which include outdated medical terms as a means to deny claims.
- Trustees accepting policies and processes which create barriers through unreasonable delays in processing claims, along with barriers created within the complex application forms and processes.
- Trustees accepting the use of techniques designed to prolong and frustrate the claims process. These included surveillance, (multiple) independent medical examinations, activity diaries, requests for information in a 'drip feed' fashion and open ended general authorities. These techniques lead to high levels of withdrawn claims, particularly for mental health claimants.
- Trustees accepting a move toward incremental payments rather than lump sum TPD payments, requiring claimants to undergo ongoing medical and other checks over a period of years.

In our experience, many industry superannuation fund trustees will support their members' claims and argue with an insurer that the claim should be admitted – this is not so common with retail industry funds.

Despite the current statutory and common law obligations for trustees to act in the best interest of fund members, decisions such as the above are still being made. This would indicate that the current obligations are not working to protect the interests of consumers.

These decisions have practical, and sometimes lifelong impacts. In Appendix One to this submission, we detail three case studies which, aside from demonstrating how different the outcome would be for consumers if UCT protections were afforded in insurance contracts, also show the human side of the current situation.

In light of these case studies, and in response to the claims we deal with on a daily basis, Maurice Blackburn rejects the proposition that current 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.

**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?**

No. We believe that any move to include insurances in Unfair Contract Terms legislation should include all insurance types. There should not be a difference for general or life insurance contracts.

**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?**

We agree with the proposition in the discussion paper:

*“...that where a term provides a life insurer with the ability to unilaterally increase premiums, this will be considered to be fair where the premium increase is related to the management of the insurer’s risk”.<sup>16</sup>*

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

Yes.

**30. Are the transition arrangements outlined in the discussion paper appropriate or should alternative transition arrangements be considered?**

We believe the transition arrangements outlined on page 22 of the discussion paper are appropriate

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

No response to this question

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

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<sup>16</sup> Ibid, p.21

Maurice Blackburn Lawyers submission to the Treasury Inquiry into Extending Unfair Contract Terms Protections to Insurance Contracts.

We believe that any move to include insurances in Unfair Contract Terms legislation should include all insurance types. There should not be a difference for general or life insurance contracts.

## **Appendix One – Case Studies**

### **Unfair Contract Terms and Life Insurance**

In each of the case studies detailed below, the first element of the UCT regime is clearly satisfied, as there is significant imbalance in the parties' rights and obligations under the contract (assuming that a party includes a third party beneficiary).

In each case, our client (and other affected members) were obligated to pay ongoing premiums for cover which they could never claim against, paid out of (and therefore eroding) their retirement savings.

In our experience, most superannuation fund members do not investigate the intricacies of the insurance cover they receive by virtue of their membership, and only become aware of limitations such as those in the examples below when they make a claim. Fund members are therefore denied the opportunity to compare the insurance cover under their policies and thereby make an informed decision to seek out cover to suit their needs in the event of their inability to work due to disability.

With respect to superannuation based insurance policies, members generally do not have the opportunity to negotiate the terms of the contract before it is entered into by the fund Trustee on their behalf. They rely on the fund Trustee to enter an arrangement that will benefit them. That, however, is not always the case, shown by the current proliferation of "junk" policies. Under the current regime, our clients would need to rely upon sections 13 and 14 of the *Insurance Contracts Act* (ICA) and common law notions of good faith to challenge the unfair terms the insurer has invoked. As these case studies show, current protections under the *Insurance Contracts Act* 1984 (ICA) and common law are inadequate.

Furthermore it is clear from each of these case studies that despite their negotiating power and their various duties to members, the fund Trustee has entered into an arrangement which detrimentally affects significant proportions of their membership, and in each case, the detriment to the member has only been apparent when they made the claim and it was denied. The fund Trustee has potentially entered these arrangements also despite their obligations under s 52(2) and s 68AA of the *SIS Act* to respectively perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries (amongst other things) and provide My Super members with permanent incapacity insurance benefit, as well as their fiduciary duties to members generally.

Our clients were in each case study making contributions, and paying fees and premiums so that both the Fund Trustee and Insurer, as well as Fund Managers, received financial benefits from our clients.

The Royal Commission has brought to light widespread fee gouging which was abetted by superannuation fund Trustees.

Clearly, these market and regulatory factors do not provide protections that are in practice comparable to a UCT regime.

In each of the case studies below, our clients' claims were denied which has had a significant impact on them and on their families as they are no longer working due to disability causing them great financial difficulty. Disability insurance is provided for that purpose and in each case our clients have been prevented from accessing a benefit due to an unfair contract term. In each case we submit that a UCT regime would protect our clients' interests from these unfair terms.



### **Case study 1:**

Our client signed up to a superannuation fund after commencing as a stable-hand at a high profile horse training facility. He sustained serious injuries to his left hand in a workplace incident on 2 February 2014. A claim was lodged for Total and Permanent Disability (TPD) on 17 August 2016 and rejected on 28 September 2016 as the occupation of stable-hand is an 'excluded occupation'. The Occupation Classifications for the Policy specifically exclude: Farm employee or labourer 'not insurable'; Horse strapper: 'not insurable'.

Under the current law, it would be difficult for our client to successfully challenge the insurer's decision given the specific and strict wording of the policy.

If the unfair contract terms laws were extended to life insurance policies, we submit that it is likely that a court would declare the 'excluded occupation' clause to be an unfair term and therefore void because:

1. There is clearly a significant imbalance in the parties' rights and obligations under the contract for the reasons above.
2. The clause is not reasonably necessary to protect the legitimate interests of the insurer. As is common in the insurance industry, the insurer could instead reflect any increased underwriting risk arising from the nature of our client's employment duties by increasing the premium to be paid by our client and other insured members in these occupations; and
3. Reliance upon this clause by the insurer has resulted in significant detriment to our client. It is effectively junk insurance and he has been left without the support from insurance he badly needs.

As a result, our client would likely be entitled to claim against the policy he has paid for and receive a lump sum TPD benefit which will assist him at this time when he needs it most.

### **Case study 2:**

Our client signed up to a fund where seasonal or contract employment is an 'excluded occupation'. He is a 41 year old plant operator employed on contract basis via a labour hire company in the mining industry and is suffering from chronic schizophrenia and chronic lower back pain. He injured his back on 6 October 2014. Claim lodged for Income Protection (IP) and TPD 7 July 2015 and rejected on 30 August 2016, as seasonal or contract employment is an 'excluded occupation'.

Seasonal or contract employment is defined as work that is not fixed term employment but employed for a fixed term/contracted to complete a specific job and without guarantee of continuity of employment, irrespective of hours worked or period of employment. He and his colleagues were all project workers — which is obviously very common during the recent boom in Western Australia — and they were issued with 'termination notices' at the conclusion of the project. None of these workers, including our client, was ever going to have insurance cover under this policy even though they paid premiums.

Similarly to case study one, the current regime that applies under the *ICA* and common law is inadequate and it would be difficult to challenge the denial of his claim.

However, if the unfair contract terms laws were extended to life insurance policies, we submit that it is likely that a court would declare the exclusion clause in the group insurance policy to be an unfair term and therefore void since:

1. There is clearly a significant imbalance in the parties' rights and obligations under the contract for the reasons above;
2. The clause is not reasonably necessary to protect the legitimate interests of the insurer. As above, any underwriting risk can be reflected in increased premiums rather than the carte blanche exclusion of a large subset of members. In any event, we question whether there would be any increased underwriting risk to the insurer of insuring seasonal or contract workers since any increased underwriting risk would only exist if that class of workers was more likely to lodge claims than casual, part-time or full-time workers; and
3. Reliance upon this clause by the insurer has resulted in significant detriment to our client since he is unable to claim the benefits he needs to cover his loss of income from his inability work due to his disabilities.

As a result, our client would likely be entitled to claim against the policy for income protection benefits.

### **Case Study 3:**

Our client has TPD insurance under both a group insurance policy through his superannuation and another under his employer's group insurance plan. He had worked in high level IT / management. Despite having a past history of periods of depression, mostly related to life stressors such as his wife undergoing successive miscarriages, he never had any significant time absent from work. He is now moribund with severe mental illness and this is supported by a psychiatrist's opinion. He will not work again in his pre-disability management field.

The group insurance policy provided through his super fund includes the following offset / exclusion clause:

*Pre-existing conditions: An insured member who became covered for TPD Cover under automatic acceptance or transfer terms is not covered for total and permanent disability that is caused directly or indirectly, wholly or partially, by a pre-existing condition **if a similar benefit could be claimed by the insured member under another insurance policy.***

Under the current law, our client may not have grounds to challenge the insurer's decision.

However, if the UCT laws were extended to life insurance policies, we submit that it is likely that a court would declare the exclusion clause in the group insurance policy to be an unfair term and therefore void because:

1. There is clearly a significant imbalance in the parties' rights and obligations under the contract for the reasons above.
2. It is difficult to see how an insurer will be able to establish that this clause is reasonably necessary to protect the insurer's legitimate interests. This is not a case of double dipping by our client as he has paid premiums in return for insurance cover under the group insurance policy and his employer has paid premiums to another insurer for cover under the group insurance plan. Even if it could be established that

our client was 'over-insured' for his actual financial loss, arguably this is not a relevant consideration for the insurer and does not touch upon the risk of our client becoming TPD; and

3. Reliance upon this clause by the insurer has resulted in detriment to our client since now he is unable to claim any TPD benefit despite paying premiums for two policies.

Accordingly, our client would likely be entitled to receive TPD benefits under both policies, which will go some way to assisting him with his treatment and recovery.