

# Treasury Consultation Extending Unfair Contract Terms Protections to Insurance Contracts

Submission by Legal Aid Queensland



# Extending Unfair Contract Terms Protections to Insurance Contracts

## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Treasury Consultation on extending Unfair Contract Terms to Insurance Contracts. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients dealing with insurers both in the claims process and assisting them to dispute insurance claims with the internal dispute resolution and external dispute resolution processes. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to insurance, mortgage stress, housing repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ regularly assists and represents clients with complaints about insurance contracts. This submission is informed by that knowledge and experience.

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

LAQ supports the proposal to amend section 15 of the Insurance Contracts (IC) Act to allow the current Unfair Contract Terms (UCT) laws set out in the ASIC Act to apply to insurance contracts regulated by the IC Act.

In LAQ's view, the advantages of this model are:

- (a) It ensures that consumers are provided with the same UCT protections across all financial products and services, including insurance contracts;
- (b) It provides consumers with certainty and consistency about the scope of protections that they have regardless of the type of consumer contract that they have entered;
- (c) It implements the objective of the Australian Consumer Law and ASIC Act that UCT protections should be applied across the economy;
- (d) It does not affect the existing interpretations of sections of the IC Act.

**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).**

LAQ acknowledges that there are likely to be some compliance costs for the Insurance industry in reviewing and amending contracts to ensure that they comply with UCT laws once they apply to insurance contracts. However, these costs are unlikely to be substantially more or any different to the costs that other industries have successfully borne in making their contracts UCT compliant. While there are some short term costs, there is no longer term disadvantage for the insurance industry.

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

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

LAQ does not support either of the other options for extending UCT protections to Insurance contracts.

Enhancing existing IC Act remedies:

- (a) Will not provide the consistency and certainty for consumer about the protections they enjoy across all consumer contracts.
- (b) Creates unnecessary duplication of laws when the ASIC Act already has a framework of protection that can be easily applied to insurance contracts.
- (c) Creates the impression that Insurance Contracts are in some way different to other financial products and services with respect to Unfair Contract terms. This is not supported by the findings of the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry.

The duty of utmost good faith does not provide the same protection to consumers that are provided by unfair contract terms to consumers. The duty of utmost good faith does not provide protection that addresses and protects consumers from unfair contract terms.

Also consumers have difficulty accessing their rights under the existing IC Act remedies and it is unlikely that they will be able to successfully use any additional rights under the IC Act.

Introducing the existing UCT laws into the IC Act is likely to:

- (a) Create unnecessary confusion for consumers who will have different UCT provisions applying for different types of financial services and products. This is inconsistent with the intent of the Australian Consumer Law.
- (b) Creates the impression that Insurance Contracts are in some way different to other financial products and services with respect to Unfair Contract terms. This is not supported by the findings of the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry.

Consumers have difficulty accessing their rights under the existing IC Act remedies and it is unlikely that they will be able to successfully use any additional rights under the IC Act.

**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).**

LAQ is unable to break down the exact costs that will be experienced by insurers. However, in LAQ's submission it is unlikely that these costs will be significantly more than the short term costs experienced by other industries which have successfully implemented the UCT legislative protections.

## Terms Excluded from UCT Laws

### Main Subject Matter

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

LAQ supports the view that a tailored "main subject matter" exclusion is necessary.

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

LAQ supports the proposal that the main subject matter of an insurance contract be defined narrowly. This narrow definition is critical to the UCT regime being effectively applied to Insurance Contracts.

In LAQ's view the advantages of this proposal are that:

- (a) It implements the objective of the ACL and the ASIC Act that the protections of the UCT regime apply widely.
- (b) It provides certainty to consumers about which terms in insurance contracts are eligible for review.

- (c) The over-arching purpose of the UCT regime is to address the power imbalance created by the take it or leave it nature of standard form contracts. It is consistent with this objective and with the principles of fairness to have a narrow definition of main subject matter which allows the widest possible scope for review.

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

LAQ is not aware of any evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.

### **Upfront Price**

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

LAQ supports the proposal that upfront price is a term excluded from review. This approach is consistent with the application of the UCT provisions across other contracts for financial products and services.

#### **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?**

In LAQ's view, where there is a direct relationship between the excess payable under an insurance contract and the upfront price it is reasonable that the quantum of the excess payable be considered as part of the upfront price for the purposes of the UCT provisions.

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

LAQ is not aware of any evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.

### **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?**

In LAQ's submission it is necessary to clarify that insurance contracts which provide consumers with a choice of policy options that affect coverage should still be considered standard form. In LAQ's experience, the reality of insurance contracts is that irrespective of the type and extent of coverage chosen by a consumer they, in reality, have no ability to negotiate any of the terms which apply to that level of insurance cover.

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

LAQ supports the proposal that an insurance contract will still be considered standard form even where a consumer or small business can choose from various options of policy coverage (including excess, sum insured and exclusions).

This proposal recognises the fact that once a consumer chooses the type of policy coverage they have no ability to negotiate or bargain about the terms applicable to that level of coverage and no option but to accept the terms of that level of coverage if they want to proceed with the insurance contract.

**Meaning of Unfair****15. Do you consider that 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?**

LAQ supports the proposal which sets out that a term will be reasonably necessary to protect an insurer's interest where it reasonably reflects the underwriting risk and does not disproportionately or unreasonably disadvantage the consumer. However, LAQ recommends that for this test to provide protection for consumers, consumers need only to assert that a term is unfair. The onus is then placed on the insurer to show that the term reasonably reflects the underwriting risk and the term does not disproportionately or unreasonably disadvantage the consumer.

In LAQ's view, this definition most reasonably balances the competing interests of protecting the consumer which is the over-riding objective of the UCT provisions and acknowledging the impact of underwriting of an insurer's decision making.

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

LAQ is not aware of any evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.

**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?**

LAQ supports providing a non-exhaustive list of examples of insurance terms that may be unfair. This approach is consistent with the approach taken for other types of consumer contracts in the UCT provisions. In LAQ's view, it is important that IC Act contracts be treated in the same way as any other financial services contract under the UCT provisions.

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

LAQ supports the example terms set out on page 18 of the consultation paper being included in the non-exhaustive list of terms.

In LAQ's submission other terms that should be included are:

- (a) Terms in a contract asking the consumer to provide information that only a third party can know as a pre-condition for the claim.
- (b) Terms allowing the amount of a cash settlement to be reduced for reasons including GST or builder's mark-up.
- (c) Terms that require the payment of an excess in full before a claim can be paid or repairs commenced.

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

LAQ is not aware of any evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.

## **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)?**

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

LAQ supports the proposal that the remedy for an unfair term should be that the term is declared void. In LAQ's submission it is important that the remedy for an unfair term be consistent across all consumer and financial services contracts that the UCT provisions apply to.

However, LAQ recognises that in some insurance contracts declaring a term void potentially could remove the basis upon which a claim can be made under the contract. This declaration would lead to an outcome that causes the consumer detriment and would not meet the intention of the UCT regime to provide increased protection for consumers from unfair contract terms.

As a consequence, in LAQ's view it is appropriate that the Court, when faced with an unfair contract term, should also be given the power to make another order that it believes will provide a more appropriate and just outcome in the circumstances.

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

LAQ is aware of no evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the

Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.

### Third-party beneficiaries

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

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

LAQ supports the proposal set out on Pages 20 and 21 of the Consultation Paper which would allow third party beneficiaries to have the benefit of UCT protections. This protection is important because some insurance policies provide benefits to 3<sup>rd</sup> parties and it is important that these 3<sup>rd</sup> parties also have the protection of the UCT provisions.

**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?**

LAQ has no submission to make in response to this question.

### 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?**

LAQ is aware of no evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.

**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?**

LAQ has no submission to make in response to this question.

### Transitional Arrangements

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

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

LAQ supports the transitional arrangements set out on Page 22 of the Consultation Paper.



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

LAQ has no submission to make in response to this question.

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

LAQ is not aware of any evidence that supports the view that tailoring specific to either general or life insurance should be considered. The evidence provided to previous inquiries including the Australian Consumer Law Review, the 2017 Senate Inquiry into the General Insurance Industry or the 2018 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the life insurance industry does not support the view that specific tailoring is required.