
**Submission in respect of the
Insurance Contracts
Amendment (Unfair Terms) Bill
2013**

The Treasury

Problems with the insurance contracts unfair terms proposed provisions

Insurance Contracts are already adequately regulated in respect of these issues under the Insurance Contracts Act 1984 (Cth)

It is superficial to argue that because national unfair terms contract terms laws apply to most contracts of financial products and financial services (under Subdivision BA of Division 2 of Part 2 of the Australian Securities and Investments Act 2001 (Cth)) that they must therefore apply to insurance contracts. The reason the notion is superficial is that it ignores the following:

1. Contracts of insurance are contracts of the utmost good faith at common law;
2. Section 13 of the Insurance Contracts Act implies a term requiring each party to the contract to act with the utmost good faith "in respect of any matter arising under or in relation to it".
3. Section 14 supplements this by providing that a provision (ie term) can be relied upon only in the utmost good faith. In applying s14, subsection (3) specifically provides that the court is to have regard to whether the insured received advance notification of the terms that the insurer is seeking to rely upon.
4. Standard cover contracts exist in respect of the prescribed types of contracts listed in the Insurance Contracts Regulations (consumer contracts). If the terms of these standard cover contracts are to be altered the insurer is required to comply with s35 otherwise they cannot rely on the altered term/s.
5. In the case of non standard cover s37 requires the insurer to clearly inform (which means more than just notify) the insured in writing of any unusual term in the contract otherwise the insurer is unable to rely on the term.
6. If a term has been clearly explained to the insured prior to entry into the contract and there is no basis upon which to argue that the insurer should not be able to rely upon it, should the term be breached by the insured, the insurer's remedy will depend upon

the application of s54. Section 54 effectively renders redundant the proposed unfair terms provisions. Section 54 applies so that if the breach by the insured did not affect the loss, the insurer must pay the claim. If it did, the insurer is entitled to reduce the claim by an amount representing the amount of prejudice suffered by the insurer. The section deals with unfairness in a more sophisticated way than the proposed unfair terms provisions.

Issues with respect to the unfair terms provisions and their application to insurance contracts.

The proposed provisions focus on whether a term is unfair. The better approach, and one which is consistent with the development of common law contractual principles, is to focus on whether reliance on a term is unfair, not whether the content of the term itself is unfair. If the term has been clearly explained to the other contracting party and the party is content to enter the contract on that basis, then the term should form part of the contract. The important rider to this in the insurance law context is that s54 of the Insurance Contracts Act 1984 (Cth) provides protection to the insured in that, if the term is breached, the insurer's remedy will depend upon its application. Section 54 does not permit an unfair outcome where the term breached could not have contributed to the insured's loss. This is a far superior way of approaching the issue than to make the insurer prove that the term was "reasonably necessary to protect their legitimate interests"(subsection 15B(1)).

The Bill introduces a new concept, the ***standard form consumer contract*** defined in subsection 15A(3) to mean a standard form contract which is also a contract of general insurance. A consumer contract is defined as one in which an individual is a party and whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption. This definition, which appears in the old Trade Practices Act 1974 (Cth) defective goods provisions, is not particularly apposite to this category of contract. It may also lead to confusion by introducing yet another class of contract which is similar to, but not the same as, a standard cover contract.

In considering whether a term is unfair the court must take into account whether the term was "transparent" (subsection 15B(2)). To be transparent the term must be expressed in

reasonably plain language (which does not necessarily mean that it makes sense or reads well), is legible, presented clearly, and readily available to any party affected by the term (subsection 15B(3)). This introduces another new concept into the insurance contracts arena. The terminology used consistently throughout the Insurance Contracts Act 1984 (Cth) is that the insured be “clearly informed” of a particular term or duty. These words are used in s22; s35 and s37. There is a body of case law which makes it clear what is required to satisfy the standard of “clearly inform”. The standard is quite rigorous (see *Suncorp General Insurance Ltd v Cheihk* [1999] NSWCA 238) and indeed offers more protection to the insured than “transparent” given the definition of “transparent” only requires that the term be “available” which falls far short of ensuring the insured has been “clearly informed” of its nature and of the consequences of breach. Further it is not clear how practicable it will be for an insurer to make a term available to any party who might be affected by it.

Finally, the insurer is already required to provide:

- a Product Disclosure Statement;
- a Key Fact Statement;
- a Notice which informs the Insured of the nature and consequences of breaching their Duty of Disclosure;
- in the case of standard cover where there has been a derogation from cover, a notice which satisfies s35;
- in the case of non standard cover, a s37 notice if there are any “unusual” terms; and
- ensure compliance with s14 in respect of any other provisions which might require pre-contractual notification to the insured before the insurer is able to rely on them.

To superimpose on the existing legislative framework, which includes s54, the provisions of the Unfair Terms Bill, will introduce additional complexity for no material gain.

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