

2013

EXPOSURE DRAFT

INSURANCE CONTRACTS AMENDMENT (UNFAIR TERMS) BILL 2013

DRAFT EXPLANATORY MEMORANDUM

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

| <i>Abbreviation</i> | <i>Definition</i> |
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| ASIC | Australian Securities and Investments Commission |
| ASIC Act | <i>Australian Securities and Investments Commission Act 2001</i> |
| Amendment Bill | Insurance Contracts Amendment (Unfair Terms) Bill 2013 |
| Corporations Act | <i>Corporations Act 2001</i> |
| FOS | Financial Ombudsman Service |
| IC Act | <i>Insurance Contracts Act 1984</i> |
| IC Regulations | <i>Insurance Contracts Regulations 1985</i> |
| RIS | Regulation Impact Statement |
| UCT | Unfair contract terms |

General outline and financial impact

Outline

1.1 National unfair contract terms (UCT) 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* (ASIC Act). The laws were introduced as part of the Australian Consumer Law reforms on 1 July 2010 to protect consumers from unfair terms in standard form consumer contracts. The UCT laws apply to all sectors of the economy, and to all businesses operating in those sectors in Australia which use standard form contracts in their dealings with consumers.

1.2 However, the UCT laws for financial products do not currently apply to contracts of insurance regulated by the *Insurance Contracts Act 1984* (IC Act).

1.3 The Insurance Contracts Amendment (Unfair Terms) Bill 2013 (Amendment Bill) will amend the IC Act to introduce UCT provisions for standard form consumer contracts of general insurance. The Amendment Bill also provides ASIC with the enforcement and investigation powers it has under the ASIC Act to administer the new UCT provisions in the IC Act.

1.4 Minor technical amendments will also be made to two sections of the ASIC Act to clarify that the UCT provisions in that Act do not apply to a standard form consumer contract of general insurance, and that unfairness in those contracts will be dealt with under the IC Act.

Date of effect: The amendments will commence 12 months after the Act receives the Royal Assent.

Proposal announced: These reforms were announced by the Assistant Treasurer, the Hon David Bradbury MP on 20 December 2012.

Financial impact: The Amendment Bill will have no financial impact.

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 3.

Compliance cost impact: The Regulation Impact Statement (RIS) for this reform assessed that compliance costs for insurers are not likely to be high.

Summary of regulation impact statement

Regulation impact on business

Impact: The RIS for this reform is available at <http://ris.finance.gov.au/>.

Main points:

- Insurers are likely to incur additional costs in relation to:
 - understanding the legislation and reviewing their contracts; and
 - any actions by consumers or ASIC seeking a review of a term under the UCT amendments. This could include internal reviews, disputes referred to the Financial Ombudsman Service (FOS) or court action.
- These potential costs are difficult to quantify, as there is uncertainty regarding how the introduction of UCT provisions will affect the number of consumer disputes.
- It is arguable that insurers may mitigate any increase in costs by taking a reasonable and conservative approach in assessing their standard contract terms, referring to ASIC guidance (if any) and engaging with ASIC when assessing their contracts against the unfairness criteria. By doing so, insurers could make any necessary changes and potentially avoid having unfair terms that require litigation.

Chapter 1

Schedules to the Bill

Outline of chapter

1.5 Schedule 1 to the Amendment Bill contains amendments to the IC Act to introduce UCT protections for general insurance contracts.

1.6 It also gives:

- consumers, or ASIC the ability to seek orders from a court relating to an unfair term under relevant provisions of the ASIC Act (as those sections apply under proposed subsection 15G(1) of Division 2 of Part II of the IC Act); and
- ASIC the ability to conduct investigations under relevant provisions of the ASIC Act (as those sections apply under proposed subsection 15G(2) of Division 2 of Part II of the IC Act) when it suspects that there has been a contravention of the UCT protections for general insurance contracts.

Note: Section 15G will provide for incorporation, by reference, into the IC Act the enforcement and investigation provisions of the ASIC Act in relation to a standard form consumer contract of general insurance (respectively as applied enforcement provisions and applied investigation provisions). Schedule 1 will also provide technical modifications to adapt the application of specified sections of the applied enforcement provisions and investigation provisions for consistency with the new UCT provisions of the IC Act.

1.7 Schedule 2 to the Amendment Bill amends section 12BF of the ASIC Act so that this section does not apply to standard form consumer contracts of general insurance.

Context of amendments

1.8 Currently, Subdivision BA of Division 2 of Part 2 of the ASIC Act applies UCT protections to consumer contracts that are standard form contracts for financial products or the supply of financial services.

1.9 However, section 15 of the IC Act provides that insurance contracts are not capable of being made the subject of relief under any other Act (including the ASIC Act) on grounds including that the contract is unfair. Therefore, the UCT provisions of the ASIC Act do not apply to insurance contracts regulated by the IC Act.

1.10 On 20 December 2012, the Assistant Treasurer, the Hon David Bradbury MP announced that the protections from unfair terms in the ASIC Act would be extended to contracts for general insurance.

Summary of new law

1.11 The Amendment Bill will amend the IC Act to introduce a UCT regime for standard form consumer contracts of general insurance. The regime is equivalent to the existing UCT regime in Subdivision BA of Division 2 of Part 2 of the ASIC Act with the following modifications appropriate for contracts of general insurance.

- A term in a standard form consumer contract of general insurance that has been declared unfair must not be relied on.
- The definition of an unfair term will include clarification about what is reasonably necessary to protect the legitimate interests of an insurer. This will be that the term reflects the underwriting risk accepted by the insurer. The insurer will have the burden of proof that the term reflects their underwriting risk.
- A court will not be able to make orders in relation to an unfair term in a standard form consumer contract of general insurance which would declare the contract void, vary its terms or refuse to enforce the contract. This is consistent with the core remedy of non-reliance available where a term in such a contract is declared to be unfair.

1.12 The Amendment Bill will also make the following main amendments to the IC Act in relation to consumer contracts that are standard form contracts of general insurance:

- an insurer will fail to comply with the duty to act with the utmost good faith if:
 - a term of a contract they are a party to is declared unfair under section 12GND of the ASIC Act (as it applies under

proposed section 15G of Division 2 of Part II of the IC Act); or

- they attempt to rely on, or purport to rely on such a term.
- Disapply some sections of the IC Act relating to ASIC's administrative and supervisory powers and apply the relevant enforcement and investigation powers of the ASIC Act (as those sections apply under proposed section 15G of Division 2 of Part II of the IC Act). This will prevent any duplication or conflicts between ASIC's enforcement of the UCT regime for general insurance across the IC and ASIC Acts. It will also ensure that ASIC has consistent powers to regulate the UCT regime across all contracts of financial products.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
|--|--|
| New UCT laws in the IC Act will apply to consumer contracts which are standard form consumer contracts of general insurance. | Part 2, Division 2 of the ASIC Act applies unfair terms laws to most financial products and financial services. However, the IC Act prevents these laws from applying to insurance contracts regulated by the IC Act, including general insurance contracts. |
| An insurer will fail to comply with the duty of utmost good faith in the IC Act in relation to a general insurance contract if: <ul style="list-style-type: none"> • a term of the contract is declared unfair under section 12GND of the ASIC Act (as it applies under proposed section 15G of Division 2 of Part II of the IC Act); or • they attempt to rely on, or purport to rely on such a term. | The duty of utmost good faith in section 13 of the IC Act does not explicitly relate to unfair terms. |
| If a term is declared unfair, an insurer must not rely on that term under section 14 of the IC Act. | No equivalent. The IC Act does not explicitly provide for remedies in relation to unfair terms in contracts of general insurance. Contracts of general insurance are excluded from the operation of the UCT laws in the ASIC Act. A term |

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| | of a contract (other than a general insurance contract) is void if declared unfair (under section 12GND of the ASIC Act). |
| <p>A term in a standard form consumer contract of general insurance is unfair if the term:</p> <ul style="list-style-type: none"> • would cause a significant imbalance in the parties rights and obligations under the contract; • would cause detriment to a party if relied on; and • is not reasonably necessary to protect the legitimate interests of the party advantaged by the term. <p>A term will be reasonably necessary if it reflects the underwriting risk accepted by the insurer.</p> | <p>No equivalent for general insurance contracts.</p> <p>Consistent with section 12BG of the ASIC Act.</p> |
| <p>The UCT laws will not apply to a term in a standard form consumer contract of general insurance to the extent it:</p> <ul style="list-style-type: none"> • defines the main subject matter under the contract; • sets the upfront price payable under the contract; or • is a term required, or expressly permitted by a law of the Commonwealth or a State or Territory. | <p>No equivalent for general insurance contracts.</p> <p>Consistent with application of section 12BI of the ASIC Act.</p> |
| <p>Through a referral in the IC Act to relevant parts of the ASIC Act, ASIC and consumers will be able to take court action if they consider a term is unfair.</p> | <p>No equivalent for general insurance contracts.</p> <p>Consistent with application of sections 12GD, 12GM, 12GN and 12GNB of the ASIC Act.</p> |
| <p>Through a referral in the IC Act to relevant parts of the ASIC Act, ASIC will have available the same enforcement, investigation and information gathering powers that are currently available to it to administer the UCT laws in the ASIC Act.</p> | <p>No equivalent for general insurance contracts dealing with unfair terms.</p> <p>ASIC has certain other administrative powers in the IC Act.</p> |

Detailed explanation of new law

Schedule 1 — Amendment of the Insurance Contracts Act 1984

1.13 The Amendment Bill amends the IC Act to introduce a UCT regime for standard form consumer contracts of general insurance.

Interpretation

1.14 The Amendment Bill inserts meanings of terms relevant to the operation of the UCT regime for standard form consumer contracts of general insurance. These are:

- *applied enforcement provisions of the ASIC Act* means the provisions of the ASIC Act applied by subsection 15G(1) of the IC Act;
- *applied investigation provisions of the ASIC Act* means the provisions of the ASIC Act applied by subsection 15G(2) of the IC Act;
- *ASIC Act* means the *Australian Securities and Investments Commission Act 2001*;
- *consumer contract* has the meaning given by subsection 15A(4);
- *standard form consumer contract of general insurance* has the meaning given by subsection 15A(3);
- *transparent* has the meaning given by subsection 15B(3);
- *unfair* has the meaning given by subsection 15B(1); and
- *upfront price* has the meaning given by subsection 15D(2).
[Items 1, 2, 3, 4, 5, 6, 7 and 8, subsection 11(1)]

Supervisory powers

1.15 Under Part IA of the IC Act, ASIC has responsibility for the general administration of the Act.

1.16 In particular, ASIC may, for any purposes connected with this administration:

- require an insurer to provide ASIC with insurance documents (section 11C); and
- review administrative arrangements of an insurer (section 11D).

1.17 A new section 11G is inserted to amend ASIC's ability to exercise these powers in relation to unfair terms in certain contracts of general insurance. ASIC must not exercise its powers under subsection 11C(1) or 11D(1) to either:

- investigate if the insurer has relied on, or purported to rely on, a term of a standard form consumer contract of general insurance that the Court has declared an unfair term under section 12GND of the applied enforcement provisions of the ASIC Act; or
- for any purpose connected with such an investigation. [*Item 9, subsection 11C(1), item 10, subsection 11D(1) and item 12, subsection 11G(1)*]

1.18 Section 11G also includes a note that states ASIC may instead use its powers under the applied investigation provisions of the ASIC Act for a purpose referred to in subsection 11G(1). (See paragraphs 1.79 and 1.80 for the explanation of the applied investigation provisions in subsection 15G(2)).

1.19 This ensures that ASIC will use the same supervisory powers in relation to an unfair term in a standard form consumer contract of general insurance as it does in relation to an unfair term in other contracts of financial products and services.

Power to intervene in proceedings

1.20 The Insurance Contracts Amendment Bill 2013 proposes to amend the IC Act to provide that ASIC will have power to intervene in any proceeding arising under the IC Act and be taken as a party to the proceeding, with all the rights, duties and liabilities of such a party (Schedule 3, item 1, section 11F of the Insurance Contracts Amendment Bill 2013). This amendment would apply to proceedings commenced the day after the Insurance Contracts Amendment Bill 2013 receives the Royal Assent.

1.21 ASIC's power to intervene in proceedings under proposed section 11F will be amended in relation to unfair contract terms. The amendment provides that ASIC must not exercise the power conferred by subsection 11F(1) to intervene in proceedings relating to whether an

insurer has failed to comply with the duty of the utmost good faith under proposed subsection 15A. Instead, ASIC may intervene in such a proceeding under section 12GO of the ASIC Act (as it applies under proposed subsection 15G(1) of Division 2 of Part II of the IC Act) for a purpose referred to in subsection 11G(2). [*Item 11, subsection 11F(1) and item 12, subsection 11G(2)*]

1.22 This ensures that ASIC will use the same powers to intervene in proceedings in relation to an unfair term in a standard form consumer contract of general insurance as it does in relation to an unfair term in other contracts of financial products and services.

Part II - The duty of the utmost good faith

Division 1 – General

1.23 A new Division 1 will be created for the duty of the utmost good faith as it applies to contracts of insurance other than certain contracts of general insurance that are dealt with in new Division 2. Sections 12, 13, 14 and 15 will be included in Division 1. [*Item 13*]

1.24 Currently, section 15 prevents a contract of insurance from being made the subject of relief under any other Commonwealth Act (including the ASIC Act). This relief includes the judicial review of a contract on the ground that it is unfair.

1.25 An exception from the effect of section 15 will be provided for a standard form consumer contract of general insurance. The exception will provide that such contracts will be capable of being made the subject of relief under the applied enforcement provisions of the ASIC Act. [*Item 14, subsection 15(3)*]

Division 2 – Unfair contract terms in certain contracts of general insurance

1.26 In Part II of the IC Act, a new Division 2 is created relating to unfair contract terms in standard form consumer contracts of general insurance.

1.27 Division 2 contains provisions equivalent to the UCT provisions of the ASIC Act which apply to contracts of financial products or services, other than contracts of insurance (sections 15A to 15F). However, the application of UCT provisions in these sections is modified compared to those in the ASIC Act to make them appropriate for a standard form consumer contract of general insurance.

Unfair terms in standard form consumer contracts of general insurance

1.28 Under section 13 of the IC Act there is implied into all contracts of insurance a requirement that each party to that contract of insurance act with the utmost good faith towards the other party in respect of any matters arising under or in relation to the contract.

1.29 New section 15A makes it explicit that under a standard form consumer contract of general insurance, an insurer will fail to comply with the duty of the utmost good faith if either:

- a term of the contract is declared to be an unfair term under section 12GND of the applied enforcement provisions of the ASIC Act; or
- the insurer relies on, or purports to rely on such a term. [*Item 15, subsection 15A(1)*]

1.30 If the contract can operate without the unfair term being relied on, the contract will continue to bind the parties. [*Item 15, subsection 15A(2)*]

1.31 Currently, section 14 prevents a party to a contract of insurance from relying on a provision of such a contract, if reliance on the provision would be to fail to act with the utmost good faith. Therefore, if a term of a standard form contract of general insurance is declared to be an unfair term under section 12GND of the applied enforcement provisions of the ASIC Act, section 14 provides that the insurer may not rely on the term.

1.32 This remedy differs from that which applies in the UCT provisions of the ASIC Act which provides that if a term in a standard form contract for a financial product or service is unfair, the term is void (subsection 12BF(1) of the ASIC Act). That is, the remedy of ‘voidance’ applies where a term in a standard form consumer contract has been declared an unfair term.

1.33 The difference is that the remedy of ‘voidance’ would affect all the standard form contracts which use the same term, whereas ‘non-reliance’ would only affect the particular contract which is the subject of the declaration. It is anticipated that an insurer that has a term in a general insurance contract that is declared to be unfair would make arrangements to amend that term in standard form consumer contracts of general insurance that are entered into subsequently.

1.34 The Insurance Contracts Amendment Bill 2013 proposes to amend section 13 of the IC Act so that a breach of the duty of utmost good faith is a breach of the requirements of the IC Act. This will mean

that a breach of the duty of utmost good faith in relation to an unfair term in a standard form consumer contract of general insurance will be a breach of the requirements of the IC Act.

1.35 The IC Act is a ‘financial services law’ as defined in section 761A of the Corporations Act. This gives insurers an obligation to comply with the IC Act as a condition of their Australian Financial Services Licence (AFSL) that they ‘comply with the financial services laws’ (subsection 912A(1)(c)). Therefore, were an insurer to breach the requirements of the IC Act in respect to the failure to comply with the duty of the utmost good faith, ASIC may exercise certain powers under the Corporations Act, including administrative actions against the insurer as the holder of an AFSL.

1.36 A breach of the IC Act for a failure to comply with the duty of utmost good faith implied into all contracts of insurance is not an offence against the IC Act.

1.37 New Division 2 will apply to a standard form consumer contract of general insurance which is defined as:

- a standard form contract; and
- a contract of general insurance. *[Item 15, subsection 15A(3)]*

1.38 A consumer contract is a contract to which at least one of the parties is an individual, and whose acquisition of what is supplied under the contract is wholly or predominately an acquisition for personal, domestic or household use or consumption. *[Item 15, subsection 15A(4)]*

1.39 A contract of general insurance is defined in subsection 11(6) of the IC Act as a contract of insurance that is not a contract of life insurance. Therefore, the UCT provisions of the IC Act will not be applied to contracts of life insurance. Further, since the IC Act does not regulate contracts of private health insurance, the UCT provisions will not apply to these contracts.

1.40 New section 15A is adapted from section 12BF of the ASIC Act, with the modifications referred to above, and to make it specific to a contract of general insurance rather than to apply to contracts for financial products or services.

Meaning of unfair

1.41 A term in a standard form consumer contract of general insurance is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- would cause detriment to a party if it were to be applied or relied on. *[Item 15, subsection 15B(1)]*

1.42 In determining whether a term of a standard form consumer contract of general insurance is unfair, a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole. *[Item 15, subsection 15B(2)]*

1.43 For these purposes, the definition of transparent is a term that is:

- expressed in reasonably plain language;
- legible;
- presented clearly; and
- readily available to any party affected by the term. *[Item 15, subsection 15B(3)]*

1.44 It will be presumed that a term of a consumer contract is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term, unless the party proves otherwise. *[Item 15, subsection 15B(4)]*

1.45 In relation to a standard form consumer contract of general insurance, an insurer will be taken to have proved that a term is reasonably necessary to protect their legitimate interests if they prove that the term reflects the underwriting risk accepted by the insurer. *[Item 15, subsection 15B(5)]*

1.46 New section 15B is equivalent to section 12BG of the ASIC Act, with the addition of subsection 15B(5) in its application to a standard form consumer contract of general insurance.

Examples of unfair terms

1.47 A non-exhaustive, indicative list of examples of the types of terms that may be considered unfair is provided. *[Item 15, paragraphs 15C(1)(a) to (n)]*

1.48 The examples provide statutory guidance on the types of terms which may be regarded as being of concern. They do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair.

1.49 Any consideration of a term of a type listed as an example is subject to the test set out in section 15B. In this context, there may be circumstances in which the use of such a term is reasonably necessary to protect an insurer's legitimate interest.

1.50 As part of this list, subparagraph 15C(n) provides a regulation making power by which additional examples may be added to the list, but this is subject to the requirements in subsection 15C(2) that before making a regulation, the Minister take into account the specified matters.

1.51 New section 15C is equivalent to section 12BH of the ASIC Act, with no modifications in its application to a standard form consumer contract of general insurance.

Terms that define main subject matter of consumer contract etc. are unaffected

1.52 A term of a standard form consumer contract of general insurance will be unaffected by new section 15A, but only to the extent that the term:

- defines the main subject-matter of the contract;
- sets the upfront price payable under the contract; or
- is a term which Commonwealth, State or Territory law expressly permits or requires. *[Item 15, subsection 15D(1)]*

1.53 The upfront price payable under a standard form consumer contract of general insurance is consideration that is:

- provided, or is to be provided, for the supply under the contract; and
- disclosed at or before the time the contract is entered into.

1.54 It does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event. *[Item 15, subsection 15D(2)]*

1.55 New section 15D is equivalent to section 12BI of the ASIC Act, with no modifications in its application to a standard form consumer contract of general insurance.

Standard form contracts

1.56 There will be a presumption that a contract of general insurance is a standard form contract if a party to a proceeding alleges this to be the case, unless the other person to the proceeding proves otherwise. *[Item 15, subsection 15E(1)]*

1.57 In determining whether a contract of general insurance is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

- whether one of the parties has all or most of the bargaining power in the transaction;
- whether the contract was prepared by one party before any discussion by the parties about the transaction;
- whether one party was required to accept or reject the terms of the contract;
- whether another party was given an effective opportunity to negotiate terms of the contract (other than those referred to in subsection 15D(1));
- whether the terms of the contract (other than those referred to in subsection 15D(1)) take into account the specific characteristics of another party or the transaction;
- any other matter prescribed in regulations. *[Item 15, subsection 15E(2)]*

1.58 New section 15E is equivalent to section 12BK of the ASIC Act, with no modifications in its application to a standard form consumer contract of general insurance.

Contracts to which this Division does not apply

1.59 Division 2 will not apply to a consumer contract that is a constitution of a company, managed investment scheme or other kind of body. This section is included to avoid doubt that the provisions do not apply to the constitution of a company and other bodies. *[Item 15, section 15F]*

1.60 New section 15F is equivalent to section 12BL of the ASIC Act, with no modifications in its application to a standard form consumer contract of general insurance.

1.61 Section 12BM of the ASIC Act provides that a party to a consumer contract is not taken to have contravened the ASIC Act when a term of the contract is made void because a term is unfair. The IC Act will not be amended to include a section equivalent to section 12BM. This is because under amendments to section 13 of the IC Act, included in the Insurance Contract Amendment Bill 2013, a breach of the duty of utmost good faith will be a breach of a requirement of the IC Act (see paragraphs 1.34 and 1.35). The proposed section 13 amendment, together with the new section 15A, will provide that if an insurer breaches the duty of utmost good faith because of an unfair term this will be a breach of the requirements of the IC Act. (The section 13 amendment will commence the day the Insurance Contract Amendment Bill receives the Royal Assent.).

Application of ASIC Act

1.62 New section 15G creates an enforcement and investigations regime in relation to unfair terms in a standard form consumer contract of general insurance. It does so by incorporating into the IC Act, by reference, certain enforcement and investigation provisions of the ASIC Act (defined by the amendments in items 1 and 2 as the ***applied enforcement provisions of the ASIC Act*** and the ***applied investigation provisions of the ASIC Act***). [Item 15, section 15G]

1.63 Schedule 1 is also inserted into the IC Act which makes technical modifications to specified sections of the applied enforcement and investigation provisions so they operate consistently with the new UCT provisions in sections 15A to 15F. [Item 17, Schedule 1]

Enforcement provisions

1.64 The applied enforcement provisions of the ASIC Act apply in relation to a standard form consumer contract of general insurance.

1.65 The applied enforcement provisions of the ASIC Act are:

- section 12AC (other than subsection (2)) which relates to the extraterritorial application of Division 2 of Part 2 of the ASIC Act;
- Subdivision G of Division 2 of Part 2 (other than sections 12GB to 12GCA, 12GF, 12GI, 12GLA to 12GLD and 12GNA). Subdivision G provides a number of remedies that a court may award, such as a declaration that a term is an unfair term, injunctions, or orders to redress loss or damage;

- Subdivision H of Division 2 of Part 2, which relates to miscellaneous matters; and
- any provisions that define expressions used in the above provisions. [*Item 15, subsection 15G(1)*]

1.66 The applied enforcement provisions of the ASIC Act apply, with the modifications set out in proposed Part 1 of Schedule 1 of the IC Act (and any other modifications prescribed by the regulations).

Investigation and information-gathering provisions

1.67 The applied investigation and information-gathering provisions of the ASIC Act apply in relation to a standard form consumer contract of general insurance.

1.68 The applied investigation and information-gathering provisions of the ASIC Act are:

- Division 1 of Part 3 (other than section 15). Division 1 relates to ASIC's powers of investigation;
- Division 2 of Part 3, which relates to the examination of persons;
- Division 3 of Part 3 (other than sections 29, 30A, 39A and 39B). Division 3 relates to ASIC's inspection of books and other audit information-gathering powers;
- Division 5 of Part 3, which relates to proceedings after an investigation;
- Division 7 of Part 3, which relates to offences;
- Division 9 of Part 3, which relates to the evidentiary use of certain material;
- Division 10 of Part 3 (other than section 86). Division 10 relates to miscellaneous matters; and
- any provisions that define expressions used in the above provisions. [*Item 15, subsection 15G(2)*]

1.69 The applied investigation provisions of the ASIC Act apply, with the modifications set out in proposed Part 2 of Schedule 1 of the IC Act (and any other modifications prescribed by the regulations).

1.70 The applied enforcement provisions of the ASIC Act are not intended to limit a court's powers under the IC Act in respect of a standard form consumer contract of general insurance that includes a term that has been declared to be an unfair term under section 12GND of the applied enforcement provisions of the ASIC Act. [Item 15, subsection 15H(1)]

1.71 In considering whether to exercise a power under the IC Act in respect of a contract referred to in subsection 15G(1), the court must consider:

- the contract as a whole; and
- the extent to which the insurer has complied with the requirements of the IC Act (other than proposed section 15A) in relation to the contract. [Item 15, subsection 15H(2)]

Division 3 - Remedies

Representative actions by ASIC

1.72 Where ASIC is satisfied that an insured will suffer damage from the terms of an insurance contract, the conduct of the insurer or breaches of the IC Act, section 55A of the IC Act provides that ASIC may apply to bring an action or continue an action against an insurer on behalf of insureds on public interest grounds.

1.73 Section 55A will be amended to preclude ASIC from taking such action for a standard form consumer contract of general insurance if the damage suffered or likely to be suffered by insureds is because the insurer has failed to comply with the duty of the utmost good faith in relation to the contract under section 15A (which relates to unfair terms). Instead, ASIC may use its powers under the applied enforcement provisions of the ASIC Act. [Item 16, subsection 55A(4)]

Schedule 1 – Modifications of applied ASIC Act provisions

Part 1 – Applied enforcement provisions

1.74 Part 1 of Schedule 1 sets out general and specific modifications to the applied enforcement provisions of the ASIC Act.

General modifications

1.75 Proposed Schedule 1 provides that the applied enforcement provisions will apply so that a reference in the applied enforcement provisions of the ASIC Act:

- to a provision included in those provisions is to be read as a reference to that provision as it applies under section 15G(1) of the IC Act [Item 17, Schedule 1, Part 1, subclause 1(1)]; and
- to a contravention of Division 2 of Part 2 of the ASIC Act, or of a provision of Division 2 of Part 2 of the ASIC Act, is to be read as a reference to relying on, or purporting to rely on, a term of a standard form consumer contract of general insurance that the Court has declared to be unfair under section 12GND of the applied enforcement provisions of the ASIC Act. [Item 17, Schedule 1, Part 1, subclause 1(3)]

1.76 All other references in the applied enforcement provisions of the ASIC Act to Division 2 of Part 2 of the ASIC Act are to be read as a reference to the applied enforcement provisions of the ASIC Act. [Item 17, Schedule 1, Part 1, subclause 1(2)]

1.77 A reference in the applied enforcement provisions of the ASIC Act to Part 3 of the ASIC Act is to be read as a reference to the applied investigations provisions of the ASIC Act. [Item 17, Schedule Part 1, subclause 1(4) subclause)]

1.78 In addition to the modification to the applied enforcement provisions as set out in proposed clause 1, further modifications to remedy provisions are made:

- Injunctions - Section 12GD of the ASIC Act applies as if subsection (9) were omitted; [Item 17, Schedule 1, Part 1, clause 2]
- Findings in proceedings to be evidence - Section 12GG of the ASIC Act applies as if the following references were omitted:
 - to a proceeding against a person under section 12GF of the ASIC Act;
 - to sections 12GBC, 12GLA and 12GLB of the ASIC Act; and
 - to an offence against section 12GB of the ASIC Act; [Item 17, Schedule 1, Part 1, clause 3].
- Other orders - Section 12GM of the ASIC Act applies as if:
 - subsection (1) were amended by omitting “or makes an order under section 12GF, 12GLA or 12GLB”;

- subsection (4) were amended by omitting “this Part” and substituting “this Subdivision”;
- subsections (6), (7A) and (10) were omitted; and
- a new subsection (7B) were inserted which precludes the Court from making an order of the kind referred to in paragraph (7)(a), (b) or (c) in relation to a standard form consumer contract of general insurance; *[Item 17, Schedule 1, Part 1, clause 4]*
- Power of Court to prohibit payment or transfer of money or property - Section 12GN of the ASIC Act applies as if:
 - paragraphs (1)(a) and (c) were omitted;
 - paragraph (1)(e) were amended by omitting “(a)” and “(c)”;
 - paragraph (3)(b) were amended by omitting “this Part” and substituting ““this Subdivision””; and
 - subsection (9) were omitted; *[Item 17, Schedule 1, Part 1, clause 5];*
- Orders to redress loss or damage suffered by non-party consumers etc. - Section 12GNB of the ASIC Act applies as if:
 - subparagraph (1)(a)(i) were omitted;
 - subparagraph (1)(a)(ii) were amended by omitting “a consumer contract”, and substituting “a standard form consumer contract of general insurance”;
 - paragraph (2)(a) were omitted;
 - paragraph (5)(a) were omitted; and
 - subsections (6) and (10) were omitted; *[Item 17, Schedule 1, Part 1, clause 6]*
- Kinds of orders that may be made to redress loss or damage suffered by non-party consumers etc. - Section 12GNC of the ASIC Act applies as if:
 - a new subsection (2) were inserted which precludes the Court from making an order under section 12GNB(1), of

the kind referred to in paragraph (1)(a), (b) or (c) in relation to a standard form consumer contract of general insurance; [*Item 17, Schedule 1, Part 1, clause 7*]

- Declarations - Section 12GND of the ASIC Act applies as if:
 - subsection (1) were amended by omitting “a consumer contract”, and substituting “a standard form consumer contract of general insurance” and adding at the end “(within the meaning of subsection 15B(1) of the IC Act)”; and
 - subsection (1A) were omitted; [*Item 17, Schedule 1, Part 1, clause 8*]
- Disclosure of documents by ASIC - Section 12HB of the ASIC Act applies as if paragraph (1)(b) were amended by omitting “section 12GLA or 12GLB or”; [*Item 17, Schedule 1, Part 1, clause 9*]
- Jurisdiction of Court to make declaration and orders - Section 12HD of the ASIC Act applies as if subparagraph (1)(a)(i) were omitted. [*Item 17, Schedule 1, Part 1, clause 10*]

Part 2 – Applied investigation provisions

1.79 Part 2 of Schedule 1 sets out general and specific modifications to the applied investigation provisions of the ASIC Act.

General modifications

1.80 A reference in the applied investigation provisions of the ASIC Act to:

- a provision included in those provisions is to be read as a reference to that provision as it applies under subsection 15G(2) of the IC Act [*Item 17, Schedule 1, Part 2, subclause 11(1)*]; and
- Part 3 of the ASIC Act is to be read as a reference to the applied investigation provisions of the ASIC Act. [*Item 17, Schedule 1, Part 2, subclause 11(2)*]
- Division 2 of Part 2 of the ASIC Act is to be read as a reference to the applied enforcement provisions of the ASIC Act. [*Item 17, Schedule 1, Part 2, subclause 11(3)*]

1.81 In addition to the modification to the applied investigation provisions as set out in proposed clause 1, further modifications to investigation provisions are made:

- General powers of investigation – Section 13 of the ASIC Act applies as if:
 - Subsections (1), (2) and (3) were omitted; and
 - Subsection (6) were omitted and substituted with proposed subsection (6). The proposed subsection allows ASIC to make such investigations as it thinks appropriate if it has reason to suspect that an insurer has relied on, or purported to rely on, a term of a standard form consumer contract of general insurance that the Court has declared under section 12GND of the applied enforcement provisions of the ASIC Act to be an unfair term. *[Item 17, Schedule 1, Part 2, clause 12]*
- Minister may direct investigations – Section 14 of the ASIC Act applies as if subsection (2) were omitted and the proposed subsection (2) were substituted. The proposed subsection allows the Minister to direct ASIC to investigate a matter, where in the Minister’s opinion it is in the public interests to do so, in respect to a suspected or purported reliance by an insurer on a term of a standard form consumer contract of general insurance that the Court has declared to be an unfair term under section 12GND of the applied enforcement provisions of the ASIC Act. *[Item 17, Schedule 1, Part 2, clause 13]*
- Final report on investigation – Section 17 of the ASIC Act applies as if subsection (1) were amended by omitting “or 15”. *[Item 17, Schedule 1, Part 2, clause 14]*
- When inspection and audit powers may be exercised – Section 28 of the ASIC Act applies as if:
 - “sections 29, 30A, 35, 36 and 39A” were omitted, and “sections 35 and 36” were substituted; and
 - paragraphs (a), (b) and (c) were omitted. *[Item 17, Schedule 1, Part 2, clause 15]*
- Notice to produce books about affairs of body corporate – Section 30 of the ASIC Act applies as if:

- the heading were amended by omitting “or registered scheme”; and
- subsection (2) were omitted. *[Item 17, Schedule 1, Part 2, clause 16]*
- Notice to produce books about financial products – Section 31 of the ASIC Act applies as if:
 - paragraphs (1)(a) and (b) were omitted; and
 - paragraph (1)(e) were omitted amended by omitting “(a), (b),”; and
 - paragraphs (1)(g) and (j) were omitted. *[Item 17, Schedule 1, Part 2, clause 17]*
- Notice to produce documents in person’s possession – section 33 of the ASIC Act applies as if subsection (2) were omitted. *[Item 17, Schedule 1, Part 2, clause 18]*
- ASIC may authorise persons to require production of books, giving of information etc. – section 34 of the ASIC Act applies as if subsection (3) were omitted amended by omitting “30A.” *[Item 17, Schedule 1, Part 2, clause 19]*
- Powers where books produced or seized – Section 37 of the ASIC Act applies as if paragraphs (5)(b) and (c) were omitted and new paragraphs substituted. *[Item 17, Schedule 1, Part 2, clause 20]*
- Non-compliance with requirements made under applied investigations provisions – Section 63 of the ASIC Act applies as if:
 - paragraph (1)(c) were amended by omitting “30A,”;
 - subsection (2) were omitted;
 - subsection (3) were amended by omitting “or 29(2)” and “or 58(1), (2) or (4)”;
 - subsection (4) were amended by omitting “or 48(2)”;
 - subsection (5) were amended by omitting “(1A), (2)”.*[Item 17, Schedule 1, Part 2, clause 21]*
- Self-incrimination – Section 68 of the ASIC Act applies as if:

- subsection (1) were amended by omitting “of Division 3 of Part 10, and Division 2 of Part 11,”; and
- paragraph (2)(a) were amended by omitting “Division 3 of Part 10 or Division 2 of Part 11,”. [*Item 17, Schedule 1, Part 2, clause 22*]
- Legal professional privilege – Section 69 of the ASIC Act applies as if paragraph (1)(a) were amended by omitting “Division 3 of Part 10, or Division 2 of Part 11,”. [*Item 17, Schedule 1, Part 2, clause 23*]
- Powers of Court where non-compliance with applied investigation provisions - Section 70 of the ASIC Act applies as if subsection (1) were amended by omitting “(other than Division 8)”. [*Item 17, Schedule 1, Part 2, clause 24*]
- Copies of, or extracts from, certain books - Section 80 of the ASIC Act applies as if paragraph (1)(aa) were omitted. [*Item 17, Schedule 1, Part 2, clause 25*]
- Evidence of authority - Section 85 of the ASIC Act applies as if “(other than Division 6)” were omitted. [*Item 17, Schedule 1, Part 2, clause 26*]
- Allowances and expenses – Section 89 of the ASIC Act applies as of subsection (2) were omitted. [*Item 17, Schedule 1, Part 2, clause 27*]

Application and transitional provisions

1.82 The amendments made by Schedule 1 of the Amendment Bill apply to a standard form consumer contract of general insurance that is originally entered into on or after the commencement of this Schedule (the *commencement day*). [*Item 18*]

1.83 The application provisions ensure that the Amendment Bill will only apply to new arrangements entered into between general insurers and consumers. Contractual arrangements entered into before the commencement day will not be subject to the provisions introduced by the Amendment Bill, other than on the renewal or variation of the contract.

1.84 The commencement day will be 12 months after the day the Act receives the Royal Assent. It is considered that 12 months is an

appropriate transition period to allow insurers to comply with the new UCT protections.

1.85 If such a contract that was originally entered into before the commencement of the schedule is renewed, the amendments made by Schedule 1 apply to the contract as renewed, on or after the day (the **renewal day**) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal takes effect. *[Item 18]*

1.86 In relation to a contract of insurance that was originally entered into before the commencement of the Schedule but is varied on or after that day, the amendments made by Schedule 1 apply to the term as varied, on or after the day (the **variation day**) on which the variation takes effect, in relation to conduct that occurs on or after the variation takes effect. Other terms of that contract will not be made subject to the UCT provisions because of the variation, until such time as the contract is renewed. *[Item 18]*

Schedule 2 — Other amendments

Australian Securities and Investments Commission Act 2001

1.87 To avoid doubt that the unfair contract terms provisions of the ASIC Act do not apply to contracts of general insurance, subsection 12BF(1) will be amended so that it does not apply to such contracts. A note is inserted at the end of the subsection to refer to Division 2 of Part II of the IC Act in relation to unfair terms in standard form consumer contracts of general insurance. *[Items 2 and 3, subsection 12BF(1)]*

1.88 A definition of standard form consumer contracts of general insurance is inserted in subsection 12BA(1), has the meaning given by subsection 15A(3) of the IC Act. *[Item 1, subsection 12BA(1)]*