

Submission to the Treasury

**Extending Unfair Contract
Terms Protections to
Insurance Contracts
Proposal Paper**

August 2018

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About Us

Slater and Gordon Limited is a leading consumer law firm in Australia. We employ over 800 people in 40 locations across Australia. Slater and Gordon's mission is to give people easier access to world class legal services.

As Australia's leading trade union and labour movement law firm, we also have a proud history of partnering with trade unions to defend workers' rights. The firm provides specialist legal and complementary services in a broad range of areas.

Our Superannuation and Disability Insurance practice has been dedicated to assisting claimants for more than 20 years. The area of disability insurance, whether through a group life policy within a superannuation scheme or retail policy, can be challenging and daunting for people suffering from an injury or illness.

The struggle to cope with the difficulties and frustrations that an illness or injury can bring to them and their families' drives us to support and guide them through this complex area both legally and through our dedicated in house social work services.

Introduction

Slater and Gordon welcome the opportunity to provide submissions to the Treasury on its proposal paper on the extension of unfair contract terms protections to insurance contracts.

Through the provision of support and guidance to clients with insurance claims, Slater and Gordon has extensive experience and exposure to the variety of obstacles faced by working Australians, including individuals who are ineligible to claim on the cover they have due to unfair contract terms.

The carve out of the application of unfair contract terms protections to insurance contracts by virtue of s.15 of the Insurance Contracts Act ("ICA") has for almost a decade been the subject of consideration and contention in a number of reviews by Parliamentary Committees. Yet to date, little or no real action has been taken to address the shortcomings of the carve out for consumers, who are at a significant disadvantage when it comes to understanding and negotiating on terms.

Slater and Gordon seek to address the questions posed by the Treasury on this important issue as follows.

(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?

Slater and Gordon adamantly support the proposed amendments to s. 15 of the ICA to allow unfair contract term laws to apply to insurance contracts.

The exclusion of insurance contracts when UCT protections were effected in January 2011 based upon the rationale that the ICA provided adequate protections, specifically dealing with the uniqueness of insurance contracts was unsound.

The aim of the Australian Consumer Law (ACL) was to ensure consistency in application as well in remedy. Current consumer protections for insurance contracts fall far short of what is required to adequately protect consumer rights and entitlements. We consider that the amendment will enable this to be realised.

Slater and Gordon do not believe that consumers are protected by the ICA from unfair contract terms as asserted by the insurance industry, and much less by virtue of s.13. This conclusion was reached by the ACL Review Final Report of March 2017, whereby it found that the duty to act in utmost good faith provided less consumer protection than that provided by ACL.¹ The interpretation and scope of this provision has long been the subject matter of industry, academic and Court consideration and conjecture based upon the difficulty in the scope and application of the duty of utmost good faith.

The interpretation and application of the duty of utmost good faith by the Courts has generally centered upon the honesty and integrity of the insurer in its dealings and processes around the contract, and not upon the fairness of the particular terms therein.²

The duty of utmost good faith cannot be seen to be an effective mechanism of prevention of inclusion of unfair contract terms in insurance contracts, nor does it provide adequate power to remedy when a consumer is affected by an unfair contract term. The Australian Securities and Investments Commission (ASIC) have also raised its concerns regarding the present inadequacy of the penalty provisions for breach of duty of utmost good faith.³ Thus s.13 is clearly insufficient to protect consumers from unfair contract terms.

¹ Consumer Affairs Australia and New Zealand, Australian Consumer Law Review, March 2017, p. 53

² CHOICE, to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry Submission 49, p. 14.

³ Mr Peter Kell, Deputy Chairman, Australian Securities and Investments Commission, Committee Hansard, 8 September 2017, p. 38.

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

Advantages

We consider that the proposals outlined by the Treasuries proposal paper, including the intervention enforcement powers of the ASIC, certainly provide an increased incentive for insurers to ensure that contract terms are clear and transparent, and to either remove or reasonably justify the need for unfair contract terms within their policies.

The implementation of unfair contract terms protections to this area would ensure that the onus is upon insurers to adequately consider the appropriateness of exclusion clauses.

The remedies currently available to consumers who are impacted by unfair contract terms in other contracts will be accessible to impacted consumers creating consistency in application.

As observed by Lauren Wright in her paper,⁴ *'consumer confidence is detrimentally affected where consumers and the community as a whole perceive systemic unfairness in financial products, or in dealing with financial service providers in respect of those products.'* This can be no truer a description of the current state of play between consumers and industry, given the immense divide between consumer and community expectations and insurer conduct. The proposal is a great step towards correcting some of the current imbalance for consumers and small business with insurers.

Disadvantages

Arguments have been put forward by the insurance industry that the application of unfair contract term laws to the insurance industry will result in additional costs to both insurers and consumers alike.

We understand that life insurance premiums are calculated on the actuarial risk that is assumed by the life insurer. As such, there cannot be a general assumption that the exclusion of some risks and the acceptance of others is necessarily an unfair term, where doing so makes the contract more affordable for the consumer. This is no doubt a complicating factor for the introduction of unfair contract terms.

⁴ Utmost Good Faith and Fairness in Life Insurance: Restoring Consumer Confidence [2017] UNSWLawJlStud 3, page 1.

However, if the decision to offer or not offer certain terms is based upon actuarial data, then the insurer may reasonably justify the need for unfair contract terms within the policy offered. There is a distinction to be drawn between an exclusion clause for the purpose of offering insurance, and unfair contract terms that by their very nature are unreasonable and plainly unfair.

The experience of the United Kingdom in relation to the extension of unfair contract terms to insurance contracts should be used as opportunity to learn and improve the way in we extend the ACL to insurance contracts,⁵ and not as justification for retaining the status quo.

Accordingly, while we consider costs to be a relevant consideration, we do not believe that it serves as a legitimate or reasonable basis for unfair contract terms protections to remain excluded from insurance contracts.

- (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).**

Increased cost to industry is not a legitimate or justifiable reason to allow the industry to remain uninhibited by appropriate regulation. The application of unfair contract terms to all other financial products has by no means occurred without additional cost in compliance. Accordingly, we refer to and repeat our response to question 2.

Other options for extending UCT protections

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

Slater and Gordon do not support the other proposed models. It is apparent that the current provisions and past attempts to amend the ICA are insufficient to adequately protect consumers against unfair contract terms.

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

The disadvantage to consumers based upon with the inconsistent application of unfair contract terms to financial products and remedies will continue.

⁵ Mr Nick Kirwan, Policy Manager, The Financial Services Council, Committee Hansard, 1 December 2017, p. 25–27.

- (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).**

We are not in a position to address this question, save as to say that with any legislative or regulatory change, there will be costs associated with compliance. We maintain our position that this is not a legitimate reason for the inconsistencies on application of unfair contract terms to continue.

Terms excluded from the UCT laws

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

Slater and Gordon do not support the exclusion of main subject matter. To provide such an exclusion would be counterproductive to the balance of rights and protections that is sought by the proposal. We support the narrow defining of terms describing what is being insured for clarity and consistency in main subject matter.

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

N/A

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

For transparency and consistency, we consider that there is no legitimate reason to necessitate specific tailoring of the rules and they should be applied uniformly.

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

We support the exclusion of upfront pricing from being capable of review. This ensures that the existing UCT laws are consistent and in uniform with the proposed changes.

- (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?**

This needs to be balanced with the concept of fairness. The quantum needs to be neither excessive nor hidden to ensure fairness, awareness and understanding by consumers. The fact that examples exist whereby consumers are detrimentally affected means that closer scrutiny needs to be given to the appropriateness of the proposal, and whether a process for review is warranted.

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

No. We refer to our answer to question 9 above.

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?**

Slater and Gordon agree with this proposal. Policy options are offered with the intended purpose of targeting the needs of a demographic rather than on individually negotiated terms. Thus, they remain and should be considered to be standard form.

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

We support this proposal.

Meaning of unfair

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

We consider that proposal appropriate. We submit that an insurer's legitimate interest should reasonably reflect underwriting risk, but this risk must be based upon actuarial data rather than status quo procedures and practices of the industry. The insurer should carry the burden of proof in this regard to ensure that there is no unreasonable detriment to consumers.

- (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?**

We refer to and repeat our answer to question 15.

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

No. We refer to our answer to question 15 and say further, that while insurance contracts may have specific features that differentiate them from other general insurance contracts, they are not sufficiently difference to justify the tailoring of the application of unfair contract terms to such contracts.

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?

Slater and Gordon consider that it is necessary, and avidly support the addition of specific examples of unfair contract terms relevant to insurance contracts, consistent with other contract terms and Australian consumer laws. It promotes transparency, clarity and consistency in the law to all parties affected.

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

Yes, we support the examples of terms as described in the proposal paper, which will provide guidance to all relevant parties. There will inevitably be other examples of terms that should also be considered. The ability for terms to be added will be an important part of ongoing regulation and remedy for unfair contract terms.

In particular, we call for unfair terms in relation to mental health exclusions to be reviewed as a matter of priority. We consider the systemic blanket exclusion of mental health condition without evidence of reasonable reliance on robust, actuarial or statistical data, to fall outside of the proposed definition of insurer's legitimate interest.⁶

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

No. We refer to and repeat our answer to question 15 above.

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)?

Slater and Gordon's preference is for the inability of an insurer to rely upon a term that is unfair, instead of the term being declared void. Our preference is premised upon the potential for there to be a real but unforeseen impact on the relevancy and enforceability

⁶ Beyondblue submission to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (November 2016), Submission 18, page 3; Mental Health Australia submission to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (November 2016), Submission 16.

of the contract as a whole by virtue of the voiding of a term, that in the circumstances of the consumer, is unfair, as pointed out in the proposal.

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

Slater and Gordon consider it appropriate for a Court to have the authority to make the orders is considers just and appropriate based upon the circumstances of the matter before it.

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

No. We refer to and repeat our answer to question 15 above.

Third-party beneficiaries

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

Slater and Gordon strongly support the proposal for unfair contract terms to apply to third-party beneficiary contracts of insurance (group life). This is essential given that approximately 92% of working Australians with some form of life insurance cover obtained such insurance by way of a group life policy incepted through their superannuation fund.⁷

As third-party beneficiaries, they have no bargaining power over the terms of the contract taken out on their behalf of a group of fund members. They are informed of the terms and conditions associated with their insurance by way of lengthy and legally worded product disclosure statements.

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

We refer to our answer to question 24.

(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?

⁷ Financial Services Council submission to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (November 2016), Submission 26, page 20 (referencing Rice Warner Underinsurance in Australia – published in August 2016)

Group life contracts of insurance offered by life insurers to superannuation funds on behalf of third-party beneficiaries, and the requirement and expectation that trustees of superannuation funds will act in the best interests of their members has also experienced significant scrutiny of late.

Currently, trustees of superannuation funds have fiduciary obligations at general law and by virtue of the Superannuation Industry (Supervision) Act and regulations.

Some have registered their intention to be bound by and comply with the Insurance in Super Voluntary Code of Practice (the Code). However, according to the Association of Superannuation Funds of Australia (ASFA) 'Superannuation Statistics' publication,⁸ of the total 224 Corporate, Industry, Retail and Public Sector super funds nationally, 86 of which are members of ASFA, only 65 have registered their intention to adopt and comply with the Code.⁹

These governing frameworks clearly do not go far enough to protect consumers as individual members, or as third-party beneficiaries of group members in a specific policy by virtue of the employment group they fall into.

To protect third-party beneficiary consumers against unfair terms, it is incumbent on the superannuation fund trustee to ensure that extensive and relevant due diligence is undertaken on third-party beneficiary policies to ensure that they are not junk policies or contain unfair terms.

We are on record¹⁰ as supporting the Productivity Commission's recommendation for superannuation trustees to be required articulate why the cover chosen is in the fund member's best interests, which we consider to be a fundamental aspect of the outcome of due diligence, and goes to the question of reasonableness and fairness.

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?

No, we do not believe that tailoring of the UCT laws is necessary.

⁸ <https://www.superannuation.asn.au/ArticleDocuments/269/SuperStats-Jun2018.pdf.aspx?Embed=Y> June 2018.

⁹ <https://www.superannuation.asn.au/policy/insurance-in-superannuation-voluntary-code-of-practice>

¹⁰ Slater and Gordon submissions to the Productivity Commission - Superannuation: Assessing Competitiveness and Efficiency, July 2018, paragraph 36, page 9.

(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 recognise that premium increases are required as part of business by virtue of the type of risk that is assumed by insurers.

On the provision that unilateral premium adjustments are relevant to the reasonable management of the risk assumed by the insurers, and the terms permitting the unilateral increase are conveyed and understood clearly by the consumer affected, we do not consider that it would be an unfair term for the purpose of the proposals.

Transitional Arrangements

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

Given the life insurance industry is currently reviewing its Code of Practice for amendment; it is an ideal time for the transition to occur. In the circumstances, we consider that 12 months is appropriate.

At a time when consumer confidence in the industry is at an all-time low, insurers should not see the timeline for compliance as a constraint but an opportunity to properly consider and adapt their practices and products.

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

We consider the proposed transition arrangements to be appropriate. It will allow for a structured approach to the application of the provisions to the relevant products.

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

Insurers will need to review their contracts to identify any potentially unfair terms and take active steps to rectify or remove such terms.

We recommend that the industry heed the words of the Parliamentary Joint Committee in its report¹¹ that suggested *“life insurers could take a proactive approach and immediately begin reviewing their contracts with a view to removing any unfair contract*

¹¹ Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (27 March 2018) page 49.

terms. Indeed, life insurers should not need to wait for the passage of legislation that requires the removal of unfair contract terms.”

They should consider the outcomes achieved previously by engagement between the ACCC and other consumer organisations in engaging with businesses to remove unfair terms, as a balanced best practice taking account of budgetary constraints on regulation and litigation costs.¹²

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

No.

Conclusion

We take this opportunity to thank the Treasury for the opportunity to provide feedback on the Proposals Paper.

In summary, we consider that:

- a. Section 15 of the ICA should be amended to enable unfair contract terms protections should be extended to insurance contracts;
- b. Consumer protections for insurance contracts be entitled to the same protections afforded by unfair contract terms ACL to other financial contracts;
- c. The insurance industry should take a proactive step towards the voluntary removal of unfair contract terms as a show of good faith and opportunity to rebuild consumer confidence in the sector.

We would welcome any further opportunity to provide further assistance to the Treasury on this important topic for all Australian consumers.

¹² CHOICE submission to the Parliamentary Joint Committee on Corporations and Financial Services Report on the Life Insurance Industry (November 2016), Submission 49, p. 15