3 June 2013

By email: UCT_reforms@treasury.gov.au

Manager
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Dear Sir or Madam

Exposure Draft Insurance Contracts Amendment (Unfair Terms) Bill 2013

Thank you for the opportunity to comment on the *Exposure Draft Insurance Contracts Amendment (Unfair Terms) Bill 2013* (**the draft Bill**) and the exposure draft explanatory memorandum (**the explanatory memorandum**).

This submission is made jointly by:

- Consumer Action Law Centre
- Insurance Law Service
- Legal Aid New South Wales

Details on each organisation can be found in the appendix.

Broad remarks

We are broadly very supportive of the draft Bill. Unfair contract terms protections currently apply to every other contract an Australian consumer is ever likely to enter[1] and it has always been our view that these protections should apply equally to insurance contracts.

The draft Bill is informed by a proposal set out in a Media Release from the Assistant Treasurer, the Hon David Bradbury from December 2012 (**the December 2012 proposal**).[2] That proposal in turn came out of extensive consultation by Treasury, the Assistant Treasurer and his office with insurers and consumer advocates. This proposal—in particular the decision to insert new elements in the *Insurance Contracts Act* rather than simply extend the existing *ASIC Act* provisions to insurance—was not the preferred option for consumer advocates. However, the

[1] Section 28 of the Australian Consumer Law provides that certain contracts regarding shipping are not subject to the unfair terms protections, nor are contracts which are the constitution of a company, managed investment scheme or similar body.

[2] Available at http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/171.htm&pageID=003&min=djba&Year=2012&DocType=0

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result is in our view workable and a considerable improvement on the current situation. More importantly it is a result achieved through genuine negotiation between both sides of the debate which deserves to be enacted.

That being the case, this submission does not make any recommendations to amend the draft Bill in a way that is contrary to the scheme outlined in the December 2012 proposal. Our suggestions below are intended to ensure that the draft Bill and explanatory memorandum put that proposal into law.

Briefly, this submission:

- recommends that the amendments to the Insurance Contracts Act be restructured so that the central unfair terms provisions are inserted into, or immediately follow, section 14;
- recommends that proposed paragraph 15A(1)(b) be amended to create an obligation on insurers to conform to the expected standard of fairness prior to a Court-sanctioned order being made. This amendment is required to make the unfair terms law operate as it is intended in relation to insurance, but reflects the December 2012 proposal in that it still avoids the risk of market uncertainty raised by insurers;
- recommends that text should be inserted in the Explanatory Memorandum to explain the purpose for the main subject matter exemption;
- recommends that amendments to the draft Bill and the explanatory memorandum should be made regarding proposed subsection 15B(5) to be clear a contract term which reflects underwriting risk is not protected from challenge as an unfair term if it reflects underwriting risk in a way which is unreasonable;
- raises serious concerns that ASIC is not capable of using its investigation and enforcement powers in relation to a suspected unfair contract term until a declaration of unfairness is made (either under the ASIC Act currently or under the proposed amendments to the Insurance Contracts Act). It is not clear whether the relevant sections of the draft Bill will effectively apply the ASIC Act standard of enforcement to this Act. In either case changes should be made to ensure ASIC has investigation powers prior to a declaration of unfairness;
- notes that the draft Bill appears to remove two (relatively minor) ASIC powers without clear reason. These powers should be reinstated or the reason for the removal made clear;
- recommends that the Explanatory Memorandum explicitly note that the unfair terms law is open to be applied by industry external dispute resolution schemes; and
- recommends that, as soon as the *Insurance Contracts (Unfair Terms) Bill 2013* receives royal assent, Government should begin consulting on how unfair terms protections should also be extended to consumer life insurance contracts.

Our comments are detailed more fully below.

Structure of the amended sections

Unfair contract terms provisions have two key benefits. The first is that they allow remedies for consumers who have suffered detriment because a trader relied on an unfair term. The second is that it creates an incentive for traders to draft their contracts with an eye to fairness and review

their existing contracts and remove terms which may be unfair, rather than face enforcement action later.

While the first benefit (righting a wrong after the fact) is important, the second (preventing harm before it occurs) is far more so. In our view this second point—promoting good faith drafting of standard form contracts by traders—should be reflected in the law as the primary purpose for unfair terms protections. This is all the more relevant for this draft Bill, which explicitly links the prohibition on unfair contract terms with the existing duty for insurers to act with utmost good faith in sections 13 and 14 of the Insurance Contracts Act.

We do not believe the structure of the draft Bill—which presents the unfair terms provisions (sections 15A to 15H) as an exception to section 15 of the Insurance Contracts Act—sends this message. The purpose of section 15 is to prevent consumers from seeking relief under another piece of law on the basis that (among other things) an insurance contract is "harsh, oppressive, unconscionable, unjust, unfair or inequitable". A natural reading of the structure proposed by the draft Bill would leave the reader with the impression that insurers are generally immune from actions claiming that their contracts are unfair, except in the limited circumstances described by 15A-15H.

Instead of setting the unfair terms provisions as an exceptional case, the law should promote the fact that insurers have an obligation to act in utmost good faith, and one element of that duty is that contract terms should be fair. There are two ways this could be achieved with uncomplicated amendments to the draft Bill:

- Option 1: place the unfair terms provisions in, or immediately following, section 14 of the Insurance Contracts Act. The unfair terms provisions follow naturally from section 14 which provides that an insurer may not rely on a term of an insurance contract if to do so would be to fail to act with utmost good faith.

  This change could be made by:
  - moving proposed sections 15A-15H to 14A-14H;
  - potentially deleting the proposed subsection 15(3) as it is no longer be necessary, however it could be replaced with a note under section 15 to the same effect.

- Option 2: refer to a broad obligation to avoid unfair contract terms in section 14, and allow other amendments to follow section 15. This would place the unfair terms provisions as a natural part of the broader duty to act with utmost good faith while making fewer changes to the draft Bill than Option 1.

  This change could be made by:
  - moving proposed section 15A (which sets out the broad duty) to a subsection under section 14;
  - leaving proposed sections 15B-15H where they are (though they would need to be re-labelled); and
  - potentially deleting the proposed subsection 15(3) as it is no longer be necessary, however it could be replaced with a note under section 15 to the same effect.

Recommendation:
We recommend that the amendment to be restructured in one of the ways suggested above.

Section 15A

Section 15A is the key provision in the draft Bill. It is the equivalent in the insurance context to the existing s12BF ASIC Act which sets the standard upon which Financial Service Providers must comply in the drafting of the terms in their standard form contracts to conform with unfair terms obligations.

A key challenge in this Bill has been to replicate the ASIC Act standard whilst minimising unintended consequences. A recurring argument raised by insurers was that the ASIC Act test, which made unfair terms in standard form contracts 'void' at the moment they entered the marketplace, caused far too much uncertainty. The drafting that has been posited in s15A, whilst very close to being a solution that works, needs further refinement to ensure that consumers are not excluded from enforcing their rights with insurers or through EDR processes.

On the current drafting of s15A, there is no legal obligation on an insurer to conform to the s15B standard of fairness in relation to their standard form contracts *at any point* prior to a Court-sanctioned order being made. For consumers, the effect would be that, unless *that* particular term had been declared unfair by a court previously:

- consumers would have no legal basis to *succeed* in a claim for unfairness under s15A against an insurer—except in running their case in Court to seek that declaration; and
- equally, external dispute resolution schemes would have no legal power to *bind* an insurer to any obligation in relation to s15A—only a Court has that power.

That is, under the current drafting of s15A, no insurer can ever be in breach of unfair terms laws *at any point* prior to court-sanctioned orders. The consequence for the marketplace is that:

- there is no overarching concept which requires insurers to consider the fairness of terms in their standard form contracts when they first enter the marketplace, because the unfair terms standard does not operate on insurers until after court-sanctioned orders. This is very different to the principle behind the unfair contract terms regime in the ASIC Act which creates an obligation of fairness from the point the terms are drafted;
- because of the above, the duty of utmost good faith is significantly diminished in its effect to positively influence patterns of behaviour by insurers in the drafting their contracts, the manner in which they approach unfair terms disputes at any point, prior to Court proceedings

The simple solution would be to amend s 15A(1)(b) to read (amended text in bold)

> the insurer relies upon, or purports to rely on, **a term that is unfair within the meaning of s 15B**

The attraction of this simple amendment is that it better reflects the intention of unfair terms regulation, to *proactively* influence market behaviour before harm arises, while allaying insurer concerns regarding market instability (to which we refer above, regarding the ASIC Act outcome that unfair terms become void). Our proposed rewording would place an obligation on insurers to

comply with s15B fairness long before any declaration by a court. But given proposed s15A already links back to the concept of 'reliance' in Insurance Contracts Act section 14, the impact for non-compliance by insurers would not undermine the market—it only sidelines the particular clause in the particular contract between the insurer and the individual making the claim.

This reword may create related concerns that a technical breach by an insurer of s 15A(1)(b) may automatically trigger regulator intervention (which is not the intent of our reword). In breaching 15A(1)(b) an insurer would breach their duty of utmost good faith, which will soon be considered a breach of the Insurance Contracts Act. We understand that a similar problem was raised during the drafting of the unfair terms provisions in the ASIC Act and that the solution was to insert section 12BM, which reads:

> Conduct is not taken, for the purposes of this Act, to contravene this Subdivision (or this Division) merely because of subsection 12BF(1).

The same solution could be applied here. We suggest inserting a provision to the effect that conduct does not breach the Insurance Contracts Act merely because of a technical breach of 15(1)(b).

Recommendation:
We recommend that proposed section 15A(1)(b) be amended to read:

> the insurer relies upon, or purports to rely on, a term that is unfair within the meaning of s 15B

Main subject matter exemption

The draft Bill, like the existing unfair terms provisions in the ASIC Act and the Australian Consumer Law, prevents terms which form part of the main subject matter of a contract from being challenged on the basis that it is an unfair contract term (proposed section 15D).

In the insurance context this has special significance because if key conditions or exclusions within a policy are exempt from review on the basis that they form part of the main subject matter, then consumers will not have the level of protection they need in insurance policies.

The main subject matter of a contract is understandably considered immune from challenge on the basis of unfairness. Unfair terms protections are provided to address some of the imbalance caused by use of standard form contracts—defined by unfair terms provisions essentially to mean a contract which is drafted entirely by one party, with no power for the other to negotiate terms. These contracts create the risk that a consumer may feel obliged enter into a contract to acquire goods or services despite the contract containing terms they consider to be unfair.

A consumer, for example, may feel as though they have little choice but to purchase comprehensive car insurance because they are required to have it under the terms of their car loan, or the risk of going without insurance (losing their car in an accident and not being able to afford another) is too high to accept. However, the reality is that a consumer is unlikely to fully understand every term of that contract when they sign it, because insurance is inherently

complex and not well understood by most consumers. Further, even a fully informed consumer would at some point grudgingly accept terms, exclusions and conditions they did not like rather than go without insurance. This is a problem in insurance as much as in any other industry. The purpose of unfair terms protections is to redress this imbalance, by preventing a business from relying on terms so unfair that consumers only accept because they lack the power to negotiate fairer terms.

It follows that unfair terms protections should not apply where consumers do have power to negotiate terms of a contract. This is why the unfair terms protections only apply to standard form contracts, and why they do not apply to the upfront price and the main subject matter—which in the comprehensive car insurance example we understand to mean that the product purchased is insurance, it is for a motor vehicle and it is a comprehensive policy. These are terms that a consumer must necessarily have agreed to before entering the contract. No amount of power imbalance could lead a consumer to purchase car insurance when they actually wanted a home building policy.

The explanatory memorandum to the Australian Consumer Law explains this principle:

> ***Main subject matter of the contract***
> 5.59 The exclusion of terms that define the main subject matter of a consumer contract ensures that a party cannot challenge a term concerning the basis for the existence of the contract.
>
> 5.60 Where a party has decided to purchase the goods, services, land, financial services or financial products that are the subject of the contract, that party cannot then challenge the fairness of a term relating to the main subject matter of the contract at a later stage, given that the party had a choice of whether or not to make the purchase on the basis of what was offered.
>
> 5.61 The main subject matter of the contract may include the decision to purchase a particular type of good, service, financial service or financial product, or a particular piece of land. It may also encompass a term that is necessary to give effect to the supply or grant, or without which, the supply or grant could not occur.

To be absolutely clear, we support the main subject matter exemption in the draft Bill just as we support it in the existing ASIC Act and Australian Consumer Law provisions. We also support the decision to not define the term 'main subject matter' in the draft Bill, because we think the meaning of this term is already established at law. However, we have concerns that this exemption may work against consumers if main subject matter is given a broad reading.

Throughout the consultation process, the insurance industry has argued that 'main subject matter' should be taken to include 'terms and exclusions that define an insurance contract's scope of cover'.[3] In our view, this argument is not consistent with accepted definitions of the term 'main subject matter'. Policy exclusions will rarely if ever be considered the main subject matter of an insurance contract. They are not (in the words of the Explanatory Memorandum quoted above) a term 'concerning the basis for the existence of a contract'. While exclusions and conditions precedent help define the scope of cover, they could not by any definition be

[3] See for example Insurance Council of Australia, *Unfair Terms in Insurance Contracts: Draft Regulation Impact Statement for Consultation* , 28 February 2012, p 16. Accessed from http://www.insurancecouncil.com.au/assets/submission/2012/unfair%20terms%20in%20insurance%20contracts%20-%20draft%20regulation%20impact%20statement%20for%20consultation.pdf

considered the reason the transaction takes place. Nor could it be said that, in reference to an exclusion or condition precedent, the consumer 'had a choice of whether or not to make the purchase on the basis of what was offered'—insurance is typically purchased over the phone and at the point of sale the consumer has not even seen the full terms of the contract.

Further, this definition of main subject matter would effectively mean that key terms of an insurance contract that a consumer are more likely to challenge for unfairness would be immune from review. In our experience the most common (and most egregious) complaints about unfair terms in insurance regard exclusion clauses. To omit them from review would have a significant impact on the effectiveness of the regime to insurance contracts.

Given the importance of this provision to the overall operation of the unfair terms regime, we would encourage proper and clear guidance being given to the Court as to the context in which main subject matter sits within the regime. That is, that this is consumer protection legislation intended to apply generally to the terms of insurance contracts, except such particular terms that (and only those terms that) define the main subject matter.

We suggest the best way to effect this is to include text in the Explanatory Memorandum and or the second reading speech explaining the purpose of the main subject matter exemption. This should not attempt to define the meaning of the term but it could, like the text from the ACL explanatory memorandum, give enough guidance to prevent an artificially broad definition gaining favour.

> **Recommendation:**
> Government should include text in the Explanatory Memorandum to explain the purpose for the main subject matter exemption.

Underwriting Risk

The draft Bill provides that, before a court can determine that a term is unfair it must (among other things) find that that term

> ...is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.[4]

This element is already a part of the definitions of 'unfair' in the unfair contract terms provisions in the ASIC Act and the Australian Consumer Law. However, the draft Bill does introduce a new element to the definition of 'unfair' for the Insurance Contracts Act at proposed subsection 15B(5):

> An insurer... is taken to have proved that a term of the contract is reasonably necessary in order to protect the legitimate interests of the insurer, if the insurer proves that the term reflects the underwriting risk accepted by the insurer.

[4] Proposed paragraph 15B(1)(b).

The term 'underwriting risk' is not defined by the draft Bill and it is not entirely clear how 15B(5) will be interpreted. This raises two (related) concerns.

'Underwriting risk' as currently defined may weaken the effectiveness of the unfair terms regime, and a court may lack independent evidence on the nature of the underwriting risk

Much like 'main subject matter', we think it is natural that any insurer which has a contract term challenged on the basis of unfairness will argue a defence under 15B(5), and will argue that the term 'underwriting risk' be construed broadly. This will particularly be the case in the first unfair terms cases that come before the courts when ASIC as well as insurers will have an interest in testing the boundaries of the new provisions.

In our view there is a real risk that the 15B(5) could be construed broadly and so represents a risk to the whole unfair terms regime in insurance. In a sense, any term of an insurance contract that defines or limits the risk an insurer is willing to take on could be seen as a term 'reflecting the underwriting risk'. This could lead to the curious (and circular) result that any term of an insurance contract that would ever be challenged (a consumer is unlikely to challenge a term unless it limited the risk covered) would be ultimately immune from challenge by 15B(5) because it itself defines the risk being accepted.

To reduce this likelihood, we suggest that there would need to clarification of ASIC's general investigation power regarding review of underwriting guidelines, including the ability to review insurer's underwriting guidelines without the need of Court-sanctioned order on a particular term. We do not suggest ASIC should be challenging the reasonableness of the guidelines generally, but there is a role for ASIC to play in investigating the worst excesses in the marketplace, to ensure that particular wording drafting in standard form contracts accurately reflects the underwriting guidelines. We have suggested in past consultations that travel insurance and CCI insurance were two areas where we thought this aspect of the new regime would have most effect. It follows that ASIC would also have a role to then assist the market by articulating in Regulatory Guidance, examples of deviations from the standards set under the new regime, It also follows that with proper powers of investigation, Courts (particularly lower courts) and EDR would have some guidance on this important but challenging aspect of the new regime. .

As we discuss below, it seems to be the case that ASIC's general investigation power (in relation to unfair terms in financial services broadly under the ASIC Act and in general insurance under the draft Bill) is not triggered until after a court has made a declaration of unfairness. This limits the ability of ASIC to challenge an insurer's argument that a term accurately reflects the underwriting guidelines. We refer to our recommendations below under the 'applied enforcement and investigation provisions' subheading.

A term reflecting underwriting risk could still be unfair in itself

Alternatively, an exclusion clause could be found to 'reflect the underwriting risk accepted' and so be immune to challenge despite being patently unfair. For example, we have seen a case where one clause of a caravan insurance contract claimed to provide cover for damage to third parties, but an exception clause later said that no cover was provided where the damage occurred when, or immediately after, the caravan was being towed by a motor vehicle. The effect of the two clauses, as far as we can see, is that the exemption renders the initial clause providing entirely redundant (except for in extraordinarily unlikely scenarios, perhaps where the caravan is blown over in a freak gust of wind).

It may be that these clauses accurately reflected the underwriting risk accepted by the insurer, that is that damage to third parties is only covered for highly improbable events. However, we submit that it is still obvious that these contract terms are unfair—if the insurer wished to only

cover those improbable events it should not have suggested in the first instance that a broader category of third party damage was covered. Under the current phrasing of 15B(5) it is quite possible that these clause would still escape challenge as an unfair term because they 'reflect the underwriting risk accepted by the insurer', even if they are expressed in a way which is clearly unfair and even though the insurer could have easily reflected the same underwriting risk with fairer terms.

Recommendation:
Proposed subsection 15B(5) should be rephrased to say:

> ...a term of the contract is reasonably necessary in order to protect the legitimate interests of the insurer, if the insurer proves that:
>
> a) the term reflects the underwriting risk accepted by the insurer; and
> b) the term reflects that risk in a reasonable way.

Recommendation:
The Explanatory Memorandum should explain that 15B(5) is not intended to protect a term from challenge as an unfair term if reflects underwriting risk in a way which is unreasonable, and the insurer could have reflected that risk more reasonably.

Applied enforcement and investigation provisions

The purpose of the applied enforcement and investigation provisions (proposed section 15G and Schedule One to the draft Bill) are to give ASIC the same enforcement, investigation and information gathering powers in relation to unfair terms in general insurance as it does for other financial services under the ASIC Act.[5]

Our key concern with these provisions are that:

- ASIC's investigation powers and some of its enforcement powers are only triggered *after* a declaration of unfairness; and
- some relatively minor powers are not transferred from the ASIC Act to the Insurance Contracts Act.

<u>Investigation and enforcement powers are only triggered after a declaration of unfairness</u>

Schedule 1, Part 2 of the draft Bill seeks to apply ASIC investigation powers from the ASIC Act to the Insurance Contracts Act in relation to unfair terms in general insurance contracts. The current drafting of Schedule 1, Part 2 seems to mean that ASIC does not have any power to investigate suspected reliance on unfair terms by insurers *unless* a term has already been declared unfair by a court.

Item 12 in Schedule 1 of the draft Bill applies subsection 13(6) of the ASIC Act (regarding ASIC's general powers of investigation). In the ASIC Act, subsection 13(6) reads:

> If ASIC has reason to suspect that a contravention of a provision of Division 2 of Part 2 may have been committed, ASIC may make such investigation as it thinks appropriate.

[5] Draft explanatory memorandum, page 8. See also David Bradbury's media releases on the proposed bill from 20 December 2012 and 10 May 2013.

The draft Bill modifies this wording so that in relation to the Insurance Contracts Act, subsection 13(6) will read:

> If ASIC 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 Division 2 of Part 2, to be an unfair term, ASIC may make such investigation as it thinks appropriate.[6]

The plain reading of the modified section 13(6) is that, while ASIC has general investigation powers, it can only use them *after* a term has been declared by a court to be unfair. In other words, ASIC cannot use any of its investigation powers to help make a case that a term is unfair. Once a declaration is made, ASIC can then undertake investigations regarding that term, presumably to help applications for further declarations of unfairness.

It is not clear to us whether the modified subsection 13(6) accurately reflects ASIC's investigation powers in relation to unfair terms in financial products regulated by the ASIC Act. One interpretation is that ASIC Act subsection 13(6) does not give ASIC any powers to investigate a suspected unfair term before a court declares the term to be unfair because an unfair term is not a 'contravention of a provision' until that point.[7] We believe there is an equally valid interpretation that ASIC does have this investigation power prior to a court declaration.[8] If this is the case, the draft Bill has been incorrectly drafted.

Either way, the result is unsatisfactory—investigation powers are of little use unless they can be used to investigate unfairness prior to Court proceedings. Without the ability to investigate, ASIC is less capable of making a convincing case that a term is unfair and so is less likely to bring cases at all. This significantly reduces the incentive for businesses to strive to meet the unfair terms standard and so undermines the purpose of the provision.

[6] Schedule 1, item 12 of the draft Bill.
[7] Because of the operation of ASIC Act section 12BM.
[8] Under this interpretation, the words in s 12BM is that the provision was designed to ensure that any technical breach of s12BF unfair terms would not automatically trigger breach of the ASIC Act. The particular words in s 12BM is important in this respect. The words don't say breach of s 12BF *is not* contravention conduct. Rather that conduct does not contravene 'merely because' of s 12BF, That leaves open the possibility that certain conduct may amount to contravention conduct. From a policy perspective, this then gives the regulatory the power to intervene in the most appropriate cases, not every time a technical breach occurs. This interpretation also supports to need for a s 15A(1)(b) amendment in the terms outlined in this submission, to clarify the standard insurers need to meet in the marketplace at the time contracts enter the market – as exists in s 12 BF (because that section creates the obligation as soon as contracts enter the marketplace – concept of 'void').

Recommendation:
If there has been an error in the drafting of the draft Bill, it should be corrected before being put before Parliament. This could be achieved by amending the modified section 13(6) to read:

> If ASIC 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 is in breach of subsection 15A(1)(a) or (b) of the Insurance Contracts Act, ASIC may make such investigation as it thinks appropriate

Note: This amendment needs to be treated in conjunction with amendment to s 15A(1)(b) as outlined in this submission to achieve proper regulatory legislative effect.

Recommendation:
If the modification of 13(6) in the draft Bill accurately reflects ASIC's powers to investigate suspected unfair terms under the ASIC Act, we recommend that, as soon as the *Insurance Contracts (Unfair Terms) Bill 2013* receives royal assent, Government should consider amendments to the ASIC Act and the Insurance Contracts Act to ensure that ASIC can use its investigation and enforcement powers before a declaration of unfairness.

Note: This amendment needs to be treated in conjunction with amendment to s 15A(1)(b) as outlined in this submission to achieve proper regulatory legislative effect.

<u>Other powers are not applied</u>
It is not clear to us why the draft Bill removes the following powers which are available under the ASIC Act:

- the power under 12HD(1)(a)(i) to seek a declaration in relation to the operation or effect of any provision of certain provisions of Division 2 of Part 2 of the ASIC Act; and
- the power under section 86 of the ASIC Act to serve documents on natural persons in respect of investigations under Part 3 of the ASIC Act in a streamlined manner.

The removal of these powers may not have any significant impact on ASIC's ability to administer the unfair terms provisions under the IC Act. However there seems to be no reason why these powers should be removed.

Recommendation:
We recommend that either:

- the draft Bill be amended so that these powers are not removed; or
- the explanatory memorandum be amended to explain why it is necessary to remove these powers.

Power of external dispute resolution schemes to apply unfair terms provisions

In our experience, industry external dispute resolution schemes can be reluctant to apply law in their consideration of disputes unless it is clear it is open for them to consider. We have referred

to this issue above in our comments regarding proposed section 15A—an external dispute resolution scheme may not see itself as empowered to make a binding determination about unfair terms in insurance unless a court has already declared the term to be unfair.

As most insurance disputes settled externally are handled by industry external dispute resolution schemes, it is important that the law is clearly available to be used in this forum.

> **Recommendation:**
> We recommend the Explanatory Memorandum explicitly note that the unfair terms law is open to be applied by industry external dispute resolution schemes.

Application to consumer life insurance contracts

The draft Bill will not extend unfair terms law to life insurance policies. As this reflects the result of the good faith negotiations made in 2012, we will not oppose the Bill on the basis of this exclusion. However, we wish to be clear that we think it will be necessary to extend this consumer protection to other areas including life insurance.

Consumer concerns raised over the years in relation to the fairness of terms drafted in life policies are as important and relevant as those that relate to general insurance. Those issues extend to and include group life products that can provide important TPD and death cover to the most vulnerable consumers in the community. It is worth noting that it is not only consumer advocates that have been in favour of extending unfair terms protection to insurance contracts generally—many inquiries and bodies have come to the same conclusion.[9]

In our view, the statement in the explanatory memorandum that the unfair terms regime will not apply to life insurance contracts 'at this stage' is an acknowledgement that this is still a live issue for ultimate resolution.

We would hope that a process could begin once this Bill is passed to explore the proper extension of this regime to life insurance contracts.

> **Recommendation:**
> We recommend that, as soon as the *Insurance Contracts (Unfair Terms) Bill 2013* receives royal assent, Government should begin consulting on how unfair terms protections should also be extended to consumer life insurance contracts.

Conclusion

[9] For example, the following bodies and enquiries specifically supported the extension of unfair contract terms protections to insurance contracts: Senate Economics Legislation Committee report into the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (2009, at para 10.13); the Natural Disaster Insurance Review inquiry into flood insurance and related matters (2011, rec 37); the House of Representatives Committee on Social Policy and Legal Affairs inquiry into the operation of the insurance industry during disaster events (2012, at para 7.22); the draft report of the Productivity Commission into Barriers to Effective Climate Change Adaptation (2012, at pp 242-3).

Thank you again for the opportunity to comment on the draft Bill and explanatory memorandum Please contact us if you have any questions about this submission. Our contact details are in the Appendix.

Yours sincerely

Gerard Brody	Kat Lane	Bill Grant
CEO	Principal Solicitor	CEO
Consumer Action Law Centre	Insurance Law Service	Legal Aid NSW

Appendix: About the contributors

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Insurance Law Service

The Consumer Credit Legal Centre is a community legal centre that also runs the Insurance Law Service ("ILS"). The ILS is funded by the Legal Aid Commission of NSW and the Federal Government through the Community Legal Services Program.

The Insurance Law Service ("ILS") has been providing advice and assistance to Australian consumers in relation to insurance since July 2007. In that time our solicitors have provided advice in the course of over 13,500 calls, and opened more than 550 casework files. Advice is provided free of charge on a 1300 number available throughout Australia. While based in NSW, the ILS is a national service and more than 68% of calls taken in the 2011/2012 financial year were from interstate, including 20% from Qld, 25% from Victoria and 10% from Western Australia.

We have a dedicated website (www.insurancelaw.org.au) which contains specific information about flood/storm and bushfire related claims, general information about claiming on your car or home insurance (in Arabic, Chinese and Vietnamese in addition to English), and a range of other resources such as sample letters for use by consumers in raising a dispute with their insurance company. The ILS also provides training for other community sector agencies on insurance issues, particularly trainee financial counsellors.

Legal Aid New South Wales

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body, established under the *Legal Aid Commission Act 1979* (NSW). It provides legal services, including advice, minor assistance and representation in Federal and State courts and tribunals, to socially and economically disadvantaged people. Legal Aid NSW has particular expertise in the area of insurance law including casework experience in disaster relief as well as general and life insurance claims. Legal Aid NSW is an active contributor to the policy debate in insurance, including various submissions and inquiries on unfair terms in insurance.