Submissions to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Round 6 Hearing

Legal Aid NSW

Introductory remarks

Legal Aid NSW (LAN) welcomes the opportunity to provide written submissions following Round 6 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ("**The Commission**").

Our responses to the questions raised by the Commission are directly informed by the legal services we provide to consumers and in particular those who have experienced a natural disaster in NSW. The Commission has highlighted critical systemic issues and poor conduct of insurers, both in the general and life insurance spheres. Legal Aid NSW's experience is that this conduct is apparent across the financial services sector, with the impact of this conduct leading in some cases to particularly egregious and harsh outcomes for vulnerable consumers, including consumers who may have recently experienced trauma. We propose a Safe, Suitable and Fair Framework for regulation of Financial Services.

Q1. Is the current regulatory regime adequate to minimise consumer detriment? If the current regulatory regime is not adequate to achieve that purpose, what should be changed?

Suitable, Safe and Fair – A Proposed Framework for regulation in Financial Services

The current framework is not adequate to minimise consumer detriment. Legal Aid NSW supports a regulatory framework based on three minimum standards that customers *should* be able to expect across all retail financial products:

1. Suitable - all retail products sold pass a *not unsuitable* test (credit + insurance)
2. Safe - products sold do not lead to:
    a. substantial financial hardship (credit) or
    b. gross underinsurance (insurance)
3. Fair -
    a. Standard form contracts - terms included are necessary to protect a legitimate business interest (credit + insurance)

b. Business trading models - protect against unfair business models devised to take advantage of the most vulnerable (credit + insurance)

c. Remedies and outcomes –legislative frameworks in credit (responsible lending) and insurance (utmost good faith, s 35) provide for compensation to consumers that is proportionate to the trader's breach

A - Product Design

Q2. Are there particular products – like accidental death and accidental injury products which should not be sold?

Yes. Legal Aid NSW's casework experience is consistent with the case studies examined at the Royal Commission which illustrated some of the hurdles consumers encounter before being able to claim under these policies. These hurdles make the product very profitable for the insurer while providing the insured with little or no benefit.

As a result Legal Aid NSW supports the introduction of the Design and Distribution Obligations (DDO) and Product Intervention Power (PIP).

Q3. Should the requirements of the Life Insurance products code in relation to updating medical definitions be extended to products other than on sale products?

Legal Aid NSW supports the extension of the requirement to update medical definitions to all financial products. Our casework tells us that many consumers who try to buy travel insurance are refused cover on the basis of outdated definitions of both illnesses and treatments. In particular, we have been told of cases where insurers fail to take into account new treatments such as immune therapy which do not technically result in remission, but which can leave a person symptom free for the remainder of their lives.

B – Disclosure

Q4. Is the current disclosure regime for financial products set out in Chapter 7 of the Corporations Act 2001 (Cth) and Division 4 of Part IV of the Insurance Contracts Act 1984 (Cth) adequately serving the interests of consumers? If not, why not, and how should it be changed? In answering these questions, address the following matters:

4.1 the purpose(s) that the product disclosure regime should serve;

4.2 whether the current regime meets that purpose or those purposes; and

4.3 how financial services entities could disclose information about financial products in a way that better serves the interests of consumers. (Despite the reference to the Insurance Contracts Act 1984 (Cth), this question is not limited in scope to contracts of insurance.)

Legal Aid NSW acknowledges work done by the Insurance Council of Australia which demonstrates that PDSs are not effective in explaining policies to consumers[1]. In our experience, consumers continue to struggle to understand the complexity of insurance documents resulting in consumers purchasing insurance products without sufficient information.

Legal Aid NSW considers that the terms of policies should be contained in a single document. We therefore do not support the removal of PDSs at present. However, significantly more work is needed to ensure that PDSs are written in plain English. Legal Aid NSW supports the continued use of Key Facts Sheets where applicable.

C - Sales

Q7. Should monetary and non-monetary benefits given in relation to general insurance products remain exempt from the ban on conflicted remuneration in Division 4 of Part 7.7A of the Corporations Act 2001 (Cth)? If so, why?

Q8. Should monetary benefits given in relation to life risk insurance products remain exempt from the ban on conflicted remuneration in Division 4 of Part 7.7A of the Corporations Act 2001 (Cth)? Why shouldn't the cap on such benefits continue to reduce to zero?

Q9. Is banning conflicted remuneration sufficient to ensure that sales representatives do not use inappropriate sales tactics when selling financial products? Are other changes, such as further restrictions on remuneration or incentive structures, necessary?

Q10. Should the direct sale of insurance via outbound telephone calls be banned? If not, is the current regulatory regime governing the direct sale of insurance via outbound telephone calls adequate to avoid consumer detriment? If the current regulatory regime is inadequate, what should be changed?

Q11. Is Recommendation 10.2 from the Productivity Commission's report on "Competition in the Australian Financial System", published in June 2018, sufficient to address the problems that can arise where financial products are sold under a general advice model (for example, the sale of financial products to consumers for whom those products are not appropriate)? If not, what additional changes are required? Are there some financial products that should only be sold with personal advice?

Q12. Should all financial services entities that maintain an approved product list be required to comply with the obligations contained in FSC Standard No 24: Life Insurance Approved Product List Policy?

Legal Aid NSW supports the ban on conflicted remunerations and considers that there should be no exemptions under *Division 4 Part 7.7(a) of the Corporations Act 2001*. These

[1]"Too Long; Didn't Read, Enhancing General Insurance disclosure". Report of the Effective Disclosure Taskforce to the Insurance Council Board. October 2015

measures will go some way to ensuring that cultures within insurance companies can one that focuses on financially rewarding sales practices to one that prioritises the best interest of the consumer. However further restrictions on remuneration or incentive structures, such as capping sales remuneration and compulsory disclosure, are also necessary.

General insurers have long argued that a "no advice" model is necessary in order to optimise profits and reduce unnecessary costs. However, this focus on profitability has produced poor outcomes for consumers throughout the whole financial services industry as highlighted by The Commission.

Legal Aid NSW recommends that insurers give consideration to moving away from a "no advice" model and ensuring that the products which they provide to their consumers are "safe, suitable and fair".

We recommend that consideration be given to amending the General Insurance Code of Practice to reflect this model.

D – Add-on Insurance

Q13. Should the sale of add-on insurance by motor dealers be prohibited?

Yes, Legal Aid NSW supports the prohibition of the sale of add-on insurance by motor dealers.

Legal Aid's casework experience supports findings in ASIC's Reports 470, 471 and 492 that the add-on insurance market represents poor value for consumers, and that the payment of incentivised commission payments creates a high risk of unfair sales and adverse outcomes.

The sale of add-on insurance products by motor dealers (including products like consumer credit insurance, tyre and rim insurance and mechanical breakdown insurance) leads to poor consumer outcomes as dealers seek to profit from the sale of products that represent very little value to consumers.

In some cases add on insurance products offer no value at all to consumers.

Those selling add-on insurance to consumers are interested in profit, rather than the best interest of the consumer.

These practises disproportionately affect those disadvantaged consumers who often have complex needs, mental health issues or low literacy are more vulnerable to high pressure tactics, less able to protect their own interests and have fewer options.

Q14. Alternatively, should add-on insurance only be sold via a deferred sales model? If so, what should be the features of that model?

In the alternative, if add-on insurance is <u>not</u> prohibited, Legal Aid supports the establishment of a deferred sales model.

Legal Aid NSW refers to its October 2017 submissions to ASIC's consultation on the sale of add-on insurance and warranties through caryard intermediaries.[2]

In summary, Legal Aid NSW would support the establishment of a deferred sales model for the sale of add-on insurance with the following features:

- A deferral period starting after delivery of the car, after consumer communication has been provided and for a period of 30 days, thereby allowing a consumer time to compare and consider options without experiencing 'decision fatigue';
- Consumers selecting the add-on products they wish to purchase after they have chosen the vehicle and finance is approved;
- Applicability to both used and new car markets;
- No consumer opt-out mechanism.

Another key component in improving consumer outcomes in the add-on insurance industry is improving consumer understanding of, and engagement with, their decisions about add-on insurance. This would require interactive and meaningful communication with the consumer about the cost, coverage and value of add-on insurance products.

Q16. If the ban on conflicted remuneration is not extended to apply to general insurance products, should the payment of commissions for the sale of add-on insurance by motor dealers be limited or prohibited?

Legal Aid NSW's preferred approach is a ban on conflicted remuneration on all general insurance products. However, in the case that a ban on conflicted remuneration is not extended to apply to general insurance products, we support the prohibition of commission payments for the sale of add-on insurance by motor dealers.

We refer to our comments in our submission to the Australian Bankers' Association's *Independent Review of Product Sales Commissions and Product Based Payments* for further details.[3]

Our casework experience shows that commissions incentivise the sale of inappropriate products to consumers where consumers derive little or no value. ASIC's Reports 470, 471 and 492 supports this observation.

The payment of commissions for the sale of add-on insurance leads to:

- High pressure sales tactics;
- Consumers purchasing products with little or no value;
- Salespeople acting in their own interests, rather than in the consumer's interests;

[2] Legal Aid NSW submission to ASIC *The Sale of add-on insurance and warranties through caryard intermediaries*, October 2017.

[3] Legal Aid NSW submission to the Australian Bankers' Association *Independent Review of Product Sales Commissions and Product Based Payments,* September 2016.

- Poor outcomes for vulnerable consumers, particularly where credit is used to purchase add-on insurance products.

E – Claims Handling

Q17. Should the obligations in section 912A of the Corporations Act 2001 (Cth) apply to all aspects of the provision of insurance, including the handling and settlement of insurance claims?

Legal Aid NSW believes that the obligations of *Section 912(a) of the Corporations Act 2001 [CCH]* should apply to all aspects of the provision of insurance including handling and settling of insurance claims.

Q18. Should ASIC have jurisdiction in respect of the handling and settlement of insurance claims?

Legal Aid NSW submits that the ICA should seek ASIC approval of the General Insurance Code of Practice in accordance with Regulatory Guidance 183. ASIC approval would encourage consumer confidence in the General insurance Code and would allow ASIC to monitor the General Insurance Code based on issues raised by consumers, EDR Schemes or industry.

Q19. Should life insurers be prevented from denying claims based on the existence of a pre-existing condition that is unrelated to the condition that is the basis for the claim?

In answering this question we have assumed that it is referring to undisclosed and unrelated claims.

Yes. Legal Aid NSW's case work experience suggests that Life Insurers have denied claims on the basis of a pre-existing condition which is unrelated to the condition which is the basis of the claim.

We accept that insurers are entitled to know about conditions that may impact on the insurer's assessment of risk. However an unrelated health condition does not necessarily provide a legal basis for denying a claim, regardless of whether the condition has previously been disclosed.

Q20. Should life insurers who seek out medical information for claims handling purposes be required to limit that information to information that is relevant to the claimed condition?

In Legal Aid NSW's casework experience, Life Insurers request lengthy medical histories; review several years of medical notes, and find an entry (sometimes in General Practitioners notes) that may be over 10 years old referring to a possible stress and or psychiatric condition. A refusal is then based on this notation.

It is our practice to advise clients that instead of signing a general medical release, they request the insurer amend the release so that it covers specific and relevant medical information. We strongly support a limitation on the medical information that a life insurer can request.

Q21. Should life insurers be prevented from engaging in surveillance of an insured who has a diagnosed mental health condition or who is making a claim based on a mental health condition? If not, are the current regulatory requirements sufficient to ensure that surveillance is only used appropriately and in circumstances where the surveillance will not cause harm to the insured? If the current regulatory requirements are not sufficient, what should be changed?

Legal Aid NSW considers that currently private investigation practices are under-regulated. Poorly conducted and unsophisticated investigations risk exacerbating harm to consumers struggling with mental illness, and causing distress and upset to all consumers who are subject to various forms of surveillance and investigation. Poor or uninformed investigative techniques may lead to inaccurate conclusions, which can cause further harm or distress.

However rather than banning particular practices, Legal Aid NSW would support a national framework for improving the quality of investigation and guidelines to better ensure surveillance is used appropriately, and in circumstances where it will not cause harm.

Legal Aid NSW understands there is some appetite from within the Insurance industry for an accreditation scheme for private investigators, and guidelines about how surveillance should be carried out.

Some private investigator work is comparable to investigative work carried out by police services. However police investigations are far more regulated. For example, a private investigator can interview a consumer for as many hours as they wish without a break, or access to water, support people, interpreters etc. By contrast, police are required by statute and regulation to ensure certain conditions are met or they risk evidence being determined inadmissible. Police must generally establish a threshold case before they can interview a suspect, and some forms of surveillance require court sanction in the form of a warrant.

Legal Aid NSW supports;

- An accreditation scheme for private investigators;
- Regulation of private investigators;
- An industry Code of Conduct for private investigators;
- Detailed guidelines for private investigators;
- A commitment in Life and General Insurance Codes that insurers will only use accredited private investigators who are signatories to all relevant industry Codes.

General insurance

Q22. Should the General Insurance Code of Practice be amended to provide that, when making a decision to cash settle a claim, insurers must: 22.1 act fairly; and 22.2 ensure

that the policyholder is indemnified against the loss insured (as, for example, by being able to complete all necessary repairs)?

In our casework experience, cash settlements are common practice in insurance claims following a natural disaster. We find that insurers will rely on clauses contained within the contract that purport to allow an insurer to settle a claim for the amount it would cost the insurer to rebuild or repair a property, rather than the cost that the insured would incur. When we test these propositions by lodging a claim with the appropriate EDR Scheme, our experience is that the EDR Scheme is likely to find in favour of the insured.

While EDR decision have repeatedly found that insurers have a duty to settle a cash claim fairly, Legal Aid NSW considers that an amendment to the General Insurance Code of Practice to make this explicit would provide greater clarity around insurer's obligations. Further, in our experience, an inherent risk in accepting a cash settlement is that during the course of the repairs further damage is uncovered and further costs are incurred. The insured is then faced with the prospect of having to either wear the cost of the additional repairs themselves or lodge a further claim with the insurance company.

F – Insurance in Superannuation

Q23. Should universal: 23.1 minimum coverage requirements; and/or 23.2 key definitions; and/or 23.3 key exclusions, be prescribed for group life policies offered to MySuper members?

Yes. The current problem is that each superannuation fund offering a MySuper product, has different coverage, key definitions and exclusions. This makes it very hard for the average consumer to navigate. A large number of MySuper products are offered through industry superannuation funds and it is these funds which, on the whole, take out group life policies rather than those which are tailored to suit individual members. In our experience, our clients generally sign up with an employer superannuation fund based on the industry they are working in (e.g. HESTA for the health services sector, REST for the retail sector, CBUS for the building and construction sector).

Presently there is a huge disparity between the funds in the levels of automatic insurance cover provided, what is covered and what is excluded. This creates problems for our clients in understanding the level of insurance cover they have and what that cover is for. In our view, it would be far more preferable to have a universal definition and minimum coverage requirements for MySuper members, who make up a large part of the Australian population.

Q24. Should group life insurance policies offered to MySuper members be permitted to use a definition of "total and permanent incapacity" that derogates from the definition of "permanent incapacity" contained in regulation 1.03C of the Superannuation Industry (Supervision) Regulations 1994 (Cth)?

No. There is a significant consumer benefit, and benefit to the industry as a whole, that there is a consistency of definitions across various MySuper insurance offerings. This landscape is already confusing enough for consumers. In our experience, clients have limited

awareness about the disability insurance cover that they have through their superannuation, what that cover is for, the level of cover they have, that the cover was offered to them automatically, and that they have been paying for that insurance cover as part of their employer's superannuation contributions. Many do not know that they have any cover at all.

Further the definition set out in section 1.03C of the SIS Regulations in our view is stringent enough, in that it requires members to be unable to work again based on their training, education and experience. We consider imposing a tougher definition of 'total and permanent incapacity' is unfair, especially where it relates to MySuper members.

We are aware of some superannuation funds that have recently changed the test of total and permanent disability, so that a client has to prove that they are unable to work in *any* occupation *ever* again. In our view it is only fair to take into consideration a member's level of education, previous employment history and functional capacity when determining the likelihood of whether they will be able to work again. For example, we do not consider that someone who left school at 15, has been a bricklayer his whole life and who suffers a serious back injury at the age of 45 which prevents him from being able to work, should be forced into trying to obtain computer or secretarial skills and fail at that, before being awarded a TPD benefit.

Q25. Should RSE Licensees be obliged to ensure that their members are defaulted to statistically appropriate rates for insurance required to be offered through the fund under section 68AA(1) of the Superannuation Industry (Supervision) Act 1993 (Cth)?

Yes, the RSE licences should be obliged to ensure that their members are charged an appropriate premium.

Q26. Should RSE Licensees be prohibited from engaging an associated entity as the fund's group life insurer?

Yes. In our view, we consider that there is a significant potential conflict of interest where RSE Licensees engage an associated entity to provide group life insurance cover. This may be in the form of superannuation funds receiving rebates from associated insurers where they keep claims at a minimum, superannuation funds investing member funds in an associated entity that provides insurance cover, superannuation funds pushing insurance products offered by the associated entity that are junk insurance products and offer no benefit to the member.

Best practice would require superannuation funds and insurers to remain entirely separate and independent of each other to adequately protect the interest of members.

Q27. Alternatively, should RSE Licensees who engage an associated entity as the fund's group life insurer be subject to additional requirements to demonstrate that the engagement of the group life insurer is in the best interests of beneficiaries and otherwise satisfies legal and regulatory requirements, including the requirements set out in paragraphs 22 to 24 of Prudential Standard SPS 250, Insurance in Superannuation?

We do not consider that there are adequate protections that can be put in place that would preserve the rights of members and beneficiaries without superannuation funds and insurers being entirely independent of each other.

Q28. Are the terms set out in the Insurance in Superannuation Voluntary Code of Practice sufficient to protect the interests of fund members? If not, what additional protections are necessary?

In our view, the Superannuation Voluntary Code of Practice is a good first attempt at protecting the interests of fund members. However, in our experience since the Code's inception, we have found that customer service representatives at superannuation funds have not been made aware of the Code at all, even where the fund has signed up to the Code and openly advertises this on their website.

For example, we have had a number of experiences involving Aboriginal clients where we have tried to find out information about what insurance cover they have with various funds. At the time the person became a member of the fund, they were not required to provide photo ID to establish their identity, the fund was more than happy to sign them up in many cases without even an address or a phone number. However, when we go to try and access details about a client's account, the fund has required an authority with a signature and photo ID to verify the member. Some of our Aboriginal clients do not have photo ID, and despite the protections set out for vulnerable consumers in Part 6 of the Code, superannuation funds will not disclose information about a client's account without providing that document.

We consider that if the Code was mandatory then superannuation funds may take it more seriously and train their staff so as to avoid Code breaches being reported. Having a mandatory Code would also improve consumer confidence in the superannuation industry.

G – Scope of the Insurance Contracts Act 1984 (CTH)

Q29. Is there any reason why unfair contract terms protections should not be applied to insurance contracts in the manner proposed in "Extending Unfair Contract Terms Protections to Insurance Contracts", published by the Australian Government in June 2018?

Legal Aid NSW has long advocated for Unfair Contact Terms (UCT) laws to form part of Australian insurance law. Legal Aid NSW broadly supports the proposal to amend section 15 of the *Insurance Contracts Act* (Cth) (ICA) to allow UCT laws to apply to insurance contracts. We believe that adoption of this approach will benefit consumers, industry and the market. It will promote consistency across the industry and help to increase consumer awareness of the law. Consumers will be able to apply the same test of unfairness against a range of financial products, whether it be for a financial product or service, a general insurance contract, a funeral insurance contract or a life insurance contract.

However, we have concerns about some elements of the proposed model, in particular the proposal to introduce a tailored definition for unfairness that would only apply to insurance contracts. We provided a comprehensive paper to Treasury in August 2018. That paper is **annexed** and our concerns about the tailored definition of unfair are detailed at pages 5 and 6 of that paper.

Q30. Does the duty of utmost good faith in section 13 of the Insurance Contracts Act 1984 (Cth) apply to the way that an insurer interacts with an external dispute resolution body in relation to a dispute arising under a contract of insurance? Should it?

Section 13 of the Insurance Contracts Act 1984 (Cth) (the ***ICA***) 13 requires both the insurer and the insured to act towards the other with the utmost good faith, in respect *of* ***any matter arising under or in relation to it***, with the utmost good faith including negotiation. In our view therefore, as in the common law, the duty spans the pre-contractual stage to the post-contractual stage, and includes the making and handling of claims and EDR and litigation.

In our view, section 13 of the ICA creates (and should create) an obligation for an insurer to fully engage in the external dispute resolution process. This obligation includes the provision of documents to the EDR body on request.

H - Regulation

H. REGULATION

Q33. Should the Life Insurance Code of Practice and the General Insurance Code of Practice apply to all insurers in respect of the relevant categories of business?

It is important that consumers can be confident of commitment to fairness throughout the relationship of the policy, from purchase to claim finality. Currently subscription to both the Life Insurance Code of Practice and the General Insurance Code of Practice remain voluntary.

Asking consumers to research whether or not an insurer is a signatory to the Code would only add to the (already large) information burden placed on them when choosing an insurance product.

Uniform standards across the Life and General Insurance Industry would be of benefit as they would facilitate a return of consumer confidence to the industry as a whole.

Legal Aid NSW supports the harmonisation of the Life Insurance Code of Practice and the General Insurance Codes. Where there is a discord between the Codes we support a harmonisation to the standard which affords the highest protection to the consumer.

Further we recommend that:

- The ICA seek approval of the Code from ASIC in accordance with RG 183;

- That the General Insurance Code should be extended to incorporate all members of the industry who participate in the provision of insurance;
- APRA requires that all insurers adopt the relevant Code of Practice.

Attachment

Legal Aid NSW submission to The Treasury

Proposal to Extend Unfair Contract Terms to Insurance Contracts

August 2018

Proposal to Extend Unfair Contract Terms to Insurance Contracts

Legal Aid NSW submission to The Treasury

August 2018

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Table of Contents

About Legal Aid NSW 15
Executive summary..... **Error! Bookmark not defined.**
Introduce the UCT laws to IC contracts - Questions 1 to 4 17
Main subject matter exclusion – Questions 7 to 9 18
Upfront Price – Questions 11 to 12 18
Standard form contracts – Questions 13 to 14 18
Meaning of unfair – Questions 15 to 17..... 18
Terms that may be considered unfair – Questions 18 to 20 20
Remedies for unfair terms – Questions 21 to 23 21
Third party beneficiaries – Questions 24 to 26 21
Tailoring for specific insurance contracts – Questions 27 and 28 21
Transitional Arrangements – Questions 29 to 32..... 21

About Legal Aid NSW

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). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's Civil Law Division provides assistance to some of the most disadvantage and vulnerable members of our society and has significant experience in assisting people with insurance problems.

Legal Aid NSW welcomes the opportunity to make a submission to the Treasury regarding the proposal to extend unfair contract term laws (**UCT laws**) to insurance contracts. Should you require any further information, please contact

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Introduction

Legal Aid NSW has long advocated for UCT laws to form part of Australian insurance law and welcomes this consultation process.[4] Legal Aid NSW broadly supports the proposal to amend section 15 of the *Insurance Contracts Act 1984* (Cth) (**IC Act**) to allow UCT laws to apply to insurance contracts. We believe that adoption of this approach will benefit consumers, industry and the market. It will promote consistency across the industry and help to increase consumer awareness of the law. Consumers will be able to apply the same test of unfairness against a range of financial products, whether it be a financial product or service, a general insurance contract, a funeral insurance contract or a life insurance contract.

However, we have concerns about some elements of the proposed model, in particular the proposal to introduce a tailored definition for unfairness that would only apply to insurance contracts. Our detailed responses to the questions in the Proposals Paper follow.

Introduce the UCT laws to IC contracts - Questions 1 to 4

As indicated above, we support the primary proposal to extend UCT laws in the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) to insurance contracts. We do not anticipate that this proposal will result in any major disadvantage for the market or consumers.

We believe that extending UCT laws to insurance contracts will bring about the following benefits:

- improvements in fairness in insurance contracts
- providing the regulator with a mandate to address unfair contract terms in insurance contracts.
- improvements in consumer understanding of insurance products
- greater clarity in insurance contracts and
- improvements in underwriting guidelines, particularly for travel insurance and credit card insurance.

The proposal would also complement existing protections contained in the IC Act for insurance policy holders.[5]

Whilst we are unable to comment on specific costs to be borne by insurers in complying with the proposed model, we consider that if standard form insurance contracts are vetted before entering the market to ensure compliance, any cost to insurers will be minimal.

Legal Aid NSW does not support either of the alternative options set out in the Proposals Paper for extending UCT laws, namely:

- enhancing the current IC Act remedies or
- introducing unfair contract term laws into the IC Act.

[4] See response from National Legal Aid in 2010 to Treasury Consultation Paper on Unfair Terms in Insurance Contracts.
[5] Sections 14, 35, 37 and 54 of the *Insurance Contracts Act* 1984 (Cth).

These options would lead to a lack of consistency across the industry and would make it more difficult for consumers, particularly vulnerable consumers, to navigate the insurance market. In addition, we consider that if either of these proposals were adopted it is likely to be more expensive for insurers to comply with these provisions.

Main subject matter exclusion – Questions 7 to 9

Legal Aid NSW considers that a tailored 'main subject matter' exclusion for insurance contracts is necessary. We agree with the proposal to narrowly define 'main subject matter' as terms that describe what is being insured. We do not support the inclusion of any further contract exclusions in the main subject matter.

Upfront Price – Questions 11 to 12

Legal Aid NSW does not support the proposal that the quantum of the excess payable under an insurance contract should be always considered part of the upfront price, and therefore excluded from review under UCT laws.

We suggest that upfront price should be related to both the dollar value of the policy and the risk to the insurer.

For example, in an insurance policy for a motor vehicle, we understand that younger drivers will be charged more and have a higher excess than older, more experienced drivers because the risk to insurers is greater in insuring younger drivers. The higher upfront price and excess is a reflection of this in the policy and we would not consider this to be unfair.

In contrast, any provisions in relation to the payment of an excess, including payment of a high excess or attempts to compel consumers to pay an excess upfront should be subject to the UCT laws.[6]

Standard form contracts – Questions 13 to 14

Legal Aid NSW supports the proposal that insurance contracts that allow consumers or small businesses to choose between different policy options and level of cover should still be considered as standard form contracts for the purpose of UCT laws. We agree this would be analogous to the provisions applying in the European Union. We consider this is important as it takes into consideration the power imbalance between insurers and consumers, as evidenced by a consumer's inability to negotiate the terms of standard contracts at the time of entering into the contract.

Meaning of unfair – Questions 15 to 17

Legal Aid NSW does not consider that it is necessary to tailor the definition of unfairness for insurance contracts and treat insurance contracts differently to any other consumer contracts.

We do not consider that there should be any further specific tailoring for general insurance contracts or life insurance contracts, even considering the longevity of life insurance contracts.

[6] See *Calliden Insurance Limited v Chrisholm* [2009] NSWCA which confirmed that a failure to pay the excess upfront should not be a bar to claiming under an insurance policy

Legal Aid NSW does not support the proposal to define an insurer's legitimate business interests as being:

> *"when the term reasonably reflects the underwriting risk accepted by the insurer in relation to the contract and it does not disproportionately or unreasonably disadvantage the insured."*

We believe that the current unfair contract term test in section 12BG(1) of the ASIC Act is sufficient. A tailored extension which only applies to insurance contracts is not necessary for the following reasons:

- The current test in the ASIC Act of "legitimate business interests" would encompass underwriting decisions without the need for a specific reference to underwriting in the legislation. There is already counterbalance in the ASIC Act at s12BG (1) (a) and (c) which refer to "imbalance" and "detriment".
- "Underwriting" is an example of a legitimate business interest, it is not the only legitimate business interest. "Underwriting" does not need to be specifically referred to, in order to be a relevant consideration. There are sections in the IC Act, for example section 28 and section 29 which rely on underwriting, though this is not stated as such and these sections have been operational since the Act's inception in 1984.
- The Financial Ombudsman Service (FOS) has clearly defined procedures for the provision of underwriting, as they relate to sections 28 and s 29 of the IC Act. We expect that FOS (the Australian Financial Complaints Authority from November 2018) would follow a similar process on unfair terms and provision of underwriting.[7]
- If necessary, the Explanatory Memorandum for the amendments to the IC Act, could show Parliament's intent regarding how underwriting could be used as evidence to substantiate legitimate business interest. Again, the FOS Circular referred to above is instructive here; as FOS has made it clear as to how the evidence of underwriting will need to be presented for an assertion on underwriting to be established.
- The current ASIC test for unfairness in s12BG (1) already incorporates the concepts of proportionality, objective reasonableness and prejudice to the insured, as well as the need to balance rights and obligations. This test has its origins in the common law restraint of trade clauses.
- The concept of 'disproportionate and unreasonable disadvantage to the insured' is a high additional threshold that is subjective in nature and has no basis in common law doctrine as we know it. This creates an additional hurdle for a consumer to establish unfairness and is likely to lead to uncertainty in the market because of the application of an additional test for insurance.

[7] See FOS Circular edition 3 2010 at https://www.fos.org.au/circular3/Nondisclosure.html

- The proposed tailored extension of unfair contract term laws represents a shift from an objective test of reasonableness, as per the current ASIC Act test, to a subjective test whereby the consumer needs to establish they have suffered disadvantage.
- The proposed tailored extension may be seen to create the need for additional proof, beyond what is required under the existing test, of consumer detriment in order to establish an unfair term.
- A subjective test element would fundamentally change the nature of 'unfairness' as a test for consumer protection for insurance contracts. It does not meet a key legislative intent, namely the proper and objective assessment, on a reasonable basis, of the impact of particular terms included in standard form contracts at the time of drafting.
- The development of a 'special' test for insurance would represent a significant departure from the Productivity Commission's *Report on Consumer Protection Framework (*2008) on the importance of consistency in consumer protection laws across markets.

Terms that may be considered unfair – Questions 18 to 20

Legal Aid NSW supports the proposal to include examples that are specific to insurance contracts in UCT laws provided that the list remains non-exhaustive.

We support the three terms referred to in the proposals paper. In addition, we suggest the following terms be considered for inclusion as examples of unfair terms.[8]

Terms that:

- Charge the consumer a large sum of money or an amount that goes beyond what would be considered a reasonable pre-estimate of loss incurred by the firm, if a consumer does not fulfil their obligations under the contract or cancels the contract.
- Require a consumer to fulfil all their contractual obligations, while letting the firm avoid its own.
- Automatically renew a fixed length contract on the date of expiry, where the deadline for the customer opting not to extend is unreasonably short.
- Allow a firm to change the price payable under the contract after a consumer has agreed to the conditions in the contract.
- Bind consumers to hidden terms.
- Limit a firm's obligation to honour its agents' commitments to the consumer.
- Allow the firm to transfer its rights and obligations under the contract, where this may reduce guarantees for the consumer, without the consumer's agreement.
- Mislead the consumer about the contract or their legal rights.

[8] Financial Conduct Authority (UK), Examples of Unfair terms, first published on 6 August 2015, accessed at: https://www.fca.org.uk/firms/unfair-contract-terms/examples-unfair-terms

- Exclude or limit the consumer's legal rights or remedies when the firm has failed to meet its obligations under the contract.

Remedies for unfair terms – Questions 21 to 23

We agree with the position in the proposal paper that if a term is deemed to be unfair, it is void. This is consistent with the effect of UCT laws in other contexts and provides consistency.

Legal Aid NSW notes the concern that, in some instances, if a term is void it may remove the basis for the claim entirely. Therefore, we support the proposal that other orders can be made that will provide an appropriate and just outcome in all the circumstances.

Third party beneficiaries – Questions 24 to 26

Legal Aid NSW supports the proposal that third-party beneficiaries are able to seek declarations that terms in a contract are unfair. Legal Aid NSW has assisted a number of vulnerable consumers who fall within this category, especially in group life insurance policies and credit card travel insurance policies.

These policies are specifically designed to benefit the third party and there is no reason why they should not enjoy the same protection. Legal Aid NSW appreciates that superannuation fund trustees owe obligations to act in the best interests of fund members. However, for the purpose of consistency across the financial services industry as a whole, we consider that UCT laws should also apply to these products, in particular, to group life insurance products.

Legal Aid NSW notes that currently the IC Act provides remedies under sections 28 and 29 for avoiding contracts in general and life insurance matters as a result of misrepresentation.

Tailoring for specific insurance contracts – Questions 27 and 28

Legal Aid NSW does not consider that there should be any other specific tailoring of UCT laws to specific features of general and life insurance contracts, for reasons that we have already explained above.

Legal Aid NSW supports the proposal that unilateral premium adjustments by life insurers should not be considered unfair in circumstances where the premium increase is related to the management of an insurer's risk. However, we do not agree entirely with the proposal in Question 28, namely that a term will not be considered unfair in circumstances in which the premium increase is within the limits and under the circumstances specified in the policy. This is because there may be terms in the policy about premium increases that could still be deemed unfair under the proposed changes.

Transitional Arrangements – Questions 29 to 32

Legal Aid NSW agrees with the proposal of a 12 month transition period for the provisions to take effect and the timeframe set out in the proposal relating to new, renewed and varied contracts. We consider the transitional period should apply to all forms of insurance contracts, including life insurance products.