



The Australian Consumer Law:
Consultation on draft provisions on unfair contract terms
Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

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Dear Sir,

I refer to the release on 11 May 2009 by the Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen, of a consultation paper entitled *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms*.

NIBA's Concerns

The National Insurance Brokers Association (NIBA) is very concerned about the inclusion of insurance contracts in the draft legislation. There is already in place extensive Commonwealth law that applies to insurance contracts, namely the *Insurance Contracts Act 1984*, and there is no necessity for generic consumer laws to apply.

Having two pieces of legislation doing the same thing is fraught with danger. There will be unnecessary duplication and contradictory terms, requirements, penalties and obligations. The idea of having general unfair contract term legislation apply to insurance goes against the views of the Law Reform Commission and the provisions of the Insurance Contracts Act.

It is NIBA's recommendation that insurance covered by the Insurance Contracts Act be specifically excluded from all general unfair contract terms legislation.

The National Insurance Brokers Association (NIBA)

NIBA is the national association for insurance brokers in Australia. NIBA members are responsible for the placement of around 90% of all insurance for commercial purposes in Australia.

Typically, **insurance brokers represent the interests of the purchasers of insurance, the policy-holders**, and not those of insurance companies. Consequently the comments made in this submission are made not on behalf of insurance companies but on behalf of insurance brokers who represent the public that purchases insurance.

The Insurance Contracts Act

Generic consumer protection provisions are usually difficult to apply to insurance. For this reason it is generally accepted practice throughout the world to have specific consumer provisions apply to insurance. Australia has had such legislation since 1984 and it is still often copied today by other countries.

The Insurance Contracts Act was developed by the Australian Law Reform Commission with the specific intention of ensuring that insurance contracts and the practices of insurers in relation to such contracts operated fairly. By all accounts the legislation has been successful. This was acknowledged by Alan Cameron A.M. and Nancy Milne in their 2004 review of the Act. Only a small number of changes were proposed to the Act which are expected to be implemented this year.

The Act is Commonwealth legislation that applies to Australian insurance contracts with a small number of exclusions (e.g. reinsurance, health insurance, State and Commonwealth insurance). It provides a consistent approach to affected insurance contracts across all States and Territories. In terms of consumer remedies for unfair contract terms its provisions go further than those envisaged by the draft general provisions attached to the Minister's consultation paper.

A fundamental cornerstone of the Insurance Contracts Act is that the insurance contract is based on “utmost good faith”. On the other hand the draft general provisions simply require the parties to act in “good faith”.

Section 13 of the Insurance Contracts Act states that an insurance contract is based on “utmost good faith” and that there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

Section 14 goes on to provide that a party to the contract cannot rely on a provision of the contract if by doing so they fail to act with the utmost good faith.

There are also many provisions in the Insurance Contracts Act that ensure that insurance companies cannot take advantage of uninformed consumers (see below). These provisions generally provide specific remedies for the insured which are appropriate for insurance transactions and do not simply indicate, as the Minister's draft general legislation does, that the provision is void.

Insurance Contracts Not Subject to Other Legislation

It was never the intention that insurance contracts covered by the Insurance Contracts Act would be subject to general contract legislation. Section 15 of the Act specifically excludes insurance contracts from the operation of a Commonwealth, State, or Territory Act that provides relief in the form of judicial review for harsh, oppressive, unconscionable, unjust, unfair and inequitable contracts or the making of a misrepresentation.

The Australian Law Reform Commission in developing the legislation concluded that in the light of the utmost faith obligation, it was unnecessary for insurance contracts to be subject to other avenues of judicial review in relation to unfair contractual terms.

Duplication and Confusion

Many of the examples of unfair terms in the Minister's draft general legislation have specific provisions relating to them under the Insurance Contracts Act. Often the remedy under the Insurance Contracts Act goes further than simply making the unfair term in the contract void.

Having two sets of relief provisions for insurance contracts would be confusing to consumers, the judiciary and insurance companies. There would be no certainty as to which legislation should apply. A wrong choice could see the consumer placed at a disadvantage. Which of the two pieces of legislation would insurance companies apply?

Taking action under the general unfair terms legislation would in many cases see consumers worse off than if they had taken action under the Insurance Contracts Act. For example, specific remedies apply under the Insurance Contracts Act to the termination of a contract. These remedies are not available under the proposed general unfair terms legislation. Some "unfair provisions" of the Insurance Contracts Act operate to curtail the rights and remedies insurers would otherwise have under the contract. These include

- Avoiding a contract for fraud (section 31).
- Minimum claim amounts in relation to certain types of insurance (section 35).
- Requirement that pre-contractual written notice be provided of unusual terms (section 37).
- Rendering void provisions in interim contracts of insurance that make the application to, or the acceptance of replacement cover by the insurer a condition precedent to the interim cover (section 38).
- Excluding or limiting liability due to another insurance contract (section 45).
- Relying on exclusions regarding pre-existing defects, imperfections and pre-existing sickness or disability (sections 46 and 47).
- Termination of some renewable insurance contracts (section 58).

Conclusion

It was never intended that contracts of insurance subject to the Insurance Contracts Act should fall under other general laws relating to unfair contractual terms. The Insurance Act was developed specifically to cover unfair situations that arise in relation to insurance contracts. Over a number of years it has continued to provide a high level of protection for consumers entering into insurance contracts.

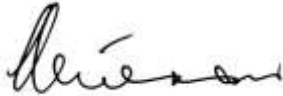
It makes no sense whatsoever to apply general contractual legislation to insurance contracts. It would provide no additional consumer protection. Any remedy under the general legislation would at best equal that available under the Insurance Contracts Act. In many situations the remedy would be inferior to that available under the Insurance Contracts Act.

It would simply be confusing as to which piece of legislation should apply and it would add an unnecessarily complication to the existing arrangements.

It is NIBA's strong recommendation that generally contractual provisions not apply to contracts of insurance that are subject to the Insurance Contracts Act.

If you would like further information about any of the issues covered by this submission, please contact me, npettersen@niba.com.au or 02 9459 4305.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Noel Pettersen', written in a cursive style.

Noel Pettersen
CEO