13 August 2009

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Economic.sen@aph.gov.au

Dear Sir,

Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill

This submission by the National Insurance Brokers Association (NIBA) focuses on that aspect of the Bill dealing with a national law on unfair terms in standard-form contracts.

NIBA's Concerns

NIBA is very concerned about the possible inclusion of insurance contracts in the legislation. There is already in place extensive Commonwealth law that applies to insurance contracts, namely the *Insurance Contracts Act 1984*, and NIBA does not believe that there is a necessity for generic consumer laws to apply.

Having two pieces of legislation doing the same thing is fraught with danger. There would be unnecessary duplication and contradictory terms, requirements, penalties and obligations. The idea of applying general unfair contract term legislation 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. NIBA does not believe that it is in the interests of consumers to have generic unfair contract terms requirements apply to insurance in Australia.

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 has often been copied 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 shortly.

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 provisions in the Bill.

A fundamental cornerstone of the Insurance Contracts Act is that the insurance contract is based on "utmost good faith". On the other hand the Bill's 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 uniformed consumers (see below). These provisions generally provide specific remedies for the insured which are appropriate for insurance transactions and do not simply void the provision as would occur under the Bill.

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 dealt with under the Bill 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).

NIBA comments on concerns expressed by consumer bodies

Under the unfair contracts legislation if a term in a consumer contract is unfair the supplier (or party that is not the consumer) will not be able to rely on that term as it will be void. The remainder of the contract will still be valid to the extent it is capable of operating without the unfair term.

The concern of the consumer groups has been that there is no equivalent right in the Insurance Contracts Act.

As noted above, section13 of the Insurance Contracts Act provides that implied in every contract of insurance is a duty upon the insurer and insured to act in good faith. There is no definition of the requirement, but it has been held that the duty to act with utmost good faith means to act with scrupulous fairness and honesty and the courts have broadly interpreted this concept.

S14 of the Insurance Contracts Act provides that if the reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.

Section 14 renders any unfair clause void. The effect is the same as under the unfair contracts legislation.

Comments have also been made that the unfair contracts legislation forces insurers to strike out clauses in all contracts not just contracts the subject of a dispute as is the case with the Insurance Contracts Act.

There is no such obligation unless ASIC brings an action in this regard.

Under the Insurance Contracts Act ASIC has no right to bring an action on behalf of the consumer as it does under the unfair contracts legislation however we note that this right is proposed in the amendments to the Insurance Contracts Act to be brought into effect next year according to the Government.

The point has also been missed in responses on the issue that under the Corporations Act the retail client Product Disclosure Statement requirements impose an obligation on the insurer to draft the PDS clearly, concisely and effectively and more generally imposes an obligation on insurer licensees to act efficiently honestly and fairly (see section 912A(1)(a).

Were ASIC to be concerned about any such conduct it and consumers have significantly more rights under the Corporations Act to bring an action against the insurer which will be subject to strict and civil liability, see sections 1021A- 1022C.

In addition to ASIC rights against insurers, consumers can also access the free FOS system which is of significant benefit and a much better route than having to rely on an ASIC run action to fix any issue.

The only other potential difference in consumer rights in relation to the same scenario is the fact that under the unfair contracts legislation the remainder of the contract will not be valid if it is not capable of operating without the unfair term.

In our view if an insurer were to seek to rely on a clause in a policy and it was found to be void under section 14 and the contract would not effectively operate without it (this is likely to be very rare because clause disputes relate to exclusions typically which would not usually make the contract inoperable), an insurer would clearly be prevented from seeking to rely on the rest of the contract and to the extent it seeks to do so the consumer would be entitled to a claim for damages for breach of the insurer's duty of utmost good faith under section 13 and the insurer would be breaching its general licence obligations and PDS obligations specified above.

As noted above the Insurance Contracts Act also provides for other forms of consumer protection that are more specific and focused on insurance contracts.

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 Contracts 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.

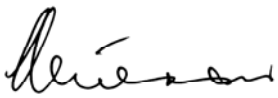
In NIBA's view it is not appropriate to apply general contractual legislation to insurance contracts. It would provide no additional consumer protection. Any remedy under the general legislation would at best equal that available under the Insurance Contracts Act. In many situations the remedy would 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 general 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



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